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THE

ENCYCLOPÆDIA

OF

PLEADING AND PRACTICE

UNDER THE CODES AND PRACTICE ACTS,
AT COMMON LAW, IN EQUITY
AND IN CRIMINAL CASES.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

WILLIAM M. McKINNEY.

VOL. I.

NORTHPORT, LONG ISLAND, N. Y.:
EDWARD THOMPSON COMPANY, LAW PUBLISHERS.
1895.

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PREFACE.

THIS work was conceived and its execution planned by Mr. JAMES COCKCROFT, to whom also belongs the credit of projecting and carrying to a splendid consummation the master legal work of the nineteenth century, *The American and English Encyclopædia of Law.*

The practicality of treating the whole body of substantive law in the form of an encyclopædia has already been demonstrated. It has been shown beyond doubt that there is great advantage and economy to be derived from having in one series of books practically all the law of general application. The present work is an attempt to do for pleading and practice what its prototype has done for substantive law. The difficulties of the work were recognized, but they have not proved insurmountable.

Pleading is generally recognized to be a subject adaptable for comprehensive treatment which will be useful in all the states. That part of procedure which is commonly called practice is not so uniform, but the lack of uniformity does not go nearly to the extent which is popularly supposed. There have been a great many instances where one state has adopted the legislation or followed the methods of another. Thus, the New York Code of Civil Procedure is the fountain-head of the practice of those states which have adopted the reform procedure. The common-law and chancery systems of England, wherever they still prevail in this country, have been modified by statutes and practice acts which have passed, often with but slight changes, from one state

to another. Criminal pleading and practice vary in details, but there is so much similarity in the different jurisdictions that authorities from a score or more of states are applicable in each of them. It is, therefore, believed that the custom of writing books on practice for use in one state only is not the outcome of necessity, and that, if valuable and useful material is not to be sacrificed, the treatment must be comprehensive.

One of the chief duties of an editor of an encyclopædia is the selection of titles for articles. In this work two considerations have been kept in mind; first, the title should be one which would naturally occur to the investigator seeking the information contained in the matter which it heads; second, the usual large titles should be broken up into numerous smaller titles, in order that the treatment may be more thorough and to conform to the general scheme of the work.

No pretense is made to state that part of practice (if such there be) which is not laid down in the books. Contributors were not expected to advise, or to tell what they knew as individuals. They have been directed to compile their contributions entirely from the authorities, and if merit is found in their work, it will be chiefly because it is a good compilation of such materials.

The general style of contributions has been kept as uniform as is possible where so many different authors are engaged. Nothing has been so much insisted upon from contributors as that their articles shall completely exhaust the subjects treated of, and that all the decisions in point shall be collected and used. It is clearly recognized that the chief value of a law book of this kind lies, not in the cogitations of the numerous writers, but in the intelligence, completeness, and accuracy with which they have arranged and digested the immense mass of decisions, statutes and rules that govern pleading and practice.

WILLIAM M. MCKINNEY.

NORTHPORT, N. Y., Feb. 1895.

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ABATEMENT OF ACTIONS.

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ABATEMENT IN PLEADING.

By F. A. CARD.

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I. DEFINITION.—Pleas in abatement are those which set up matter tending to defeat or suspend the suit or proceeding in which they are interposed, but which do not debar the plaintiff from recommencing at some other time or in some other way.

They do not Go to the Merits of the claim or cause of action, but rather to the procedure, and are thus distinguished from pleas in bar, which are addressed to the merits and tend to show that the plaintiff cannot maintain any action at any time.[1]

Must Give Plaintiff a Better Writ.—Pleas in abatement also differ from pleas in bar, not only in that they do not go to the merits, but also that they must not only point out the plaintiff's error, but must show him how it may be corrected and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or, in technical language, must give the plaintiff a better writ.[2]

The Distinction between Pleas in Abatement and in Bar is recognized in equity as well as at law.[3] It is a clear, distinct, and substantial distinction, and is recognized and enforced at the present time and notwithstanding changes in the form or manner of pleading.[4]

1. Chitty on Pleading (16th Am. ed.), p. 462; 3 Blackstone's Com. 301, 302; Co. Litt. 134 b, 277 a; Stephen on Pleading, p. 47; Moore *v.* Sargent, 112 Ind. 487.

Pleas are divided into Two General Classes—pleas in abatement and pleas in bar. A plea in abatement is defined to be a plea that, without disputing the justice of the plaintiff's claim, objects to the place, mode, or time of asserting it, and requires that therefore and *pro hac vice* judgment be given for the defendant, leaving it open to renew the suit in another place or form or at another time; while to the second class belong all those pleas having for their object the defeating of the plaintiff's claim. Hence a plea in bar of the action may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect. Pitt's Sons Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 587.

2. Chitty on Pleading (16th Am. ed.), p. 463.

3. **In Equity.**—Pleas are of two sorts, in abatement and in bar. The former question the propriety of the remedy or legal sufficiency of the process rather than deny the cause of action; the latter dispute the very cause of action itself. Beames Pl. in Eq. 59.

All declinatory and dilatory pleas in equity are properly pleas, if not in abatement, at least in the nature of pleas in abatement, and therefore in general the objections founded thereon must be taken *ante litem contestatam* by plea, and are not available by way of answer or at the hearing. Story Eq. Pl. sec. 708.

4. **Distinction Still Exists.**—Although the Code of *Iowa* has abolished all technical forms of actions and pleadings, this does not have the effect of abolishing pleas in abatement and making all pleas to be in bar, and a defendant may still interpose the same pleas in abatement as formerly, as, to the jurisdiction, another action pending, etc., as at common law. Rawson *v.* Guiberson, 6 Iowa 507.

An answer is bad on demurrer which is pleaded in bar to the whole complaint, but which sets up facts which only bar part of the claim alleged in the complaint, and notwithstanding which the plaintiff is entitled to some relief. Orb *v.* Coapstick (Ind. 1894), 36 N. E. Rep. 278; Walter A. Wood Mowing Mach., etc., Co. *v.* Niehaus (Ind. App. 1894), 35 N. E. Rep. 1112.

Denial of Corporate Existence.—Where a corporation is plaintiff, and sues on a contract, a denial in the answer of the corporate existence of the plaintiff will be considered as a plea in bar unless it be expressly pleaded in abatement. Such a denial involves more than the mere capacity of the plaintiff to sue; it goes to the merits of the action, and may be pleaded either in bar or in abatement. Oregonian R. Co. *v.* Oregon, etc., Co., 10 Sawy. (U. S.) 476.

Absence of Interest in Plaintiff.—An answer which states facts showing that the plaintiff had no interest in the subject-matter of the action at the time of its commencement, and that some other person named was at the time the real party in interest in such suit, is in absolute bar of the suit and not in abatement of it. State *v.* Ruhlman,

II. KINDS OF PLEAS IN ABATEMENT—1. Generally.—Pleas in abatement were originally divided into three kinds, viz.: to the jurisdiction of the court; to the disability of the parties plaintiff or defendant; and in abatement of the writ or declaration.[1]

Order of Pleading.—These pleas were required to be pleaded in their proper order, viz.: 1st, to the jurisdiction; 2d, to the disability of the parties; 3d, to the declaration or count; and 4th, to the writ.[2]

The Usual Pleas to the Disability of a plaintiff were that the plaintiff was a fictitious person, died before suit brought, an alien enemy, an infant, insane or under guardianship, married and her husband not a party, and that plaintiff had not the representative capacity in which he sued. The usual pleas to the disability of the defendant were coverture, infancy, privilege, etc.[3]

The Usual Pleas to the Action of the Writ were that the action was misconceived, that the action was prematurely brought, and that another action was pending.[4]

2. Pleas to the Jurisdiction—Denial of Jurisdiction to Particular Court.—The pleas to the jurisdiction of the court which can be taken as, and which are considered to be, pleas in abatement, are those which, while admitting jurisdiction in some court, deny it to the particular court in which the suit is brought for some reason alleged; for if no court has jurisdiction, the objection goes in bar and not in abatement.[5]

111 Ind. 17; Pixley *v.* Van Nostern, 100 Ind. 34; Morningstar *v.* Cunningham, 110 Ind. 328, 59 Am. Rep. 211

Matter of Defence which Goes to the Merits of the action cannot be pleaded in abatement. Peck *v.* Barnum, 24 Vt. 75.

A Plea for Want of Proper Parties is a plea in bar, and goes to the whole bill. Howth *v.* Owens, 29 Fed. Rep. 722.

1. 1 Saund. on Pleading, 318 n.; 1 Chitty on Pleading, pp. 456–468; Story's Equity Pleading, secs. 705, 708; 3 Blackstone's Com., pp. 301-303; Gould's Pleading (5th ed.), p. 211. Pleas in abatement of the writ were also subdivided into those to its form and those to its action. See authorities *supra*.

2. Chitty on Pleading, pp. 456–469. **This order could not be reversed**, for each plea in its order was held to admit the one prior in such order of pleading. Chitty, pp. 456–469.

3. Anderson's Law Dict.

Objections to the disability of the parties seem also to have been taken under the form of objections to the declaration and to the form of the writ. Chitty on Pleadings, pp. 456–469.

4. Anderson's Law Dict.; Chitty on Pleadings (16th Am. ed.), pp. 456–469; Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85. And ordinarily all writs were recited in the count or declaration, and objections were raised to the declaration and to the form of the writ. The usual objections so taken, in addition to the disability of parties, were variance between the writ and declaration, defect in the process, defect in the return, non-joinder, misjoinder, and misnomer of a party. See authorities cited *supra*.

Modern Practice.—In modern practice pleas in abatement are usually considered under the heads of the various objections for which they are interposed, and they are so considered in this article.

5. **When no Court has Jurisdiction** the objection can be taken advantage of under the general issue, and cannot be raised by plea in abatement. A plea in abatement in such a case is bad, for it cannot give a better writ, viz., name a court of the county having jurisdiction. Maisonnaise *v.* Keating, 2 Gall. (U. S.) 344; Rex *v.* Johnson, 6 East 599; Mostyn *v.* Fabrigas, Cowp. 172; Otis *v.* Wakeman, 1 Hill (N. Y.) 604; Rea *v.* Hayden, 3 Mass. 24; Lawrence *v.* Smith, 5 Mass. 362;

Objection must be Taken by Plea or Demurrer.—The objection in abatement that a court has no jurisdiction must be taken by a plea in abatement, unless lack of jurisdiction appears on the face of the record, when it may be taken by demurrer.[1] This rule applies to the question of the citizenship of parties as determining the jurisdiction of a court of the United States.[2] And it has been held to

Stewart *v.* Potomac Ferry Co., 12 Fed. Rep. 296.

Plea in Abatement Substantially a Plea in Bar.—An answer setting up matter showing that the court has no jurisdiction of the subject-matter of the action, although it be in form a plea in abatement, is not within the rule established by the statute of Massachusetts that an appeal cannot be taken from a judgment on a plea in abatement, because it is in substance a plea in bar. Selin *v.* Connecticut River Lumber Co., 150 Mass. 560.

1. Meyer *v.* Smith (Tex. Civ. App. 1893), 21 S. W. Rep. 995; Ludwick *v.* Beckamire, 15 Ind. 198; Waterman *v.* Tuttle, 18 Ill. 292; Bishop *v.* Vose, 27 Conn. 1; McLean *v.* McDugald, 8 Jones (N. Car.) 85; Killian *v.* Fullbright, 3 Ired. (N. Car.) 9; Wood *v.* Mann, 1 Sumn. (U. S.) 578; Smith *v.* Kernochen, 7 How. (U. S.) 198; Rowland *v.* Veale, Cowp. 20; Wells *v.* Hughes, 89 Va. 543; Slator *v.* Trostel (Tex. Civ. App. 1892), 21 S. W. Rep. 285; Duke *v.* Miller, 15 Hun (N. Y.) 356; Coe *v.* Raymond, 22 Hun (N. Y.) 461; Papfinger *v.* Yutte, 102 N. Y. 38; McLean *v.* St. Paul, etc., R. Co., 9 Civ. Pro. Rep. (N. Y.) 394; Hamburger *v.* Baker, 35 Hun (N. Y.) 455; Curtis *v.* Howard (Fla., 1894), 14 So. Rep. 812; Hurlburt *v.* Palmer (Neb., 1894), 57 N. W. Rep. 1019; Southern Pac. R. Co. *v.* Denton, 146 U. S. 202; Day *v.* Henry, 104 Ind. 324; Shephard *v.* Graves, 14 How. (U. S.) 505; Knapp *v.* Knapp, 59 Fed. Rep. 641; Bishop *v.* Silver Lake Min. Co., 62 N. H. 455; Varner *v.* West, 1 Woods (U. S.) 493; Jones *v.* League, 18 How. (U. S.) 76; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476; Evans *v.* Davenport, 4 McLean (U. S.) 574.

Service on Corporation.—Where a declaration served on an agent of a foreign corporation does not negative the existence of a cause of action arising in the state, a defence that such cause of action arose outside of the state must be presented by plea and not by a motion to quash, so that the decision of the court may be reviewed by appeal in the ordinary way. Maxwell *v.* Speed, 60 Mich. 36.

Service Defective.—An answer that defendant being a foreign corporation ought not to be held to answer the plaintiff's writ because proper service has not been made on it to give the court jurisdiction, is a plea in abatement. Young *v.* Providence, etc., Steamship Co., 150 Mass. 550; 28 Am. & Eng. Corp. Cas. 603.

Fraud in Obtaining Jurisdiction.—Where jurisdiction depends on the amount in controversy, this is determined by the petition; and if items are fraudulently inserted therein for the purpose of conferring jurisdiction, the defendant must raise the question by pleading such fact in abatement. Dwyer *v.* Bassett, 63 Tex. 274; Tidball *v.* Eichoff, 66 Tex. 58.

False Return.—Where an *alias* summons which is necessary to confer jurisdiction is founded on a false return of the sheriff, a plea in abatement is the proper way of quashing the writ, notwithstanding the sheriff's return. Carlisle *v.* Cowan, 85 Tenn. 165.

Too Late after Mandate to Lower Court.—After a mandate has gone down from the United States Supreme Court to the court below to enforce its decree, it is then too late for the defendant to file a plea in abatement for want of jurisdiction, and he will not be allowed to do so. Whyte *v.* Gibbs, 20 How. (U. S.) 541.

2. Smith *v.* Kernochen, 7 How. (U. S.) 198; Wood *v.* Mann, 1 Sumn. (U. S.) 578; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476; Jones *v.* League, 18 How. (U. S.) 76; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194; Evans *v.* Davenport, 4 McLean (U. S.) 574.

Federal Courts do not Follow State Practice.—In the federal courts jurisdictional questions must be raised by a special plea to the jurisdiction. The practice of a state court permitting such questions to be raised under a general denial cannot prevail in a

apply, and was enforced, notwithstanding a provision of statute saving objections to the jurisdiction, although not taken by demurrer or answer.[1] In *Michigan* the objection has been allowed to be set up in a notice of defence under the general issue,[2] and in *Illinois* it seems it may be raised by motion.[3] After the determination of a demurrer it has been held too late to so plead in abatement,[4] but the contrary is also held.[5] If the question of jurisdiction which could be raised by plea in abatement is not properly raised, the plaintiff may obtain judgment notwithstanding such want of jurisdiction.[6]

federal court sitting in such state so as to permit evidence as to the citizenship of the parties to be given under such a denial. But if such a question exists, an issue must be directed to be made by the pleadings in order to determine it. Imperial Refining Co. *v.* Wyman, 38 Fed. Rep. 574; 6 Ry. & Corp. L. J. 94.

Amendment in Court's Discretion.—It is within the discretion of a federal court to allow a plea in bar to be withdrawn, and a plea in abatement denying jurisdiction on account of citizenship to be filed. Eberly *v.* Moore, 24 How. (U. S.) 147.

Where on the trial plaintiff gave evidence which the defendant claimed tended to show he was not a citizen of the district in which the suit was brought, and the court refused to allow defendant to file a plea in abatement on that ground, and thus raise the question of citizenship, *held*, was a question resting in the discretion of the lower court, and with its action thereon the supreme court would not interfere. Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194.

1. **Statutory Provisions Saving Objections to Jurisdiction.**—The provision of the *New York* Code saving objections to the jurisdiction, although not taken by demurrer or answer, applies only to objections showing that no court has jurisdiction, and going to the power of the court. It does not save objections formerly properly raised by a plea in abatement to the jurisdiction. Such objections are waived unless taken by demurrer or answer. De Bussierre *v.* Holliday, 4 Abb. N. Cas. (N. Y.) 111; 55 How. Pr. (N. Y.) 210; Papfinger *v.* Yutte, 102 N. Y. 38; Donnelly *v.* Woalsey (Supreme Ct.), 38 N. Y. St. Rep. 39; Halbrook *v.* Baker, 16 Hun (N. Y.) 176; Gray *v.* Ryle, 50 N. Y. Super. Ct. 198; Patten *v.* Neal, 62 How. Pr. (Co. Ct. N. Y.) 158; Burling *v.* Freeman, 2 Hun (N. Y.) 661; Robinson *v.* Ocean Steam Nav. Co. (Super. Ct.), 16 N. Y. St. Rep. 583; Heenan *v.* New York, etc., R. Co., 6 Civ. Pro. Rep. (Co. Ct. N. Y.) 348; 1 How. Pr. N. S. (N. Y.) 53; Mosselman *v.* Caen, 21 How. Pr. (N. Y. Supreme Ct.) 248; 34 Barb. (N. Y.) 66.

2. **In Notice of Defence.**—Although a plea in abatement would be the better practice, yet an objection to jurisdiction, on the ground that it was obtained by ordering goods merely for the purpose of attaching them, may be set up in a notice of defence under the general issue. Copas *v.* Anglo-American Provision Co., 73 Mich. 541.

3. **By Motion.**—The question whether a party is entitled to exemption from the service of process may be raised by plea in abatement, although it is frequently presented by motion. Gregg *v.* Sumner, 21 Ill. App. 110.

4. **After Decision on Demurrer.**—It is too late to plead to the jurisdiction after appearance and the determination of an issue of law, viz., on demurrer. Slanter *v.* Hallowell, 90 Ind. 286.

5. By demurring to a declaration for want of jurisdiction, a defendant does not waive his right to plead in abatement for want of jurisdiction; and where the defendant did demur therefor, and his demurrer was sustained, and the plaintiff filed an amended declaration on its face showing jurisdiction, the defendant may plead in abatement thereto facts showing want of jurisdiction, or may traverse the facts alleged by plaintiff to show jurisdiction. Donaldson *v.* Hazen, Hempst. (U. S.) 425.

6. **Waiver.**—Where there is no plea to the jurisdiction, judgment may be given against a defendant who is not a resident of the county, as well as against a codefendant who is a resi-

Pleas must be Clear, Distinct, and Positive.—Such pleas must clearly and distinctly show want of jurisdiction.[1] They must be certain to every intent.[2] They must exclude every contrary inference, and negative all statutory exceptions.[3] They should show another court having jurisdiction of the matter in litigation.[4] But a plea

dent, in an action on time checks for labor performed out of the county. San Antonio, etc., R. Co. *v.* Cockrill, 72 Tex. 613.

1. **Must be Certain and Clear.** — A plea in abatement to the jurisdiction of a superior court must clearly and distinctly aver a want of jurisdiction, as it is presumed until the contrary is shown. Diblee *v.* Davison, 25 Ill. 486.

Where there are four defendants, and a plea to the jurisdiction alleges only two of them are residents of the county where the proceedings are had, it is bad for not stating the residence of the other two. Lester *v.* Stevens, 29 Ill. 155.

2. **Certain to Every Intent.** — Pleas in abatement to the jurisdiction must be certain; hence, where a plea to the jurisdiction alleged "that the defendant was a resident of the state of *New York* instead of the state of *Michigan*, as alleged in the declaration," *held*, that the plea was bad, for it should have alleged that the defendant was a citizen of *New York* (not merely a resident), as it is citizenship, not residence, which determines the jurisdiction of *United States* courts, and a person may be a resident of one state while a citizen of another. Evans *v.* Davenport, 4 McLean (U. S.) 276.

3. **Must Negative Inferences and Exceptions.**—A plea in abatement to the jurisdiction negativing several statutory exceptions which would otherwise have conferred jurisdiction, but failing to specifically deny the existence of them all, is fatally defective on exception taken thereto. Burchard *v.* Record (Tex., 1891), 17 S. W. Rep. 241.

In a suit for specific performance of a contract to convey realty, a plea in abatement to the jurisdiction, that the same is not laid in the county of defendant's residence, is fatally defective where it does not negative the existence of any statutory exceptions to the rule requiring actions to be brought in such county. Carvin *v.* Hill, 83 Tex. 73.

Where a plea in abatement to an attachment does not allege that the defendant resides in the county in which the suit is instituted, and hence the ordinary process of law could have been served upon him there, but merely alleges that the defendant is a citizen of the state, it is bad on demurrer. James *v.* Dowell, 15 Miss. 333.

Where to a suit on a judgment of the Supreme Court held at Albany, brought against the defendant in the Superior Court of New York, the defendant pleaded in abatement to the jurisdiction of the court, "that the cause of action accrued in the county of Albany," it was held bad for not averring that the record of the judgment was filed in Albany. Kelly *v.* Mullany, 2 Hall (N. Y.) 205.

Affinity of Justice Signing Writ.—Where a plea in abatement alleged "that James Hickox, the justice of the peace who signed the writ and took security by way of recognizance for the costs of prosecution in said suit, was at the time of signing said writ and taking said security by way of recognizance for the costs of prosecution as justice of the peace as aforesaid, and still is, related to said defendant within the fourth degree of affinity," it was held bad because not containing an allegation (except by way of recital) that the writ was signed by James Hickox, in not showing that the writ was not otherwise signed at the *time of service* thereof than by James Hickox, and in not alleging the particular relationship which constituted the affinity. Landon *v.* Roberts, 20 Vt. 286.

4. **Should Show Jurisdiction in Some Other Court.**—Where a plea to the jurisdiction of the court is filed, it must show jurisdiction in another court on its face, or it will be disregarded. It is not sufficient to deny the jurisdiction of that court, without specifying what court has jurisdiction. Ridling *v.* Stewart, 77 Ga. 539; Fain *v.* Crawford (Ga., 1892), 16 S. E. Rep. 106.

A plea to the jurisdiction must show another court in the state which has jurisdiction; hence, where a plea to a

in abatement of the writ, it is said, need not do so.[1] It is not sufficient for the plea to show facts making it discretionary with the court to exercise jurisdiction.[2]

Where the Lack of Residence necessary to confer jurisdiction is relied on, the plea must clearly show such want of residence and negative any inference of its existence,[3] and also state the defend-

suit brought in a justice's court in F. county alleged "that at the commencement of the suit the defendant was a resident of De K. county, and resides there now, and has so resided for the past year, and that the said justice court of F. county has no jurisdiction of the person of the defendant, and that a suit against the same defendant by the same plaintiff in relation to the same subject-matter is pending in the court of defendant's residence," such plea was held bad for not showing *what court* in De K. county had jurisdiction. Fain *v.* Crawford (Ga., 1892), 16 S. E. Rep. 106.

A plea in abatement to the jurisdiction must be certain, according to the most rigid rules of precision, and it must always show another form in which the rights in litigation are subject to judicial authority. Hence a plea in abatement in replevin, "that defendant took the goods as deputy United States marshal, on execution issued out of the United States Circuit Court against a third person" (specified), is bad on demurrer for failing to allege that the execution was issued on any judgment, or that any judgment had been obtained against the plaintiff in replevin or the defendant in execution, or that the property was levied on as belonging to the defendant in the execution. Heyman *v.* Covell, 36 Mich. 157.

1. **Plea in Abatement of the Writ.**—Where a defendant was not sued in the proper county, and pleaded in abatement "that he was before and at the time of the commencement of the suit, and at all times thereafter, a resident of McLean county, and was not a resident of Cook county, and that he was not found or served with process in Cook county, nor elsewhere than in the county of McLean, and that said plaintiffs were not at the commencement of said action residents of said county of Cook, nor are they now residents of said county," *held*, good on demurrer as a plea in abatement of the writ, and not technically to the jurisdiction, and that as such it need not show some other court which had jurisdiction. Scott *v.* Wailer, 65 Ill. 181.

2. **Not Sufficient to Show Jurisdiction Discretionary.**—In an action on a promissory note, the defendant's answer alleged that the defendant was a nonresident of the state; that the plaintiff was a foreign corporation; that the note in suit was made in another state; and that by reason of these facts the court had no jurisdiction either of the subject-matter of the action or the person of defendant. *Held*, demurrable, because under the New York statute the court has jurisdiction if it chooses to exercise it. Colorado State Bank *v.* Gallagher, 76 Hun (N. Y.) 310.

3. **Should Show Want of Residence.**—A plea to the jurisdiction merely alleging that a party is a citizen of Oregon temporarily residing in London, England, without specially denying the allegation made that he is a citizen of Rhode Island and resident in England, is insufficient. First Nat. Bank *v.* Salem Capital Flour Mills Co., 31 Fed. Rep. 580.

In an action on a foreign judgment a plea which alleges that defendant at the time of the commencement of the action in which the judgment was obtained, or at any time before its rendition, was not resident or domiciled within the jurisdiction, and had no notice or knowledge of the suit or opportunity of defending it, is bad for failing to allege that he was not a subject or citizen of the foreign country and amenable to its jurisdiction. British Linen Co. *v.* McEwan, 8 Manitoba Rep. 99.

In an action before a justice in one county, a plea to the jurisdiction to the effect that defendant is now a *bona-fide* citizen of another county, and was residing there at and long before the commencement of the suit, and claims the privilege of being sued in his own county, and has not waived the right of being sued in the county of his

ant's place of residence.[1]

Prayer.—The plea should conclude with a prayer, praying judgment whether the court will take cognizance of the action or suit.[2] It has been held that a plea of a fraudulent assignment to

residence, nor authorized suit to be brought against him in the county in which he was sued, is defective in not alleging with certainty that defendant was not a resident of the county in which the suit was brought. Noel *v.* Denman, 76 Tex. 306.

Several Defendants.—An answer in abatement by one defendant that the action is brought in the wrong county, on the ground that the answering defendants are residents of another county, is demurrable if it fails to show that the other defendant is not a resident of the county in which the action is brought. Brown *v.* Underhill, 4 Ind. App. 77.

A plea in abatement averring "that the cause of action arose in the county of L. and was specifically made payable there, and defendant was served there, but with process issued in the county of C., and that a codefendant served with process in C. county also resides in the county of L.," is good on demurrer. Hamilton *v.* Dewey, 22 Ill. 490.

1. **Should Show where Defendant Resides.**—In a suit in a county court by a non-resident plaintiff, where defendant is described in the writ as a resident of the county where the writ is returnable, if defendant pleads in abatement that he is not a resident of that county, he must allege and prove his residence in some county in the state. Vanderburg *v.* Clark, 22 Vt. 185.

A plea in abatement to the jurisdiction on the ground that defendant does not reside in the county in which the suit was brought and the cause of action did not arise there must state where defendant resides and where the cause of action arose. Middleton *v.* Pinnell, 2 Gratt. (Va.) 203.

A plea in abatement of a writ averring "that at and before the date of the writ (which was issued in one county and was directed to the sheriff of another county), and ever since, the defendant resided in the county in which the writ was issued," is a good plea. Clarke *v.* Hite, 5 Blackf. (Ind.) 167.

Where the material fact raised by a plea in abatement was whether the defendant resided at A. when suit was commenced, an averment "that at the time of the issuing and service of the writ the defendant did reside, and for a long time before had and ever since has resided, in the town of B. and not elsewhere," is bad on demurrer, as not sufficiently direct and positive; but an averment "that at the time aforesaid he did reside in A." is good and sufficient. Durand *v.* Griswold, 26 Vt. 48.

Abuse of Criminal Process.—Where a defendant pleads in abatement to the jurisdiction of the district court of the county in which the suit is brought "that all the defendants were at the time of the commencement of the action residents of another county; that by the abuse of the criminal process of the state a codefendant was taken from a jail in the county where all the defendants resided to the county in which the suit was brought and there served with process and thereafter returned to said jail; and that such abuse of criminal process and service was resorted to for the purpose of obtaining jurisdiction of the person of the defendant who so pleaded," *held*, a good plea to the jurisdiction. Hurlburt *v.* Palmer (Neb., 1894), 57 N. W. Rep. 1019.

Where a plea in abatement averred that the defendant was not a resident of the state, but resided in the state of M. when the writ was served, without stating in *what place* in the state of M. defendant resided, it was held good. Colburn *v.* Talles, 13 Conn. 524.

2. **Prayer.**—Leonard *v.* Grant, 6 Sawy. (U. S.) 603; Adams *v.* White, 2 Pittsb. (Pa.) 21.

A plea in abatement by a non-resident corporation sued in equity beginning: "This defendant, appearing specially and solely to object to the jurisdiction of this court, pleads to the jurisdiction of this court over it, and for cause of plea says that this defendant is not compellable to appear in response to said writs and does not accept or waive service thereof"—setting up matter showing want of jurisdiction, and concluding—"wherefore defendant prays the judgment of this

evade the insolvent laws should be liberally construed.[1] Whether it has jurisdiction may be determined by the court on the trial of the plea or the issue of fact raised.[2]

3. Infancy—Plea or Demurrer.—The objection that the plaintiff is an infant and sues in his own name should be raised by a plea in abatement or by demurrer.[3]

Waiver.—If it is not so taken it is deemed waived.[4]

4. Coverture—Demurrer or Plea.—The objection of the marriage of a female plaintiff or the non-joinder of her husband can be taken advantage of only by plea in abatement or by demurrer.[5]

Verification.—Such a plea is a dilatory one requiring an affidavit of verification where dilatory pleas are required to be verified.[6]

Non-joinder.—It has been held not to be a plea of non-joinder within the common-law procedure act.[7]

honorable court whether it ought to be required to appear in accordance with any writ of subpœna issued in said suit"—*held* proper in form and that it did not raise an issue on the merits so as to operate as an appearance by defendant. U. S. *v.* American Bell Teleph. Co., 29 Fed. Rep. 17.

1. **Fraudulent Assignment.**—A plea in abatement to the jurisdiction on the ground that a claim has been collusively and fraudulently assigned in order to evade the provisions of the law in relation to insolvent estates is not to be treated as dilatory and captious like most pleas in abatement, but should be liberally construed. Wallace *v.* Clark, 3 Woodb. & M. (U. S.) 359.

2. A plea to the jurisdiction of a probate court on the ground that a bill has been filed in a court of equity and that court has assumed jurisdiction need not set out the bill, as its sufficiency is a question to be determined on the trial of the plea. Tygh *v.* Dolan, 95 Ala. 269.

Where an action was brought in a county court to foreclose a mortgage on machinery, the defendant in his answer alleged "that at the time the mortgage was given and also at that time the machinery was a fixture and part of the homestead of one of the defendants, who was a married man and the head of a family, and that the court had no jurisdiction to decree a foreclosure of the mortgage," *held*, that it was error to sustain a general demurrer to the answer and exclude evidence of the facts alleged therein on the trial; that the court had power to hear evidence and determine whether it had jurisdiction, whether want of jurisdiction appeared in the petition or in the answer. Gentry *v.* Bowser, 2 Tex. Civ. App. 388.

3. Schemerhorn *v.* Jenkins, 7 Johns. (N. Y.) 373; Blood *v.* Harrington, 1 Pick. (Mass.) 552; Drago *v.* Moso, 1 Speers (S. Car.) 212; Young *v.* Young, 3 N. H. 345; Gully *v.* Dunlop, 24 Miss. 410.

4. Weinberger *v.* Frieden, N. Y. Daily Reg., Mch. 6, 1884; Smart *v.* Haring, 14 Hun (N. Y.) 276; Perkins *v.* Stimmel, 114 N. Y. 359; 17 Civ. Pro. Rep. (N. Y.) 25.

5. Powell *v.* Glenn, 21 Ala. 458; Sheidle *v.* Weishlee, 16 Pa. St. 134; Laster *v.* Toliver, 11 Ark. 450; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280; Surtell *v.* Brailsford, 2 Bay (S. Car.) 333.

Necessary Allegations.—A plea of coverture in abatement should allege the existence of the coverture at the time of the commencement of the action and its continuance up to the time of the filing of the plea, by the continued life of the husband. These are the necessary allegations of such a plea. Atwood *v.* Higgins, 76 Me. 423; Lovell *v.* Walker, 9 M. & W. 299; 1 Dowl. N. S. 952. This is so although part of the cause of action accrued after the coverture, and if not verified plaintiff is entitled to judgment for want of a plea, *Ib.*

6. In order to avoid the statute of limitations the disability of coverture must be pleaded; it is not available unless pleaded. Crow *v.* Fiddler, 3 Tex. Civ. App. 576.

7. Riordan *v.* Walsh, 6 Ir. R. C. L. 189.

5. Capacity to Sue—When Raised by Plea.—Any facts showing a want of capacity to sue on the part of the plaintiff should be set up by a plea in abatement unless apparent on the face of the record, in which case the objection can be taken advantage of by demurrer.[1] If not so taken it is deemed waived.[2]

Party Suing in Representative Capacity.—This rule applies to the case of a plaintiff who sues in a representative capacity and is not entitled to sue in such capacity.[3]

Admission of Capacity.—Failure to so raise the objection is an admission of plaintiff's capacity to sue in the particular action which he has brought.[4]

Requisites of the Plea.—Such pleas should be clear, definite, and certain.[5] It is not sufficient to merely deny that a corporation exists or was organized,[6] or to allege merely that it has ceased to exist.[7] The facts causing the incapacity should be

1. Edwards *v.* Ford, 2 Bailey (S. Car.) 461; Shivers *v.* Wilson, 5 Har. & J. (Md.) 130; Rich *v.* Penfield, 1 Wend. (N. Y.) 380; Elektron Mfg. Co. *v.* Jones Bros. Electric Co., 8 Ohio Cir. Ct. 311; Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 480; Hoyt *v.* Hoyt, 58 Vt. 538; Cook *v.* Lansing, 3 McLean (U. S.) 571.

2. **Waiver.**—Pierrepont *v.* Loveless, 4 Hun (N. Y.) 696; Jemmerson *v.* Kennedy (Supreme Ct.), 26 N. Y. St. Rep. 469; Palmer *v.* Davis, 28 N. Y. 242; Hathaway *v.* Orient. Ins. Co. (Supreme Ct.), 33 N. Y. St. Rep. 678; Mosselman *v.* Caen, 34 Barb. (N. Y.) 66; Nanz *v.* Oakley, 122 N. Y. 631; 19 Civ. Pro. Rep. (N. Y.) 246; People *v.* Metropolitan Tel. Co., 31 Hun (N. Y.) 599; Perkins *v.* Stimmel, 114 N. Y. 359; Kilpatrick *v.* Dean (City Ct.), 19 N. Y. St. Rep. 837; 4 N. Y. Supp. 708; Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 480.

3. Lang *v.* Whidden, 2 N. H. 435; Treasurer *v.* Wiggins, 1 McCord (S. Car.) 568; Clapp *v.* Beardsley, 1 Vt. 151; Childress *v.* Emory, 8 Wheat. (U. S.) 642; Picquet *v.* Swan, 3 Mason (U. S.) 469.

Assignee's Bond.—The objection that a general assignee for the benefit of creditors has not filed his official bond, and is therefore not entitled to maintain an action for the alleged conversion of a part of the assigned estate, should be raised by demurrer or answer, or it is waived. Kilpatrick *v.* Dean (City Ct.), 19 N. Y. St. Rep. 837; 4 N. Y. Supp. 708.

4. **Plaintiff a Corporation.**—If a defendant wishes to insist on the want of capacity of a plaintiff, a corporation, to sue as a corporation, he must do so by a special plea in abatement or in bar. Pleading the general issue or to the merits is an admission not only of the plaintiff's capacity to sue in general, but also to sue in the particular action which he has brought. Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 480.

5. Wright *v.* Wright, 54 N. Y. 437.

6. **Denial of Incorporation.**—A denial that defendant is or ever was a corporation, organized and existing under the laws of a specified country, is bad as a denial of corporate existence, because it practically admits it was organized somewhere. Wright *v.* Fire Ins. Assoc., 12 Mont. 474.

Where an answer alleges "that defendant denies any knowledge or information sufficient to form a belief as to the alleged incorporation of plaintiff" (a corporation), it is not sufficient to raise an issue as to the incorporation of plaintiff under the provisions of the N. Y. Code of Civ. Pro. § 1776, providing "that proof of the existence of a corporation need not be made unless the answer is verified and contains an affirmative allegation that the plaintiff is not a corporation." Martin Cantine Co. *v.* Warshauer (Supreme Ct.), 28 N. Y. Supp. 139; 7 Misc. Rep. (N. Y.) 412; East River Electric Light Co. *v.* Clark (C. Pl.), 45 N. Y. St. Rep. 635; 18 N. Y. Supp. 463. See also CORPORATIONS.

7. **Corporation Ceased to Exist.**—Where the existence of a corporation is expressly averred or admitted it is not sufficient to allege that it has

stated.[1] But merely denying the validity of the appointment of a receiver has been held sufficient.[2] The answer of a guardian *ad litem* should disclose for whom he was appointed such guardian or it cannot be considered for any purpose.[3]

6. Real Party in Interest—How Objection Taken.—The objection that the plaintiff is not the real party in interest or that his title to the cause of action is defective should be taken by a plea in abatement or by demurrer.[4]

Requisites.—Such pleas must clearly point out the defects existing, be definite and certain, and negative contrary inferences.[5]

ceased to exist. The facts must be set forth showing that its existence has terminated. People *v.* Stanford, 77 Cal. 360.

1. **Wound up Business.**—A plea that the charter of a corporation has expired, and that it had ceased to exist at law at the time the alleged cause of action against it for a tort arose, is a bad plea unless it also is alleged that the corporation had ceased to exist and had wound up its business in fact as well as in law. Miller *v.* Newburg Orrel Coal Co., 31 W. Va. 836.

Failure to File Articles of Incorporation.—The failure of a corporation plaintiff to file a copy of its articles of incorporation in the office of the county clerk, as required by statute in *California*, is ground for a plea in abatement, and should be so specially pleaded. An allegation in the answer that plaintiff has not legal capacity to sue, and never was a corporation duly organized under the laws of the state, does not raise the question or set up the fact of its failure to file its articles of incorporation with the county clerk. Ontario State Bank *v.* Tibbits, 80 Cal. 68.

Intervenor not Filing Bond.—A plea that an intervenor in sequestration proceedings does not show any cause therefor, and that his petition is insufficient in law, is merely a general demurrer, and does not raise the objection that no oath and bond were made and filed in the action. Irvin *v.* Ellis, 76 Tex. 164.

Alien Enemy.—Where the defendant pleads that the plaintiff is an alien enemy and therefore cannot sue, he must aver that the plaintiff possessed that character at the time of the commencement of the suit. Elgee *v.* Lovell, 1 Woolw. (U. S.) 102.

2. **Appointment of Receiver.**—An answer denying the validity of the appointment of a receiver is sufficient, although it does not point out the specific defect, where he has not alleged in his petition the various steps leading to his appointment. Matter of O'Connor (Supreme Ct.), 47 N. Y. St. Rep. 415.

The denial by executors, in answer to a petition for an accounting, of the validity of the appointment of the petitioner as receiver of a beneficiary under the will, sufficiently puts the appointment in issue, although the specific defect is not pointed out where the steps leading to the appointment are not set out in the petition. Matter of Beecher's Estate (Supreme Ct.), 19 N. Y. Supp. 971.

3. Newman *v.* Maldonado (Cal., 1892), 30 Pac. Rep. 833.

4. Lanier *v.* Trigg, 6 Smed. & M. (Miss.) 641; 45 Am. Dec. 293; Hazlip *v.* Leggett, 6 Smed. & M. (Miss.) 326; Coburn *v.* Palmer, 8 Cush. (Mass.) 124; Gerrish *v.* Gary, 1 Allen (Mass.) 213; Burnett *v.* Lyford, 93 Cal. 114; Boyseau *v.* Campbell, McAll. (U. S.) 119; Varnum *v.* Taylor, 59 Hun (N. Y.) 554; Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22.

In Kansas should be by Answer, not Plea.—In an action on a promissory note against the maker and endorsers, the question whether plaintiff is the owner of the note cannot be raised by plea in abatement or motion, even if it be claimed the note was indorsed to plaintiff in pursuance of a conspiracy to enable the action to be brought in a county where it could not be brought by the person claimed to be the real owner of the note. Such question can only be raised by answer. Linney *v.* Thompson, 44 Kan. 765

5. **Assignment of Claim.**—An objection to the prayers of the plaintiffs in an action on an insurance policy for the reason that one of them has assigned

Good and Bad Pleas.—That the plaintiff had transferred the note in suit as collateral security has been held a good plea.[1] But that the suit is not that of the plaintiff, or not authorized by him, or that plaintiff has agreed that his attorney shall have the recovery, have been held bad pleas.[2]

As a Plea in Bar.—Where such a plea has the effect of a plea in bar a final verdict may be rendered on the issue formed.[3]

7. Misnomer (see also NAMES).—**At Common Law** the misnomer of a party plaintiff or defendant was pleadable in abatement, and was not a ground for setting aside the proceedings or vacating the judgment.[4]

In the United States pleas in abatement for misnomer are generally allowed, and are the only proper mode of raising the objection, although not mentioned in the various codes as one of the grounds of demurrers or dilatory answers.[5] Their propriety has

his claim and has no existing demand is bad and untenable where it does not appear whether the assignment was in writing or not, whether made before or after suit, or whether absolute or conditional. Globe Reserve Mut. Ins. Co. *v.* Duffy, 76 Md. 293.

Member of a Trust or Combination.—An answer, in an action to recover the price of goods alleged to have been sold and delivered, which alleges by way of a plea in abatement "that the plaintiff is a member of a trust or combination which is the real party in interest," is defective for not alleging whether the alleged trust is a partnership or corporation, and also whether any of its members other than plaintiff have any interest in the goods sold or in the money to be paid therefor. National Distilling Co. *v.* Cream City Importing Co. (Wis., 1893), 56 N. W. Rep. 864.

1. **Assignment of Note as Collateral.**—In an action on a promissory note, an answer alleging that the action is not brought in the name of the real party in interest, and that the plaintiff had endorsed the note and delivered it to other parties as collateral security, is not demurrable. Johnson *v.* Chilson, 29 Neb. 301.

2. **Suit not that of Plaintiff.**—In a suit for seduction and breach of promise of marriage, a plea that the suit is not the suit of the plaintiff is properly stricken out, for the question of maintenance is one for the court, not the jury. Graham *v.* McReynolds, 88 Tenn. 240.

Suit not Authorized.—An answer alleging on information and belief that plaintiff never authorized the suit and is not aware of its institution presents no defence and is not sufficient to require an inquiry into the authority of plaintiff's attorney. Robinson *v.* Robinson, 32 Mo. App. 88.

Attorney to have Recovery.—In an action for damage for injuries to person and property, a plea in abatement that plaintiff has no interest because he had agreed with his attorneys that they should sue in his name, pay all costs, and receive the whole amount recovered, is bad, because a claim for damages to the person is not assignable. Jones *v.* Matthews, 75 Tex. 1.

3. **In Abatement and Bar.**—A plea which alleges "that the plaintiff is not the owner of the note in suit, but that his name was used by the real owner of the note in order to acquire standing in a federal court," is a plea in bar as well as in abatement, and by it an issuable defence is raised which is properly submitted to a jury, and a verdict for the plaintiff thereon is a verdict on the merits, which will not be set aside. Lanning *v.* Lockett, 11 Fed. Rep. 814.

4. Chitty on Pleading, pp. 248, 451; Gould on Pleading, ch. 5, §§ 69-84.

In England pleas in abatement for this cause were abolished by the Procedure Act, 3 & 4 Wm. IV, ch. 42, § 11.

5. First Nat. Bank *v.* Jaggers, 31 Md. 38; 100 Am. Dec. 53; Wilcox *v.* State, 31 Tex. 586; White *v.* Miller, 7 Hun (N. Y.) 427; Miller *v.* Stettiner, 22 How. Pr. (N. Y. Super. Ct.) 518; Traver *v.* Eighth Ave. R. Co., 3 Keyes (N. Y.) 497; McCrory *v.* Anderson,

been questioned,[1] but it is well settled that the objection must be raised by plea or demurrer whether the misnomer be that of plaintiff[2] or defendant,[3] and is waived if not so taken.[4]

Application of Rule.—This rule applies to a misnomer in a representative capacity,[5] to the case of a default,[6] and in equity.[7]

Raises Issue of Fact.—A plea of misnomer raises an issue of fact which is to be sustained by evidence and determined like other issues of fact, and not by a motion on the pleadings to dismiss the complaint.[8]

8. Misjoinder—Method of Raising Objection.—The mode in which the objection of misjoinder of parties should be raised varies in different jurisdictions. In some it is held that the objection of misjoinder of parties plaintiff can be raised under the general issue, and need not be taken by plea in abatement.[9] It is also held that in actions on contract the misjoinder of parties defendant can be taken

103 Ind. 12; Paden *v.* King, 30 Ind. 181; Sinton *v.* Steamboat R. R. Roberts, 46 Ind. 476; Ridenour *v.* Mayo, 29 Ohio St. 138; State *v.* Bell Teleph. Co., 36 Ohio St. 296; 38 Am. Rep. 583; Pennsylvania Co. *v.* Sloan, 125 Ill. 72.

1. Elliott *v.* Hart, 7 How. Pr. (N. Y. Supreme Ct.) 25; Dole *v.* Manley, 11 How. Pr. (N. Y. Supreme Ct.) 138.

2. Hudson *v.* Poindexter, 42 Miss. 304; Simmons *v.* Thomas, 43 Miss. 31; Melvin *v.* Clark, 45 Ala. 285; Taylor *v.* Littell, 21 La. Ann. 665; Silvernagl *v.* Fluker, 21 La. Ann. 188; Dental Vulcanite Co. *v.* Wetherbee, 3 Fish. Pat. Cas. (U. S.) 87.

It has been held not a fatal defect for an answer to designate the original plaintiff as plaintiff, although his executrix has been substituted for him as plaintiff. Williams *v.* Eikenbury, 36 Neb. 478.

3. Seely *v.* Boon, 1 N. J. L. 138; Pate *v.* Bacon, 6 Munf. (Va.) 219; Jewett *v.* Burroughs, 15 Mass. 469; David *v.* David, 1 Greene (Iowa) 427; Porter *v.* Cresson, 10 S. & R. (Pa.) 257; Gilbert *v.* Nantucket Bank, 5 Mass. 97; Miller *v.* Stettiner, 7 Bosw. (N. Y.) 692; Waterbury *v.* Mather, 16 Wend. (N. Y.) 611; Salisbury *v.* Gillett, 3 Ill. 290; Synes *v.* State, 5 Port. (Ala.) 236; Mann *v.* Carley, 4 Cow. (N. Y.) 148; Scull *v.* Briddle, 2 Wash. (U. S.) 200; Kincaird *v.* Howe, 10 Mass. 205; Smith *v.* Bowker, 1 Mass. 76; Barnes *v.* Perine, 9 Barb. (N. Y.) 202; Christian Soc. *v.* McCumber, 3 Met. (Mass.) 235; Moss *v.* Flint, 13 Ill. 570; Pendleton *v.* Bank of Ky., 1 T. B. Mon. (Ky.) 174; Carpenter *v.* State, 8 Mo. 291; Thompson *v.* Elliott, 5 Mo. 118.

Contra.—Rock Island *v.* Steele, 31 Ill. 543.

4. Bank of Havana *v.* Magee, 20 N. Y. 355; Traver *v.* Eighth Ave. R. Co., 3 Keyes (N. Y.) 497; State *v.* Bell Teleph. Co., 36 Ohio St. 296; 38 Am. Rep. 583; Young *v.* South Tredegar Iron Co., 85 Tenn. 189; 4 Am. St. Rep. 752.

5. **Misnomer in Representative Capacity.**—The rule as to misnomer of defendants applies to a misnomer relating to the representative capacity of a defendant, as where a defendant is sued as executor when he is an administrator, or *vice versa*, and objection must be taken by a plea in abatement. Clements *v.* Swain, 2 N. H. 475.

6. **Corporations.** — Unless the misnomer of a corporation is taken advantage of by plea it is waived, as well where the corporation suffers a default as where it answers. Whittlesey *v.* Frantz, 74 N. Y. 457.

7. **In Equity** a plea in abatement for misnomer is proper, but such a plea does not end the suit. The defendant after he has pleaded in abatement and disclosed his true name must plead in chief. Dixon *v.* Cavenaugh, 1 Overt. (Tenn.) 365.

8. Miller *v.* George, 30 S. Car. 526.

9. Rhoads *v.* Booth, 14 Iowa 575; Gerry *v.* Gerry, 11 Gray (Mass.) 382; Tate *v.* Citizens' Mut. F. Ins. Co., 13 Gray (Mass.) 79; Glover *v.* Hunnewell, 6 Pick. (Mass.) 222; Hill *v.* Davis, 4 Mass., 137; Whiting *v.* Cook, 8 Allen (Mass.) 63.

advantage of under the general issue.[1] In *New York, Missouri,* and *Utah* the objection of misjoinder of parties must be taken by answer in the nature of a plea in abatement or by demurrer.[2]

Who Can Object.—One who is properly made a defendant cannot object to the joinder of other parties where it does not affect him.[3]

Time for Objection.—The objection of misjoinder should properly be taken at the earliest opportunity.[4]

A Plea to Several Counts must be good as to all of them, or judgment will be given against the pleader.[5]

9. Non-joinder—Plea or Demurrer.—As a general rule, the objection of the non-joinder of proper parties plaintiff or defendant should be taken advantage of by plea in abatement or answer in the nature thereof when the objection does not appear on the face of the record, and by demurrer when it does so appear.[6]

1. Gray *v.* Palmers, 1 Esp. 135; Whiting *v.* Cook, 8 Allen (Mass.) 63; Blight *v.* Ashley, Pet. (C. C.) 16; Porter *v.* Harris, 1 Lev. 63; Shirreff *v.* Wilks, 1 East 52; Robeson *v.* Ganderton, 9 C. & P. 476; 38 E. C. L. 191; Hannah *v.* Smith, 3 T. R. 662; Manahan *v.* Gibbons, 19 Johns. (N. Y.) 109; Burnham *v.* Webster, 5 Mass. 270; Peebles *v.* Rand, 43 N. H. 339; Browne *v.* Warner, 2 J. J. Marsh. (Ky.) 38; Jenkins *v.* Hunt, 2 Rand. (Va.) 446.

In actions of tort the misjoinder of proper parties defendant can be taken advantage of only by a plea in abatement. Warner *v.* Wilson, 4 Cal. 310; Harlem *v.* Emmert, 41 Ill. 320.

2. Hier *v.* Staples, 51 N. Y. 136; Zabriskie *v.* Smith, 13 N. Y. 322; 64 Am. Dec. 551; Fosgate *v.* Herkimer Mfg. Co., 12 Barb. (N. Y.) 352; *aff'd* 12 N. Y. 580; Dillaye *v.* Parks, 31 Barb. (N. Y.) 132; Bayle *v.* Lawton, 23 N. Y. Wkly. Dig. 172; Zimmerman *v.* Schoenfeldt, 3 Hun (N. Y.) 692; Palmer *v.* Davis, 28 N. Y. 242; O'Brien *v.* Glenville Woolen Co., 50 N. Y. 128; Fox *v.* Mayer, 54 N. Y. 125; Donahue *v.* Bragg, 49 Mo. App. 273; Crenshaw *v.* Ullman, 113 Mo. 633; Preshaw *v.* Dee, 6 Utah 360.

Misjoinder of Defendants in Georgia.—In *Georgia* the improper joinder of defendants does not cause an abatement or quashing of an action, but the action proceeds against the others (proper parties) to judgment and execution in the same manner as if the defendants found not liable and discharged had not been originally joined as defendants. Wooten *v.* Nall, 18 Ga. 609.

3. **Misjoinder of Other Defendants.**—In a suit for an infringement of a patent, a citizen of the district in which the suit is brought, and who is a defendant, cannot successfully demur on the ground that he is joined as defendant with a corporation over whom the court has no jurisdiction. Cramer *v.* Singer Mfg. Co., 59 Fed. Rep. 74.

A party who is properly a defendant in an action cannot successfully demur on the ground of misjoinder of parties defendant. Bigelow *v.* Sanford (Mich., 1894), 57 N. W. Rep. 1037.

4 Adams *v.* Adams, 64 N. H. 224.

5. **Plea to Several Counts.**—Where a plea in abatement for the misjoinder of parties is pleaded to several counts in a declaration, and is bad as to any one of the counts, it must be held bad altogether and judgment of *respondeat ouster* given, although it would have been a good plea if it had been pleaded separately to the other counts. Phillips *v.* Claggett, 10 M. & W. 102; 6 Jur. 629.

6. Gock *v.* Keneda, 29 Barb. (N. Y.) 120; Cushman *v.* Family Fund Soc. (C. Pl.), 13 N. Y. Supp. 428; Davis *v.* Bechstein, 69 N. Y. 440, 25 Am. Rep. 218; Carr *v.* Security Ins. Co., 109 N. Y. 504; Risley *v.* Wightman, 13 Hun (N. Y.) 163; Ostrander *v.* Weber, 114 N. Y. 95; Browning *v.* Marvin, 22 Hun (N. Y.) 547; Reed *v.* Hayt, 51 N. Y. Super. Ct. 121; 109 N. Y. 659; Brown *v.* Brown, 29 Hun (N. Y.) 498; Fisher *v.* Hall, 41 N. Y. 416; Farwell *v.* Importers', etc., Bank, 90 N. Y.

As to Defendants, there seems to be no question that the objection must be thus raised, whether the action be on contract or in tort.[1]

In Actions for Torts the non-joinder of proper parties plaintiff must be taken advantage of by a plea in abatement when it is not apparent on the face of the record; and if not so taken, all the defendant can do is to restrict the damages to the interest of the plaintiff or plaintiffs suing.[2]

Plaintiffs in Contract.—In actions on contract it has been held in many cases that the non-joinder of proper parties plaintiff could be taken advantage of under the general issue without a plea in

483; Karelsen *v.* Sun Fire Office, 45 Hun (N. Y.) 144; Arnstein *v.* Haulenbeck (C. Pl.), 34 N. Y. St. Rep. 297; Blount *v.* Wetherell, 32 Hun (N.Y.) 386; Wemple *v.* McManus (Super. Ct.), 39 N. Y. St. Rep. 141; Sullivan *v.* New York, etc., Cement Co., 119 N. Y. 348; Zabriskie *v.* Smith, 13 N.Y. 322; 64 Am. Dec. 551; Maxwell *v.* Pratt, 24 Hun (N. Y.) 448; Hallem *v.* Jones, 2 Misc. Rep. (N. Y. C. Pl.) 249; Stelling *v.* Grabowsky (Supreme Ct.), 46 N. Y. St. Rep. 700; 19 N. Y. Supp. 280; Jemmison *v.* Kennedy, 55 Hun (N. Y.) 47; Douglass *v.* Leonard (C. Pl.), 44 N. Y. St. Rep. 293; 18 N. Y. Supp. 591; Le Page *v.* McCrea, 1 Wend. (N.Y.) 164; 19 Am. Dec. 469; Baldwin *v.* Second Street Cable Co., 77 Cal. 390; Williams *v.* Patrons of Husbandry (Mo., 1886), 5 West. Rep. 105; State *v.* True, 20 Mo. App. 176; Atkinson *v.* Mott, 102 Ind. 431.

1. Allen *v.* Lucket, 3 J. J. Marsh. (Ky.) 164; Com. *v.* Davis, 9 B. Mon. (Ky.) 128; Moore *v.* Russell, 2 Bibb (Ky.) 443; Andrews *v.* Allen, 4 Harr. (Del.) 452; White *v.* Cushing, 30 Me. 267; Robinson *v.* Robinson, 10 Me. 240; Winslow *v.* Merrill, 11 Me. 127; State *v.* Chandler, 79 Me. 172; Nealley *v.* Moulton, 12 N. H. 485; Gove *v.* Lawrence, 24 N. H. 128; Powers *v.* Spear, 3 N. H. 35; Exum *v.* Davis, 10 Rich. (S. Car.) 357; Storey *v.* McNeill, Harp. (S. Car.) 173; Hamilton *v.* Buxton, 6 Ark. 24; Allen *v.* Sewall, 2 Wend. (N. Y.) 327; Le Page *v.* McCrea, 1 Wend. (N. Y.) 164; 19 Am. Dec. 469; Robertson *v.* Smith, 18 Johns. (N. Y.) 459; 9 Am. Dec. 227; Williams *v.* Allen, 7 Cow. (N. Y.) 316; Ziele *v.* Campbell, 2 Johns. Cas. (N.Y.) 382; Gay *v.* Cary, 9 Cow. (N. Y.) 44; Pharis *v.* Gere, 14 N. Y. Wkly. Dig. 387; Shelton *v.* Banks, 10 Gray (Mass.) 401; Barstow *v.* Fossett, 11 Mass. 250; McGregor *v.* Balch, 17 Vt. 562; Mershon *v.* Hobensack, 22 N. J. L. 373; Lieberman *v.* Brothers (N. J., 1893), 26 Atl. Rep. 828; Hine *v.* Houston, 2 Greene (Iowa) 161; Hurley *v.* Roche, 6 Fla. 746; Potter *v.* McCoy, 26 Pa. St. 458; Horton *v.* Cook, 2 Watts (Pa.) 40; Wilson *v.* Wallace, 8 S. & R. (Pa.) 55; Merrick *v.* Bank of Metropolis, 8 Gill (Md.) 59; Clementson *v.* Beatty, 1 Cranch (C. C.) 178; Miner *v.* Mechanics' Bank, 1 Pet. (U. S.) 46; Henderson *v.* Hammond, 19 Ala. 340; Barnett *v.* Watson, 1 Wash. (Va.) 372; Conley *v.* Good, 1 Ill. 135; Mason *v.* Fairfield, 2 Ind. 84; Gilbert *v.* Allen, 57 Ind. 524; McArthur *v.* Ladd, 5 Ohio St. 517; Ritter *v.* Hamilton, 4 Tex. 325; Davis *v.* Willis, 47 Tex. 154; Bowen *v.* Culp, 36 Mich. 224; Coffee *v.* Eastland, 1 Cooke (Tenn.) 159.

2. Edwards *v.* Hill, 11 Ill. 22; Johnson *v.* Richardson, 17 Ill. 302; Frazier *v.* Spear, 2 Bibb (Ky.) 385; Bell *v.* Layman, 1 T. B. Mon. (Ky.) 40; 15 Am. Dec. 83; Hobbs *v.* Hatch, 48 Me. 55; Morley *v.* French, 2 Cush. (Mass.) 130; Phillips *v.* Cummings, 11 Cush. (Mass.) 469; Thompson *v.* Hoskin, 11 Mass. 419; Chandler *v.* Spear, 22 Vt. 388; Briggs *v.* Taylor, 35 Vt. 57; White *v.* Webb, 15 Conn. 302; Johnson *v.* Ransom, 24 Conn. 531; Chouteau *v.* Hewitt, 10 Mo. 130; True *v.* Congdon, 44 N. H. 48; Wilson *v.* Gamble, 9 N. H. 74; Garvin *v.* Paul, 47 N. H. 158; Reading R. Co. *v.* Boyer, 13 Pa. St. 497; Dubois *v.* Glaub, 52 Pa. St. 238; Walworth *v.* Abel, 52 Pa. St. 370; Winters *v.* McGhee, 3 Sneed (Tenn.) 128; Gilbert *v.* Dickerson, 7 Wend. (N. Y.) 449; 22 Am. Dec. 592; Wheelwright *v.* De Peyster, 1 Johns. (N. Y.) 471.

abatement or answer in the nature thereof;[1] but this is not a universal rule.[2]

Executors and Administrators.—Objection to non-joinder of executors or administrators, either as plaintiffs or defendants, it has been held, must be raised by plea in abatement.[3]

Partners.—And the same rule has been applied to partners plaintiff or defendant.[4]

1. Addison *v.* Overend, 6 T. R. 770; Scott *v.* Godwin, 1 B. & P. 73; Snelgrove *v.* Hunt, 2 Stark 424; 3 E. C. L. 473; Wiggins *v.* Cummings, 8 Allen (Mass.) 353; Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162; Thompson *v.* Hoskin, 11 Mass. 420; Wright *v.* Post, 3 Conn. 142; Pitkin *v.* Roby, 43 N.H. 139; Doremus *v.* Selden, 19 Johns. (N. Y.) 213; Robertson *v.* Smith, 18 Johns. (N. Y.) 459; 9 Am. Dec. 227; Dob *v.* Halsey, 16 Johns. (N. Y.) 34; 8 Am. Dec. 293; Ziele *v.* Campbell, 2 Johns. Cas. (N. Y.) 384; Snell *v.* Deland, 43 Ill. 323; Smith *v.* Crichton, 33 Md. 103; Duval *v.* Mayson, 23 Ark. 30; Hicks *v.* Branton, 21 Ark. 189; Hoard *v.* Wilcox, 47 Pa. St. 51.

2. White *v.* Brooks, 43 N. H. 409; Lang *v.* Whidden, 2 N. H. 435; Garner *v.* Tiffany, Minor (Ala.) 167; Dorsey *v.* Lawrence, Hard. (Ky.) 517. See also authorities cited under note 1.

Part Owners of Chattel.—If one of several part owners of a chattel sues alone, the defendant can take advantage of the fact only by a plea in abatement. Addison *v.* Overend, 6 T. R. 766; Sedgworth *v.* Overend, 7 T. R. 279.

Libel for Salvage.—In a libel for salvage the objection "that there are other persons who co-operated with the libellants in rendering the services for which the libel is filed, and who should be joined," is in the nature of a plea in abatement, and if valid is waived unless taken by answer or exception to the libel in the court of original jurisdiction. The Camanche, 8 Wall. (U. S.) 476.

Non-joinder of Plaintiff's Husband.—Under the *New Jersey* practice act, notice of the non-joinder of plaintiff's husband must be given in order to make it a defence at the trial. Brady *v.* Potts (N. J., 1887), 11 Atl. Rep. 345.

In Equity.—An objection to the non-joinder of parties plaintiff on the ground that the plaintiff is a bankrupt, and that his assignee in bankruptcy is not joined as a party, cannot be properly set up in an answer in equity, but should be raised by a plea in abatement. Kittredge *v.* Claremont Bank, 3 Story (U. S.) 590.

3. Gordon *v.* Goodwin, 2 Nott & M. (S. Car.) 70; 10 Am. Dec. 573; Newton *v.* Cocke, 10 Ark. 169; Lillard *v.* Lillard, 5 B. Mon. (Ky.) 340; Hunt *v.* Kearney, 3 N. J. L. 721.

4. Smith *v.* Cooke, 31 Md. 174; 100 Am. Dec. 58; McDonald *v.* Western Refrigerating Co., 35 Ill. App. 283; Puschel *v.* Hoover, 16 Ill. 340; Thompson *v.* Strain, 16 Ill. 369; Deal *v.* Bogue, 20 Pa. St. 228; 57 Am. Dec. 702; Bellas *v.* Fagely, 19 Pa. St. 273; Chorpenning *v.* Royce, 58 Pa. St. 474; Alexander *v.* McGinn, 3 Watts (Pa.) 220; Dorsey *v.* Lawrence, Hard. (Ky.) 517; Chappell *v.* Proctor, Harp. (S. Car.) 49; Clementson *v.* Beatty, 1 Cranch (C. C.) 178; Coffee *v.* Eastland, 1 Cooke (Tenn.) 159.

Cannot Show Partnership under General Denial.—Under a mere denial in an answer of an alleged partnership a defendant cannot claim or show that there are other persons interested in the firm who should have been made plaintiffs. Karelsen *v.* Sun Fire Office, 45 Hun (N. Y.) 144.

Non-joinder of Partners as Plaintiffs.—Where plaintiff declares in assumpsit, the objection that other persons were partners with defendant in the business in which the contract is alleged to have been made, and should have been joined as defendants, is matter of abatement, and is only available when pleaded. If defendant fails to plead it in abatement, plaintiff may prove the contract of the firm and the partnership and have judgment against defendant alone for the whole debt, every partner being liable to creditor for firm debts. Smith *v.* Cooke, 31 Md. 174; 100 Am. Dec. 58.

Need not Prove Knowledge of Partnership.—Where the defendant pleads in abatement the non-joinder of his partners who were joint promisors with him, in order to support the plea he is not obliged to prove that the plaintiff when he contracted knew he was deal-

When by Demurrer.—Where the objection appears on the face of the record, the question should be raised by demurrer, it seems to be generally held.[1] To warrant a demurrer it should appear from the record that the omitted party is alive.[2]

At Any Stage of Action.—In some cases it has been held that the defect of the non-joinder of proper parties defendant may be taken advantage of at any stage of the action and need not be raised by plea or demurrer.[3]

Requisites of Plea.—A plea in abatement for non-joinder should give the names of the parties omitted,[4] and show that they are alive

ing with a partnership. Norwood *v.* Sutton, 1 Cranch (C. C.) 327.

Plea Good if only Part of Claim Joint.—In an action against A., B., and C. for work done, they pleaded that the work was done for them jointly with another, and on trial it was proved to be so *as to part of the work. Held*, that the plea was an answer to the action. Hill *v.* White, 6 Bing. N. Cas. 23; 37 E. C. L. 263; 8 Scott 245; 3 Jur. 1077.

Joint Contractors as Variance.—The non-joinder of one of several joint contractors as defendant, whose liability is shown by the evidence, can be taken only by plea in abatement, and cannot be taken advantage of under the general issue on the ground of a variance between the pleading and proof. Wilson *v.* McCormick, 86 Va. 995.

Joint Contractors—Jury Charge.—In an action on a contract, to wit, to recover a loan which defendant claims was made to him jointly with another, the failure to join such other person as defendant can be taken advantage of only by a plea in abatement; and where the defendant fails to interpose such a plea, it is error for the trial justice to charge the jury "that if they find the loan was made to defendant and such other person jointly, they must find for defendant." Pearce *v.* Pearce, 67 Ill. 207.

Members of Association.—In an action against members of an association individually, if plaintiff names only part of those who should be named, defendants should interpose a plea in abatement; and if they do not do so, those who are named must submit to judgment against them. Davison *v.* Holden, 55 Conn. 103.

1. Note 6, p. 14, and cases there cited.

Where it is alleged in a complaint that the plaintiff is the owner of a note by means of an indorsement from a firm of which he is a member, the sufficiency of the indorsement can be tested only by demurrer for defect of parties. It cannot be presented in an attack on the complaint in the assignment of errors. Eichelberger *v.* Old Nat. Bank, 103 Ind. 402; Fulton *v.* Loughlin, 118 Ind. 288.

Overruling of Demurrer does not Prevent a Plea.—To a libel in admiralty for a breach of a charter party, the defendant may plead in abatement that there are other owners and necessary parties, notwithstanding the fact that a demurrer for an apparent variance between the libel and the charter party had been previously overruled. Card *v.* Hines, 35 Fed. Rep. 598.

2. Gilbert *v.* Allen, 57 Ind. 524; Davis *v.* Willis, 47 Tex. 154; Bowen *v.* Culp, 36 Mich. 224; Fowler *v.* Rickerby, 3 Scott N. R. 138; 2 M. & G. 760; 9 Dowl. Pr. Cas. 682.

Contra.—Where from plaintiff's pleadings it appears that a joint contractor with the defendants has not been made a party, and there is no averment of his death, the objection of his non-joinder may be raised by demurrer, as well as by a plea in abatement. State *v.* Chandler, 79 Me. 172.

3. McGregor *v.* Balch, 17 Vt. 562; Merrick *v.* Bank of Metropolis, 8 Gill (Md.) 59; Harwood *v.* Roberts, 5 Me. 441; Nealley *v.* Moulton, 12 N. H. 485; Ela *v.* Card, 2 N. H. 175; 9 Am. Dec. 46; Cook *v.* Berkley, 3 Call (Va.) 378; Newell *v.* Wood, 1 Munf. (Va.) 555; Jordan *v.* Wilkins, 3 Wash. (Va.) 110; Saunders *v.* Wood, 1 Munf. (Va.) 406; Leftwich *v.* Berkeley, 1 Hen. & M. (Va.) 61.

On Appeal.—Where in an action on a bond it appears by the declaration that one of the obligors named in the bond is not joined as a defendant in the action thereon, a plea in abatement is not necessary to raise this objection, but it may be taken on error to review a judgment by default. Cummings *v.* People, 50 Ill. 132.

4. Tweedy *v.* Jarvis, 27 Conn. 42;

and within the jurisdiction of the court and within reach of its process.[1] It has been held that it need not state the place of abode[2] or the age of the party.[3] Where the omitted parties are executors, it should show that they qualified and are acting as such.[4] Pleas in abatement for non-joinder should be clear, definite, and certain, and should show the interest in the matter of the omitted party or parties.[5] But they need not negative

American Express Co. *v.* Haggard, 37 Ill. 465; 87 Am. Dec. 257; Mershon *v.* Hobensack, 22 N. J. L. 372; Aulanier *v.* Governor, 1 Tex. 653; Wadsworth *v.* Woodford, 1 Day (Conn.) 28; Wilson *v.* Nevers, 20 Pick. (Mass.) 20; Fink *v.* Naples, 15 Ind. 297; Schwartz *v.* Wechler, 23 Civ. Pro. Rep. (N. Y. C. Pl.) 21; 29 Abb. N. Cas. (N. Y.) 332; 2 Misc. Rep. (N. Y.) 67; Crellin *v.* Brook, 1 C. & K. 571; 47 E. C. L. 570; Case *v.* Minot, 158 Mass. 577; Baker *v.* Reese, 150 Pa. St. 44.

1. Goodhue *v.* Luce, 82 Me. 222; Door County *v.* Keogh, 77 Wis. 24; Carico *v.* Moore, 4 Ind. App. 20; Palmer *v.* Field, 76 Hun (N. Y.) 229; Holt *v.* Streeter, 74 Hun (N. Y.) 538.

Should show Parties Alive.—In an action to recover possession of land the defendant pleaded in abatement "that the premises in the writ and declaration mentioned were at the time named in said writ and declaration in the possession of him the said Robert Robertson (defendant) together with one Isaac Plummer, and not in the possession of said Robertson alone, and this he is ready to verify. Wherefore, inasmuch as the said Isaac Plummer is not named in said writ and declaration together with the said Robert Robertson, he prays judgment of said writ and declaration that the same may be quashed, etc." *Held*, bad on demurrer for not alleging the omitted person to be alive and within the jurisdiction. Furbish *v.* Robertson, 67 Me. 35.

Bad if shows Parties not within Jurisdiction.—A plea in abatement for non-joinder of co-contractors is bad if it shows some of the co-contractors are non-residents within the jurisdiction, for by 3 & 4 Will. IV, ch. 42, § 8, defendant is required to state that all are resident within the jurisdiction, and must verify the plea by affidavit. Gell *v.* Curzon, 4 D. & L. 810; 11 Jur. 737.

Ordinary Language Sufficient.—Although in a plea of non-joinder in abatement it must be averred that the omitted defendant is alive and within the jurisdiction of the court, it is sufficient if this is done in language which ordinarily imports this; hence where the answer alleged "that the defendants and one K. (the omitted party) *are* co-partners doing business at Belmont, Alleghany County, New York, by the name and style of S. & K., and that the note set out in the complaint is the note of said firm in its firm business," it was held to sufficiently import that the omitted party was living and within the jurisdiction, and to be good. Lefferts *v.* Silsby, 54 How. Pr. (N. Y. Supreme Ct.) 193.

Need not Allege Positively.—In an action against the city of Sheboygan, Wisconsin, to recover damages for injuries caused by a defective street, it is a good plea in abatement for defendant to state the name of the person whose negligence caused the defect in the street and allege that he is a resident of the city, and it need not be alleged that he is living within the jurisdiction of the court. Raymond *v.* Sheboygan, 70 Wis. 318.

2. **Residence.**—A plea in abatement for non-joinder need not set forth the places of abode and additions of the persons omitted. Ela *v.* Rand, 3 N. H. 95.

3. **Age.**—A plea in abatement for the non-joinder of a person alleged to be a joint contractor with defendant need not allege that the omitted person was of full age when he entered into the contract. Roberts *v.* McLean, 16 Vt. 608; 42 Am. Dec. 529.

4. **Executors.**—Where a plea of non-joinder of co-executors as plaintiffs does not show where they reside and that they were executors at the time the suit was commenced, it is bad. Beach *v.* Baldwin, 9 Conn. 476.

Where an action affects executors, a plea in abatement "that there are other executors not named in the writ" is bad if it does not allege that the omitted executors qualified and took on themselves the execution of the will. Burrow *v.* Sellers, 1 Hayw. (N. Car.) 501.

5. **Interest of Omitted Parties.**—A

matter which would be insufficient in a replication thereto.[1]

10. **Privilege and Non-tenure.**—The objection of a personal privilege of a defendant should in general be raised by a plea in abatement,[2] and the same rule has been held in real actions in relation to the claim of non-tenure or disclaimer.[3]

11. **Defects in Process and Proceedings.**—Defects in process not appearing on the face of the record and which do not render it void must be taken by a plea in abatement, or they are waived.[4]

plea in abatement predicated on the non-joinder of parties defendant should set forth definitely the nature and intent of the interest of each person who is claimed to be a necessary party. State *v.* Goodnight, 70 Tex. 682.

Interest in Fund.—Where a defendant is sued to recover a fund in his hands, an answer by him alleging that there are other persons besides plaintiff who claim an interest in the fund and from whom he should be protected is bad and insufficient for not setting out the names of such parties and stating their interest in the fund. Johnson *v.* Gooch (N. Car., 1894), 19 S. E. Rep. 62.

Plea of No Partnership.—Where the maker of a note who was sued alone on a note signed in his name with the addition of "& Co." pleaded "no partnership," such plea is insufficient to prevent judgment; for, if true, it shows no one else ought to have been sued but him. To raise the question of non-joinder he should have pleaded it. Hirsch *v.* Oliver (Ga., 1893), 18 S. E. Rep. 154.

Tenant in Common.—Where defendant pleads in abatement the non-joinder of tenants in common of a dam, he should allege the dam to be real estate or the plea is bad. Southard *v.* Hill, 44 Me. 92; 69 Am. Dec. 85.

Claiming under Different Titles.—A plea in abatement setting up "that plaintiffs and defendants are tenants in common with other different owners of certain land (of which the land in suit forms part) and asking that the suit abate until such other owners are brought in," is bad on demurrer where it appears that defendants claim the specific lands sued for under deeds from such other persons or their vendors and have made no attempt to bring them in as parties. Smith *v.* Powell, 5 Tex. Civ. App. 373.

As a Separate Defense.—The non-joinder of proper parties must be distinctly pleaded as a separate and distinct defense; hence where in an action on contract the defendant's answer alleged that the contract was made with the plaintiff and a third person and that they had not performed it on their part, *held*, it did not raise the question of non-joinder. Chaffee *v.* Morss, 67 Barb. (N. Y.) 252; 5 Thomp. & C. (N. Y.) 708.

1. **Personal Discharge of Co promisor.**—A plea in abatement lies for the non-joinder of a joint contracting party. Facts which merely go to the personal discharge of such co-promisor, such as death, insolvency, etc., need not be alleged in the plea, because they would be insufficient in a replication thereto and hence need not be anticipated and included by the plea. Goodhue *v.* Luce, 82 Me. 222.

Discontinuance as to One of Two Defendants.—Where plaintiff discontinues after verdict as to one of two defendants sued jointly, it amounts merely to an amendment and does not entitle the other defendant to plead in abatement matter which would have been a good plea in abatement had such defendant originally sued alone. Schweyer *v.* Oberkoetter, 25 Ill. App. 183.

2. Shelby *v.* Johnson, 7 Humph. (Tenn.) 503; Grove *v.* Campbell, 9 Yerg. (Tenn.) 7.

3. Prescott *v.* Hutchinson, 13 Mass. 439; Otis *v.* Warren, 14 Mass. 240; Fogg *v.* Fogg, 31 Me. 302; Dewey *v.* Brown, 2 Pick. (Mass.) 387; Wyman *v.* Brown, 50 Me. 139; Brown *v.* Miltimore, 2 N. H. 442; Young *v.* Tarbell, 37 Me. 509; Fosdick *v.* Gooding, 1 Me. 54; Mills *v.* Pierce, 2 N. H. 10; Newbegin *v.* Langley, 39 Me. 200; 63 Am. Dec. 612; Campbell *v.* Wallace, 12 N. H. 362.

4. Pattee *v.* Lowe, 35 Me. 121; Stevens *v.* Ewer, 2 Met. (Mass.) 74; Frankfort Bank *v.* Anderson, 3 A. K. Marsh. (Ky.) 1; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 428; Owings *v.* Beall, 3

This is also the rule as to all irregularities in proceedings which are not jurisdictional.[1]

12. Variance—How Objection Raised.—A variance between the writ and the declaration or count should be taken advantage of by a plea in abatement.[2]

Oyer.—A plea in abatement for a variance should crave oyer of the originals,[3] which may be done in one paragraph.[4]

Enrollment.—The plea should set out the originals and make profert of and enroll the copies served.[5]

Enforcement of Rules.—In many of the states oyer of the writ is still allowed, and in them the rules as to variance are enforced.[6]

13. Service, etc.—Taking Advantage of Defects.—Where the court has jurisdiction and there has been no appearance, defects in the service of process should in general be taken advantage of by a plea in abatement.[7]

Litt. (Ky.) 103; Jordan *v.* Bell, 8 Port. (Ala.) 53; McCrea *v.* Starr, 1 Murph. (N. Car.) 252; Payne *v.* Grim, 2 Munf. (Va.) 297; Dudley *v.* Carmolt, 1 Murph. (N. Car.) 339; Miller *v.* Gages, 4 McLean (U. S.) 436; Johnson *v.* King, 20 Ala. 270.

1. Cabell *v.* Payne, 2 J. J. Marsh. (Ky.) 134; Borden *v.* Fowler, 14 Ark. 471; Cowell *v.* Oxford, 6 N. J. L. 432.

2. Wilson *v.* Shannon, 6 Ark. 196; Duvall *v.* Craig, 2 Wheat. (U. S.) 45; Turner *v.* Brown, 9 Ala. 866; Prince *v.* Lamb, 1 Ill. 378; Cruikshank *v.* Brown, 10 Ill. 75; Carpenter *v.* Hoyt, 17 Ill. 529; McKenna *v.* Fisk, 1 How. (U. S.) 241; Garland *v.* Chattle, 12 Johns. (N. Y.) 430; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280.

On Appeal.—A variance between the writ and the declaration is unavailable when presented for the first time in an appellate court; such an objection must be taken by a plea in abatement. Fonville *v.* Monroe, 74 Ill. 126.

Where there is a Total Departure from the writ in the declaration it is not necessary to plead the variance in abatement, but the declaration may be stricken from the files on motion. Chapman *v.* Spence, 22 Ala. 588.

3. Goldsticker *v.* Stetson, 21 Ala. 404; Chapman *v.* Davis, 4 Gill (Md.) 166; Nichols *v.* Smalley, 7 Blackf. (Ind.) 200; Lary *v.* Evans, 35 N. H. 172.

4. Pitman *v.* Perkins, 28 N. H. 90. It is immaterial whether oyer be craved of the writ and declaration or only of the writ, where the declaration is incorporated into the writ. Lyman *v.* Dodge, 13 N. H. 197.

Where the Writ Constitutes a Part of the Record it is not necessary for the defendant to crave oyer of the writ as preliminary to presenting a plea in abatement. Pierce *v.* Lacy, 23 Miss. 193.

5. Garner *v.* Johnson, 22 Ala. 494; Nelson *v.* Sweet, 4 N. H. 256; Findlay *v.* Pruitt, 9 Port. (Ala.) 195; Tucker *v.* Perley, 5 N. H. 345; Goodall *v.* Durgin, 14 N. H. 576; Dinsmore *v.* Pendexter, 28 N. H. 18; Lary *v.* Evans, 35 N. H. 172.

The name of the indorser on the writ and of the sheriff on the summons need not necessarily be enrolled in setting them out. Knowles *v.* Rowell, 8 N. H. 542.

Enrollment Substantially Correct.—An enrollment must be substantially correct, but misspelling and inaccuracies of a clerical nature are not material unless they occur in parts of the record necessary to bring out the point made by the plea. Baker *v.* Brown, 18 N. H. 551; Colby *v.* Dow, 18 N. H. 557.

Where the word "Greeting" is part of a summons, a plea attempting to show a variance between the writ and summons but omitting that word from the summons as enrolled is bad on demurrer. Goodall *v.* Durgin, 14 N. H. 576.

6. Pitman *v.* Perkins, 28 N. H. 90; Carpenter *v.* Hoyt, 17 Ill. 529; Chapman *v.* Spence, 22 Ala. 588; Pierce *v.* Lacy, 23 Miss. 193; McNeill *v.* Arnold, 17 Ark. 178; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 302; Garland *v.* Chattle, 12 Johns. (N. Y.) 430; Bank of New Brunswick *v.* Arrowsmith, 9 N. J. L. 284.

7. Curtis *v.* Baldwin, 42 N. H. 398, Carlisle *v.* Weston, 21 Pick. (Mass.)

By Motion or Writ of Error.—The objection has been allowed to be raised by motion to dismiss[1] and on writ of error.[2] Pleading in abatement has been held not a waiver of the right to move to quash the writ.[3]

Must Show Service Defective.—A plea in abatement for defective service must clearly and distinctly show that the service made was defective, and also that the writ or process was not served in any other way.[4]

Exclude Contrary Inferences.—It should exclude all matters which, if alleged in reply, would defeat it.[5]

535; Laverty *v.* Turner, 4 Dev. (N. Car.) 275; Simonds *v.* Parker, 1 Met. (Mass.) 508; Hinton *v.* Ballard, 3 W. Va. 582; Brigham *v.* Clark, 20 Pick. (Mass.) 43; Barksdale *v.* Neal, 16 Gratt. (Va.) 314.

1. **No Authority in Person Serving.**—Where total want of authority in the person who undertook to serve a writ appears on the face of the process, the defect may be taken advantage of by plea in abatement or motion to dismiss. Howard *v.* Walker, 39 Vt. 163.

2. **Not Served according to Statute.**—Where service of a writ on an absent defendant who had a last and usual place of abode within the state is not made by leaving the summons or copy thereof at such place, as required by the statute, such defect of service may be raised by plea in abatement or writ of error. Tilden *v.* Johnson, 6 Cush. (Mass.) 354.

3. **Motion to Quash after Plea.**—By pleading in abatement for a defective service the defendant does not waive the right to insist on the improper service of the process, and he may withdraw his plea and make a motion to quash the writ for the defect in the service. Halsey *v.* Hurd, 6 McLean (U. S.) 14.

4. Pearson *v.* French, 9 Vt. 349; Morse *v.* Nash, 30 Vt. 76; Adams *v.* Hodsdon, 33 Me. 225; Tweed *v.* Libbey, 37 Me. 49.

5. **Should show Defendant an Inhabitant.**—As a plea in abatement must include all matters which if alleged in reply would defeat it, it is not sufficient to aver facts showing defendant was not served, unless it be also alleged that the defendant was at the time an inhabitant of the state. Tweed *v.* Libbey, 37 Me. 49; Adams *v.* Hodsdon, 33 Me. 225.

Enable Plaintiff to make Better Service.—Where defendant pleads in abatement to the service of a writ of error "that the plaintiff ought to have served it by leaving a copy thereof with A., who was his (defendant's) attorney at the time of the pretended service, is now his attorney, and was his attorney, who appeared in the original cause," it is sufficient, although it is not averred that A. was the *only* attorney who appeared for defendant, there being sufficient alleged to enable the plaintiff to make a legal service. Colburn *v.* Tolles, 13 Conn. 524.

Service on Agent of Corporation.—In an attachment suit in Vermont against a foreign corporation, a plea in abatement by the corporation alleging that the person on whom the copy of the writ was served was not a clerk or other officer or stockholder of the corporation is insufficient, because it fails to allege that he was not an agent or attorney, or that the copy was not left with him at the place of attachment. Shampeau *v.* Connecticut River Lumber Co., 37 Fed. Rep. 771.

Service on Resident of State.—Where a writ describes the defendant as a resident of the state, a plea in abatement averring facts showing the service defective on defendant as a resident of the state is good and sufficient. Defendant is not required to negative proper service on him as a non-resident. Cady *v.* Gay, 31 Conn. 395.

Show by Whom should be Served.—A plea in abatement for defective service alleging "that the writ was served by one deputy sheriff on another deputy sheriff" is sufficient. It need not allege by whom it ought to have been served. Guild *v.* Richardson, 6 Pick. (Mass.) 369; Brown *v.* Gordon, 1 Me. 165.

False Return of Sheriff.—In *Mississippi* if it is desired to impeach the truth of a sheriff's return, it must be done by a plea in the nature of a plea

Privilege as a Witness.—When defendant relies on his privilege while attending court as a witness as rendering service on him defective, the plea should be strictly accurate in all respects, and should set out fully the court in which he was attending, the suit in which he was a witness, that the suit was then pending in the court, the names of the parties to the suit, and state the party for whom he was summoned as a witness.[1]

Material Matters.—Pleas in abatement for defective service should not allege and rely on immaterial matters.[2]

14. Action Premature—How Objection Raised.—The objection that an action is prematurely brought must be raised by plea in abatement unless it appears on the face of the record and can be taken by demurrer.[3] It cannot be alleged as a defence on the merits,[4] nor to limit the recovery.[5]

in abatement which shall set forth the facts on which reliance is had to establish the falsity of the return, and on which plea issue may be joined and a trial by jury had. A motion to set aside the return as untrue is improper. Mayfield *v.* Barnard, 43 Miss. 270.

Not Agent of Corporation.—Where in a suit against a corporation it is claimed that the person on whom service of process was made was not the agent of the corporation, that question must be raised by plea in abatement unless the grounds therefor appear on the face of the record, in which case it may be by motion to quash the return of service. Rubel *v.* Beaver Falls Cutlery Co., 22 Fed. Rep. 282.

Service by Officer Out of Office.—Where defendant pleads in abatement "that the officer by whom the writ was served was, after his appointment as a deputy sheriff, appointed and commissioned as a justice of the peace, whereby the former office became vacant," the plea is bad for not alleging that the officer both took and subscribed the oath of office as justice. —Chapman *v.* Shaw, 3 Me. 372.

1. Baker *v.* Compton, 2 Head (Tenn.) 471.

2. No Service on Defendants Not Pleading.—A plea in abatement by two defendants to a writ of error against four defendants (the two not pleading being described in the writ as residents of another state), to the effect "that no service has been made on the two defendants not pleading, alleging that they reside in the same state and traversing their residence in another state," is bad on the ground that the fact traversed is immaterial. Denslow *v.* Moore, 1 Day (Conn.) 290.

Service at Wrong Time.—A plea in abatement "that it does not appear by the writ that it was served ten days before the term" is frivolous and will be set aside. Nelson *v.* Cummins, 1 Overt (Tenn.) 436.

3. Midland R. Co. *v.* Stevenson, 6 Ind. App. 702; Carter *v.* Turner, 2 Head (Tenn.) 52; Smith *v.* Holmes, 19 N. Y. 271; Herndon *v.* Garrison, 5 Ala. 380; Giboney *v.* German Ins. Co., 48 Mo. App. 185; Clements *v.* Swain, 2 N. H. 475; Walker *v.* Johnson, 2 McLean (U. S.) 92; Wingate *v.* Smith, 20 Me. 287; Collette *v.* Weed, 68 Wis. 428.

Suit before Statutory Time.—Where a statute provided that no suit to collect a tax alleged to be erroneously assessed should be brought until it had been taken to the collector of internal revenue, *held*, that the failure to take such an appeal before bringing suit, and thus suing prematurely, was matter which must be set up by a plea in abatement, and not having been so set up, the right to object therefor was lost. Heald *v.* Soule, Deady (U. S.) 400.

4. Collette *v.* Weed, 68 Wis. 428.

5. Not to Limit Recovery.—The premature commencement of a suit cannot be used to limit recovery to a certain sum; it is matter of abatement, but not in bar. Grigsby *v.* German Ins. Co., 48 Mo. App. 276.

In Indiana matter tending to show that an action is prematurely brought can only be set up by plea in abate-

Such Matter if Pleaded in Bar has been held demurrable,[1] but not so when pleaded in abatement.[2]

15. Pendency of Another Action as a ground for a plea in abatement. See ANOTHER SUIT PENDING.

III. REQUISITES AND CONSTRUCTION—Construed Strictly.—Pleas in abatement, as they do not deny the merits of plaintiff's claim, but merely tend to delay the remedy, are not favored by the courts, and the greatest strictness is applied to them, and they will not be aided in construction by any intendments. With them correctness of form is matter of substance, and any defect of form is fatal. They must answer the whole case and contain a full, direct, and positive averment of all material facts.[3]

ment; and if pleaded with matter in bar and not verified, it will be stricken out. Moore *v.* Sargent, 112 Ind. 484.

1. **Note Not Due in Bar.**—An answer in bar to a suit on a note alleging "the note was by a mutual mistake made payable at an earlier date than intended" is demurrable. It is matter which must be pleaded in abatement, and cannot be set up in bar. Norris *v.* Scott, 6 Ind. App. 18.

2. **Agreement to Extend Time.**—Where an answer in foreclosure alleges the making of an agreement extending the time of payment, and also that the extended time for payment has not yet expired, it is sufficient and not demurrable, unless it appear from the answer that a default has been made subsequent to the making of the agreement. Eby *v.* Ryan, 22 Neb. 470.

3. Durand *v.* Griswold, 26 Vt. 48; Morse *v.* Nash, 30 Vt. 76; Pearson *v.* French, 9 Vt. 349; Lary *v.* Evans, 35 N. H. 172; Dinsmore *v.* Pendexter, 28 N. H. 18; Tweed *v.* Sibbey, 37 Me. 49; Hazzard *v.* Haskell, 27 Me. 549; Burnham *v.* Howard, 31 Me. 569; Ellis *v.* Ellis, 4 R. I. 110; Wales *v.* Jones, 1 Mich. 254; Belden *v.* Laing, 8 Mich. 500; Townsend *v.* Jeffries, 24 Ala. 329; Roberts *v.* Heim, 27 Ala. 678; Haywood *v.* Chestney, 13 Wend. (N. Y.) 495; Settle *v.* Settle, 10 Humph. (Tenn.) 504; Prosky *v.* West, 16 Miss. 711; Moss *v.* Ashbrooks, 12 Ark. 369; Mandel *v.* Peet, 18 Ark. 236; Fowler *v.* Arnold, 25 Ill. 284; Hollaway *v.* Freeman, 22 Ill. 197; Clark *v.* Warner, 6 Conn. 358; Parsons *v.* Ely, 2 Conn. 377; Wadsworth & Woodford, 1 Day (Conn.) 28; Thompson *v.* Lyon, 14 Cal. 39; Sarco *v.* Clements, 36 Cal. 132; Anonymous, Hempst. (U. S.) 215; Powell *v.* Fullerton, 2 B. & P. 420.

Plea by President of Corporation.—Great precision is required in pleas in abatement both in form and structure, and they are not favored by the courts. Hence where a corporation, sued as defendant, puts in a plea in abatement which purports to be put in by "its president and secretary," instead of "by its attorney," it will be held bad on demurrrer. Nixon *v.* Southwestern Ins. Co., 47 Ill. 444.

Bad Beginning of Plea.—Pleas in abatement must be strictly accurate even in matters of form; hence a plea for misnomer commencing "and the defendant, against whom, etc., comes," etc., is bad, for it admits such defendant to be the person sued. Feasler *v.* Schriever, 68 Ill. 322.

Actions Accruing.—A plea in abatement alleging "that the said causes of action did not accrue nor were the made payable in the county of, etc.," is bad for not averring that no one of them did accrue or was made payable in said county. Dunlap *v.* Turner, 64 Ill. 47.

Alteration of Plea.—If pleas in abatement and the jurats thereto appear on their face to have been altered, this, if assigned, may be ground for ruling them out. Holloway *v.* Freeman, 22 Ill. 197.

Pleading without Propor Defense.—Where a plea in abatement commenced, "And the defendant by his attorney appears to this suit and makes known here to this honorable court that the said attachment was unlawfully sued out," etc, it was held bad on special demurrer on the ground that it was pleaded without proper defence. Prosky *v.* West, 16 Miss. 711.

Must be Certain and Anticipate Defence.—Such pleas must be certain to every intent, and leave nothing to be drawn by inference.[1] They must anticipate and include all such supposable matter as would, if alleged by the opposite party, defeat the plea.[2] But

1. Baker *v.* Reese, 150 Pa. St. 44; Biddeford Sav. Bank *v.* Mosher, 79 Me. 242; Fahy *v.* Brannagan, 56 Me. 42; Llano Imp. Co. *v.* Cross, 5 Tex. Civ. App. 175; Webster *v.* Baggs, 6 R. I. 247; State *v.* Duggan, 15 R. I. 403; Chaney *v.* State, 118 Ind. 494; State *v.* Emery, 59 Vt. 84; Burnside *v.* Matthews, 54 N. Y. 78; Wright *v.* Wright, 54 N. Y. 437.

Submission of Claim under Statute.—Pleas in abatement must be certain to every intent, and where such a plea is founded on the pendency of a submission under the statute of all demands between the parties to a referee, it should state the name of the referee, allege his acceptance, and conclude with a prayer for judgment of the writ, or it is bad. Fahy *v.* Brannagan, 56 Me. 42.

Must Allege Assignment Bona Fide.—Where to an attachment suit it was pleaded in abatement "that the defendant therein had made an assignment of his property for the benefit of his creditors before the suit was brought, and that the deed of assignment was registered and the assignee in possession," *held*, such plea was fatally defective in failing to aver that the assignment was *bona fide*, or to make profert of the assignment. Lowenheim *v.* Ireland, 2 Baxt. (Tenn.) 214.

Facts showing Opposing Title.—Where in an action to foreclose a vendor's lien the defendant pleads in abatement an outstanding title in another than plaintiff, such plea is bad where it fails to allege the facts showing the title of the other opposed to plaintiff's title. Llano Imp., etc., Co. *v.* Cross, 5 Tex. Civ. App. 175.

Non-residence at Time Action Commenced.—A plea in abatement for the non-residence of a trustee made a defendant must allege the non-residence of the trustee at the time of the commencement of the action. An allegation of his non-residence at the time of the service of the writ is not sufficient in such a plea to show his non-residence at the time of the commencement of the action. Biddeford Sav. Bank *v.* Mosher, 79 Me. 242.

Plaintiff's Death after Filing Declaration.—A plea in abatement "that after the service of the writ and before the filing and entering of the action in court the plaintiff died, and an administrator was appointed and qualified to act for her estate," is bad on demurrer under a statute of *Rhode Island* "requiring the executor or administrator of a deceased party to a pending action to appear and further prosecute or defend the action, "the entry of a suit in court being defined to be "the filing of the necessary papers with the clerk and payment of the entry fee on the first or second day of the term," because such plea is consistent with the supposition that plaintiff died after the filing of the declaration, which would then be properly filed in her name, although before the entry of the action in court. Webster *v.* Baggs, 6 R. I. 247.

Justice Interested in Matter.—A plea in abatement in an action before a justice to punish a fraudulent debtor under the *Michigan* statute, that the justice is interested in the matter, need not allege that he was interested at the time the warrant was issued. It is sufficient where it alleges that the justice is interested and is an attorney in an action involving title to the property defendant is charged with fraudulently concealing. Clark *v.* Mikesell, 81 Mich. 45.

Notification to Holder of Legal Title.—In a suit to recover a drainage assessment an answer is insufficient which merely alleges that the defendant was not a party to and had no notice of the assessment proceedings, but fails to allege that defendant's grantor, who held the legal title when the petition therein was filed, was not notified and was not a party. Chaney *v.* State, 118 Ind. 494.

2 Bank of Vergennes *v.* Barker, 27 Vt. 243; Bowman *v.* Stowell, 21 Vt. 309; Bank of Rutland *v.* Barker, 27 Vt. 293; Goodhue *v.* Luce, 82 Me. 222; Capwell *v.* Sipe, 17 R. I. 475; McCauley *v.* State, 21 Md. 556; Mandel *v.* Peet, 18 Ark. 236.

Attending Court as a Witness.—A plea in abatement that defendant, who is a

this rule applies only to such supposable matter as can properly be alleged and set up in the replication and anticipated by the plea, and not to every imaginable matter.[1]

Duplicity.—Such pleas must not be double; duplicity is fatal to them.[2] A statute allowing several pleas has been held not to allow duplicity;[3] but the contrary has also been held.[4]

Must Give Better Writ.—Pleas in abatement must state enough to enable the plaintiff by amendment to completely avoid the mistake or supply the defect on which the defendant relies, or in technical language they must give the plaintiff a better writ.[5]

non-resident, was at the time he was served with process in attendance on the court as a witness is bad in not negativing such attendance in any other capacity than as a witness. Capwell *v.* Sipe, 17 R. I. 475.

Ratification by Agent's Act.—A plea in abatement that the person who signed an attachment bond for the plaintiffs had no competent authority from them to make it is bad unless it also alleges that the act of so signing said bond was not subsequently adopted and ratified by plaintiffs. Mandel *v.* Peet, 18 Ark. 236.

Action by State's Attorney.—Where an action is brought in the name of the state, a plea in abatement on the ground "that it is not brought by the state's attorney" should negative all statutory exceptions to the requirement that suits be brought in the name of the state's attorney, or it is defective. McCauley *v.* State, 21 Md. 556.

1. Goodhue *v.* Luce, 82 Me. 222; Clark *v.* Mikesell, 81 Mich. 45; Webster *v.* Baggs, 6 R. I. 247.

2. Steamboat Napoleon *v.* Etter, 6 Ark. 103; Culver *v.* Balch, 23 Vt. 618; Roberts *v.* Moon, 5 T. R. 487; Cobb *v.* Miller, 9 Ala. 499; Cobb *v.* Force, 6 Ala. 468; Garner *v.* Johnson, 22 Ala. 494; State v. Heselton, 67 Me. 598.

Several Distinct Pleas Bad.—If several distinct pleas in abatement, each distinct and good in itself, are pleaded at the same time, they will be held bad for duplicity as though pleaded in one plea. Culver *v.* Balch, 23 Vt. 618.

Issues on Two Distinct Matters.—When to an indictment by the grand jury the accused pleaded in abatement "that the county had not been legally divided into jury districts; that two of the towns had in their jury boxes more names than were allowed by law, and that in two other towns no notice of the drawing of jurors was given," —*held*, such plea was bad for duplicity as tendering issues upon two or more distinct, independent, and separate matters of fact. State *v.* Heselton, 67 Me. 598.

Specifying Several Particulars not Double.—A plea in abatement which alleges a variance between the writ and summons, and then proceeds to specify by setting forth two particulars, each of which was itself a fatal variance, is not double, and so bad for duplicity. Dyke *v.* Percival, 14 N. H. 578.

3. **Vermont.**—The statute of *Vermont* authorizing a defendant to plead several pleas does not embrace pleas in abatement, so as to allow several such pleas to be pleaded at the same time. Culver *v.* Balch, 23 Vt. 618.

4. **Mississippi.**—The statute of *Mississippi* making it lawful for a defendant to plead as many pleas in bar as he chooses, although some be to the party or the character of the party suing, etc., extends to and embraces pleas in abatement. James *v.* Dowell, 7 Smed. & M. (Miss). 333; Pharris *v.* Conner, 3 Smed. & M. (Miss.) 87.

5. Evans *v.* Stevens, 4 T. R. 224; Godson *v.* Good, 6 Taunt. 595; Haworth *v.* Spraggs, 8 T. R. 515; Chitty on Pleading (16th Am. ed.), p. 473; Haywood *v.* Chestney, 13 Wend. (N. Y.) 495; Ellis *v.* Ellis, 4 R. I. 110; East *v.* Cain, 49 Mich. 473; Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 501; Cook *v.* Burnley, 11 Wall. (U. S.) 668; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 84; Middleton *v.* Pinnell, 2 Gratt. (Va.) 203; Fink *v.* Maple, 15 Ind. 297; Pointer *v.* State, 89 Ind. 257; Deforest *v.* Elkins, 2 Ala. 50; Townsend *v.* Jeffries, 24 Ala. 329; Brown *v.* Gordon, 1 Me. 165; Parsons *v.* Ely, 2 Conn. 377; Wadsworth *v.* Woodford, 1 Day (Conn.) 29; Clark *v.*

Matter Affecting Codefendant.—Such pleas should not set up matter which affects only a codefendant and not the party pleading.[1]

Cannot be Amended.—Pleas in abatement cannot be amended.[2]

Rules not Obsolete.—The foregoing rules are not obsolete, but are still enforced in practice.[3]

Warner, 6 Conn. 355; Boston, etc., Foundry *v.* Spooner, 5 Vt. 93; Pearson *v.* French, 9 Vt. 349; Vanderburg *v.* Clark, 22 Vt. 388; Durand *v.* Griswold, 26 Vt. 48; Lester *v.* Stevens, 29 Ill. 155.

No Authority to Sue.—Pleas in abatement are not favored, and are strictly construed against the pleader; and a plea for defect of parties must give the plaintiff a better writ and state precisely who should be made parties. Such a plea alleging, "Defendant further says that the plaintiff herein has no authority to institute or maintain this proceeding against her," is bad. Shockley *v.* Fischer, 21 Mo. App. 551.

No Defect Shown.—Where a plea in abatement craves oyer of the affidavit, bond, and writ, but does not point out any defect therein so as to give plaintiff a better writ, it is demurrable. Mohr *v.* Chaffe, 75 Ala. 387.

Reason of no Jurisdiction.—On objection to the jurisdiction of the person, the reason therefor must be specially assigned. Freeman *v.* Burks, 16 Neb. 328.

No Action at All.—Where a plea in abatement tends to show that plaintiff can maintain no action at all, it is bad. To be good it should give plaintiff a better writ. Evans *v.* Stevens, 4 T. R. 227.

Should Set Out Title.—A plea in abatement by a defendant to an action against him as assignee of a lease to the effect "that the estate is vested in him jointly with another" is bad for not setting out the title specially. Heap *v.* Livingstone, 7 Jur. 934; 11 M. & W. 896; 1 D. & L. 334.

1. Shannon *v.* Comstock, 21 Wend. (N. Y.) 457; 34 Am. Dec. 262; Bonzey *v.* Redman, 40 Me. 336; Bridge *v.* Payson, 1 Duer (N. Y.) 614; Bell *v.* Layman, 1 T. B. Mon. (Ky.) 40; 15 Am. Dec. 83.

Codefendant not Served.—That a codefendant has not been served is not sufficient as a plea in abatement unless it be also alleged that such defendant not served is a co-promisor or a co-obligor with the defendant pleading. Patten *v.* Starrett, 20 Me. 145.

2. **Amendments.**—Evans *v.* Prosser, 3 T. R. 186; Digby *v.* Alexander, 8 Bing. 416; 21 E. C. L. 339; Mandel *v.* Peet, 18 Ark. 236; Trinder *v.* Durant, 5 Wend. (N. Y.) 72; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312; Getchell *v.* Boyd, 44 Me. 482; Roberts *v.* Heim, 27 Ala. 678; Townsend *v.* Jeffries, 24 Ala. 329. See also AMENDMENTS.

3. U. S. *v.* Williams, 1 Dill. (U. S.) 485; Donahue *v.* Bragg, 49 Mo. App. 273; Harney *v.* Parkersburg Ins. Co., 37 W. Va. 272; Parsons *v.* Ely, 2 Conn. 377; Lyons *v.* Rafferty, 30 Minn. 526; State Bank *v.* Hinton, 1 Dev. (N. Car.) 397; Stark *v.* Whitman, 58 Tex. 375.

Common-law Rules in Force in United States Courts.—The sufficiency of pleas in abatement must be tested by common-law rules in the *United States* courts in the absence of any legislation by Congress on the question of authorized rules of court. U. S. *v.* Williams, 1 Dill. (U. S.) 485.

West Virginia.—The rules of strict pleading still apply on demurrer to a plea in abatement in *West Virginia*, and material provision and exception in a statute must be averred in such plea or it is bad. Harney *v.* Parkersburg Ins. Co., 37 W. Va. 272.

Missouri.—Showing a misjoinder of parties plaintiff by the answer is not sufficient to save an objection thereto, unless objection to such misjoinder is distinctly taken by the answer. Donahue *v.* Bragg, 49 Mo. App. 273.

Texas.—Where defendant pleads in abatement that he is not sued in the county where he resides, his plea must fully negative the exceptions in the statute which would authorize suit against him in the county in which he is sued. Stark *v.* Whitman, 58 Tex. 375.

Minnesota.—A plea or answer in abatement for the misnomer of defendants must be so full and explicit as to exclude wholly any right in plaintiff to sue defendants by the name used. Lyons *v.* Rafferty, 30 Minn. 526.

Connecticut.—Where an alteration in

IV. PRAYER, SIGNATURE, AND VERIFICATION—Proper Prayer Necessary.—Pleas in abatement must have a proper beginning and conclusion,[1] and it is the conclusion or prayer which is of most importance, for it is held to determine the character of the plea and shows whether it be in bar or in abatement.[2] If the prayer be omitted, or there be a wrong prayer, the plea is bad;[3] hence if matter of abatement concludes in bar, it is bad;[4] but matter in bar pleaded in form as abatement has been held available.[5]

a writ, rendering security given thereon void, is the ground of a plea in abatement, the plea must be complete in itself and show by precise and distinct averments of fact that security was necessarily required at the time of granting the writ, and that the alteration was made under such circumstances that it avoided the security given. Parsons *v.* Ely, 2 Conn. 377.

North Carolina.—A plea in abatement "that no bond or security was taken" is sufficient, being equivalent to an allegation that the bond or security was not taken and returned. State Bank *v.* Hinton, 1 Dev. (N. Car.) 397.

1. Pitt's Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582; Scott *v.* *v.* Norris, 6 Ind. App. 18 & 102; Godson Smith, 2 Moore, 157; Godson *v.* Good, 6 Taunt. 587; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312; Foxwist *v.* Tremaine, 2 Saund. 209; Holden *v.* Scanlin, 30 Vt. 177.

2. Jenkins *v.* Pepoon, 2 Johns. Cas. (N.Y.) 312; Schoonmaker *v.* Elmendorf, 10 Johns. (N. Y.) 49; Otis *v.* Warren, 14 Mass. 240; Lyman *v.* Dodge, 13 N. H. 197; Landon *v.* Roberts, 20 Vt. 286; Peck *v.* Griswold, 26 Vt. 97; Smith *v.* Chase, 39 Vt. 89; Lyman *v.* Central Vt. R. Co., 59 Vt. 167; Sabine *v.* Johnstone, 1 B. & P. 60.

Contra.—Hargis *v.* Ayres, 8 Yerg. (Tenn.) 467.

Relief Prayed for Determines it.—Whether a plea is in abatement or in bar is determined from its conclusion, not from its subject-matter. It is the relief prayed for by the plea that determines its character. The proper prayer of a plea in abatement is that the writ and declaration be quashed; and where matter in abatement concluded with a prayer in bar, viz., prays judgment whether plaintiff ought to have or maintain his action, etc., *held* bad, as being matter in abatement pleaded in bar. Pitt's Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582.

3. Wade *v.* Bridges, 24 Ark. 569; Lownes *v.* Brown, 22 Ark. 359; Hazzard *v.* Haskell, 27 Me. 549; Yelverton *v.* Conant, 18 N. H. 123; West Feliciana R. Co. *v.* Johnson, 5 How. (Miss.) 273; Haywood *v.* Chestney, 13 Wend. (N.Y.) 495; Shaw *v.* Dutcher, 19 Wend. (N. Y.) 216; Webb *v.* Samuel, 2 Miles (Pa.) 201; Smith *v.* Chase, 39 Vt. 89; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

4. Wickliffe *v.* Carroll, 14 B. Mon. (Ky.) 137; Brown *v.* Bickle, 7 Ark. 410; Stone *v.* Miller, 7 Barb. (N. Y.) 368; Leathers *v.* Meglasson, 2 T. B. Mon. (Ky.) 64; Robertson *v.* Fisher, 3 Cai. (N. Y.) 99; Banks *v.* Lewis, 4 Ala. 599; Schoonmaker *v.* Elmendorf, 10 Johns. (N. Y.) 49; Godson *v.* Smith, 2 Moore 157; Godson *v.* Good, 6 Taunt. 587.

Indefinite Prayer.—A plea ending, "wherefore he prays judgment, etc.," is bad, as it cannot be ascertained whether it is in bar or abatement. Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312.

Prayer in Bar.—A plea to the jurisdiction purporting to answer the cause of action as a bar thereof, but failing to state matter in bar, and ending with a prayer for judgment whether plaintiff ought to have or maintain his suit, is defective, as pleading matter in abatement in bar. Lyman *v.* Central Vt. R. Co., 59 Vt. 167.

5. **In Bar Available on Demurrer.**—Where a defendant pleaded in abatement to the jurisdiction of the court that by virtue of a specified statute he was liable to be sued in her Majesty's courts of record in Dublin and not elsewhere, and the plea was demurred to, *held*, that although the plea was in form a plea in abatement, it disclosed matter in bar which the defendant could take advantage of on demurrer. Dundalk Western R. Co. *v.* Tapster, 1 Q. B. 697; 5 Jur. 699; 1 G. &. D. 657.

Form of Prayer.—The usual and proper prayer is one "praying judgment of the writ and declaration and that the same be quashed."[1] The prayer in abatement of an attachment should be "that the attachment be quashed."[2] Where the plaintiff demurs to the plea, he should pray judgment of *respondeat ouster* and not judgment in chief.[3]

Signature.—Pleas in abatement should in general be signed by counsel.[4]

Affidavit.—They are generally required to be verified by affidavit.[5]

1. Bonneau *v.* Dickinson, 12 Ala. 475; Hazzard *v.* Haskell, 27 Me. 549; Yelverton *v.* Conant, 18 N. H. 123; Baker *v.* Brown, 18 N. H. 551; Brigham *v.* Este, 2 Pick. (Mass.) 420; Ilsley *v.* Stubbs, 5 Mass. 280.

Praying Judgment of the Declaration Only is improper. Moffatt *v.* Van Mullingen, 2 Chit. Rep. 539; 18 E. C. L. 410; 2 B. & P. 124*n*; Whiting *v.* Des Anges, 4 B. & L. 678; 3 C. B. 910; Davies *v.* Thompson, 9 Jur. 736; 14 M. & W. 161. But where suit was commenced by the filing and service of a declaration, praying judgment of a declaration was held proper. Shaw *v.* Dutcher, 19 Wend. (N. Y.) 216.

Where Suit is Commenced by Bill, it is held that judgment of the bill should be prayed. Haywood *v.* Chestney, 13 Wend. (N. Y.) 495.

Abatement in Part.—Where the matter pleaded went only in part abatement of the writ, yet judgment of the whole writ was prayed, it was held proper, for the court could abate the writ in part and let it stand good for the remainder. Powell *v.* Fullerton, 2 B. & P. 420; Thayer *v.* Ray, 17 Pick. (Mass.) 166.

Several Defendants.—Prayer of general judgment of the writ by one of several defendants pleading misnomer was held bad. Webb *v.* Samuel, 2 Miles (Pa.) 201.

2. Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

3. Anonymous, 2 Wils. 302.

Prayer for Disability of Plaintiff.—Where the ground of abatement is the disability of the plaintiff, a prayer "for judgment of the writ and declaration, and that the same be quashed," is bad; it should be for "judgment whether the defendant should be compelled to answer." West Feliciana R. Co. *v.* Johnson, 5 How. (Miss.) 276.

Defective Service on Trustee.—Where a defendant trustee objects to a defective service on himself it is proper to pray that the writ be quashed, although the principal defendant was properly served. Thayer *v.* Ray, 17 Pick. (Mass.) 166.

Prayer for Affirmative Relief.—Where in a suit on a note against the maker the defendant pleads in abatement that by mistake or fraud the note was so altered as to be made due before it was intended by the parties to become due, the plea should conclude with a prayer for a reformation of the note or some affirmative relief, or it is bad. Scott *v.* Norris, 6 Ind. App. 18 & 102.

West Virginia.—The *West Virginia* Code, ch. 125, § 26, provides "that no formal defence shall be required in a plea, but it may commence, the defendant says, etc.," *held*, such provision applied to pleas to the local jurisdiction as well as to pleas in bar. Wooddell *v.* West Virginia Imp. Co., 38 W. Va. 23.

4. Holloway *v.* Freeman, 22 Ill. 197; 1 Tidd's Pr. 639, 640.

Contra.—Colburn *v.* Tolles, 13 Conn. 524; Wilcox *v.* Chambers, 34 Conn. 179.

5. **Verification Required.**—Teasedale *v.* The Rambler, Bee Adm. 9; Doe *v.* Roe, 2 Burr. 1046; 4 & 5 Anne, ch. 16, § 11; Dobbin *v.* Wilson, 3 N. & M. 260; Davis *v.* Campbell, 35 Tex. 779; Whittenberg *v.* Newton, 31 Tex. 474; Knefel *v.* Williams, 30 Ind. 11; Indianapolis R. Co. *v.* Summers, 28 Ind. 521; Blake *v.* Nichols, 4 Blackf. (Ind.) 311; Haines *v.* Gurley, 5 Blackf. (Ind.) 269; Trenton Bank *v.* Wallace, 9 N. J. L. 83; Nixon *v.* Schooley, 26 N. J. L. 461; Humphrey *v.* Whitten, 17 Ala. 30; Prim *v.* Davis, 2 Ala. 24; Hart *v.* Turk, 15 Ala. 675; Collier *v.* Crawford, Minor (Ala.) 100; Hall *v.* Wallace, 20 Ala. 438; State *v.* Middleton, 5 Port. (Ala.) 484; Holden *v.* Scanlin, 30 Vt. 177; Durand *v.* Griswold, 26 Vt. 48; Young *v.* Stringer, 5 Hayw. (Tenn.) 32; Bank of Tennessee *v.* Jones, 1 Swan (Tenn.) 391; Reed *v.*

But this is not required in all jurisdictions.[1] Such an affidavit is for the benefit of the plaintiff, and the requirement of it may be waived by him.[2] If the affidavit is defective,[3] the plaintiff may treat the plea as a nullity and enter judgment for want of a plea.[4]

Requisites of Affidavit.—The affidavit should state that the plea is true in substance and fact and not merely that it is a true plea.[5] It should be coextensive with the plea and leave nothing to be collected by inference.[6] It should strictly agree with the plea,

Bremer, Peck (Tenn.) 275; N. Y. Code of Civ. Pro., § 513; Marston *v.* Lawrence, 1 Johns. Cas. (N. Y.) 97; Richmond *v.* Tallmadge, 16 Johns. (N. Y.) 307; Robinson *v.* Fisher, 3 Cai. (N. Y.) 99; Smith *v.* Atlantic Ins. Co., 22 N. H. 21; Graham *v.* Fahnestock, 5 Gill (Md.) 215; Town *v.* Wilson, 8 Ark. 464; White *v.* Yell, 12 Ark. 139; Whidden *v.* Seelye, 40 Me. 247; 63 Am. Dec. 661; Bancroft *v.* Eastman, 7 Ill. 259; King *v.* Haines. 23 Ill. 340.

Statute of Anne.—The Stat. 4 & 5 Anne, ch. 16, § 11 (4), provided that no dilatory plea shall be received unless the party offering such plea do by affidavit prove the truth thereof or show some probable matter to the court to induce them to believe that the fact of such dilatory plea is true.

Benevolent Associations—Misjoinder.—In an action on a beneficiary certificate of a benevolent association alleged to have been executed by two defendants, one of them cannot set up a misjoinder of defendants unless he presents a plea verified by affidavit denying such alleged execution of such certificate. Supreme Lodge A. O. U. W. *v.* Zuhlke, 30 Ill. App. 98; 129 Ill. 298.

1. **Rhode Island.**—A plea in abatement for non-joinder of joint promisors need not in *Rhode Island* be accompanied by an affidavit of its truth, for in that state the statute 4 & 5 Anne, ch. 16, § 11 is not among the statutes declared in force by the act of 1749, and there is no statute or rule of court requiring such an affidavit. National Niantic Bank *v.* Adams Express Co., 16 R. I. 343.

Connecticut.—No affidavit of the truth of a plea in abatement is required in *Connecticut*. Colburn *v.* Tolles, 13 Conn. 524; Wilcox *v.* Chambers, 34 Conn. 179.

2. **Waiver of Affidavit.**—Graham *v.* Ingleby, 1 Exch. 651; 5 D. & L. 737; Richmond *v.* Tallmadge, 16 Johns. (N. Y.) 307.

3. **Defective Affidavit.**—Munden *v.* Duke of Brunswick, 4 C. B. 321; 56 E. C. L. 319; Esdaile *v.* Truswell, 2 Exch. 312; Richards *v.* Setree, 3 Price 197; Davidson *v.* Watkins, 3 Dowl. Pr. Cas. 129; Bray *v.* Haller, 2 Moore 213; Dobbin *v.* Wilson, 3 N. & M. 260; Fennick *v.* Grimes, 5 Cranch (C. C.) 603; Edmonson *v.* Barrell, 2 Cranch (C. C.) 228.

4. White *v.* Gascoyne, 3 Exch. 36; Rapp *v.* Elliot, 2 Dall. (U. S.) 184.

5. Dobbin *v.* Wilson, 3 N. & M. 260.

Affidavit to Plea of Non-joinder.—Where a defendant pleaded in abatement the non-joinder of a joint contractor, and in his affidavit in support thereof stated that himself and the omitted person were partners during the period within which the cause of action was alleged to have accrued, but did not show they continued partners down to the time laid in the common counts, the affidavit was held insufficient. Dobbin *v.* Wilson, 3 N. & M. 260.

6. Poole *v.* Pembrey, 3 Tyr. 387; 1 Dowl. Pr. Cas. 693; Esdaile *v.* Truswell, 2 Exch. 312; 17 L. J. Exch. 294.

Error in Addition.—Where in the title of a plea in abatement the defendant described himself as "Charles Frederick Augustus William *Sovereign*, Duke of Brunswick and Luneberg, sued, etc.," and in the affidavit to the plea he was similarly described, but in the appearance which he had entered the word "sovereign" was omitted, *held*, plaintiff properly signed judgment treating the plea as a nullity. Munden *v.* Duke of Brunswick, 4 C. B. 321; 56 E. C. L. 319; 16 L. J. C. P. 311.

Residence of Co-contractor.—Under 3 & 4 Will. IV, ch. 42, § 8, an affidavit in support of a plea in abatement for the non-joinder of a co-contractor with defendant must state the residence of

and variance in the name of a party has been held to render it defective.[1] When annexed to the plea it was held it need not be entitled in the cause[2] or state the addition of the defendant.[3] It could be made by a third party or the attorney[4] and sworn to before the defendant's attorney.[5] It could not be sworn to before the declaration was delivered.[6]

V. JUDGMENT AND TRIAL—Judgment for Defendant.—Where the defendant succeeds on a plea in abatement, whether the issue be one of law or of fact, the proper judgment is "that the writ be quashed unless a temporary disability or privilege be pleaded, when it is "that the plaintiff remain without day until, etc."[7]

Judgment for Plaintiff on Demurrer.—Where the plaintiff succeeds on an issue of law, the proper judgment is "that the defendant answer over,"[8] unless it be to matter pleaded *puis darrein con-*

such co-contractor at the time the plea is pleaded.

1. Maybury *v.* Mardie, 5 D. &. L. 360; 12 Jur. 80; Lambe *v.* Smythe, 10 Jur. 394; 15 L. J. Exch. 287; White *v.* Gascoyne, 18 L. J. Exch. 110; Newton *v.* Stewart, 15 L. J. Q. B. 384.

2. Prince *v.* Nicholson, 5 Taunt. 333; 1 Marsh. 70.

3. Poole *v.* Pembrey, 3 Tyr. 387; 1 Dowl. Pr. Cas. 693.

4. Anonymous, 1 Chit. Rep. 58; Lumley *v.* Foster, Barnes 344.

5. Horsfall *v.* Matthewman, 3 M. & S. 154.

Contra.—Cooper *v.* Archer, 12 Price 149.

6. Westerdale *v.* Kemp, 1 Tyr. 260; 1 Dowl. Pr. Cas. 281; Johnson *v.* Popplewell, 2 C. &. J. 544; 2 Tyr. 715.

Sworn to on Same Day.—But where defendant swore to the affidavit at Liverpool on the day the declaration was filed in town (London) and before he could have seen it, *held*, not a nullity so as to entitle plaintiff to sign judgment. Lang *v.* Comber, 4 East 348.

7. Chitty on Pl., p. 466; McKinstry *v.* Pennoyer, 2 Ill. 319; McCutchen *v.* McCutchen, 8 Port. (Ala.) 151; Blackburn *v.* Watson, 85 Pa. St. 241; Cushman *v.* Savage, 20 Ill. 330; Sarco *v.* Clements, 36 Cal. 132.

Whether to Writ or Declaration.—Whether a plea in abatement is technically to the writ or the declaration, the action should abate if the averments of the plea bring the case within a statute on the subject raised thereby. Tiffany *v.* Spalding, 22 Ill. 493.

One of Two Defendants.—Where two defendants are sued and one pleads in abatement and the other in bar, if the plea in abatement is sustained the action should abate as to the defendant so pleading and be retained for trial as to the other defendant. Foster *v.* Collins, 5 Smed. & M. (Miss.) 259.

Plaintiff cannot Reply.—Where an issue joined on a plea in abatement is found for the defendant, whether it be an issue of fact or of law, the proper judgment is that the writ be quashed; and where a demurrer to a plea in abatement is overruled, it is error to give the plaintiff leave to reply, unless there be some statute authorizing it. Clark *v.* Latham, 25 Ark. 16.

8. Renner *v.* Reed, 3 Ark. 339; Turner *v.* Carter, 1 Head (Tenn.) 520; Cravens *v.* Bryant, 3 Ala. 278; Clark *v.* Hite, 5 Blackf. (Ind.) 167; Moore *v.* Morton, 1 Bibb (Ky.) 234; Ritter *v.* Hamilton, 4 Tenn. 325; Fitch *v.* Lothrop, 1 Root (Conn.) 192; Trow *v.* Messer, 32 N. H. 361; Nichols *v.* Heacock, 1 Root (Conn.) 286; Bradshaw *v.* Morehouse, 6 Ill. 395; Baker *v.* Fales, 16 Mass. 147; Fulcher *v.* Lyon, 4 Ark. 445; McBee *v.* State, 1 Meigs (Tenn.) 122; Lambert *v.* Lagow, 1 Blackf. (Ind.) 388.

Defendant's Right to Plead Over.—Where the court overrules a plea in abatement, the defendant should have leave to answer or plead to the merits. Kendrick *v.* Davis, 3 Coldw. (Tenn.) 524.

Plea Frivolous.—When a plea in abatement is stricken out as frivolous, the defendant may answer over. Gibson *v.* Laughlin, Minor (Ala.) 182.

To Plead Over Instanter.—The defendant may be ordered by the court to plead over *instanter*. Cotton *v.* Reavill, 2 Bibb (Ky.) 199.

tinuance, when the judgment may be final.[1]

Judgment for Plaintiff on Issue of Fact.—Where an issue of fact joined on a plea of abatement is found in favor of the plaintiff, the effect of it is an admission of the merits of the plaintiff's claim, and the judgment thereon is final in favor of the plaintiff, and the jury which determines the issue should determine the plaintiff's damages.[2]

Tried by Record.—Where the issue on defendant's plea in abatement of a former recovery is tried by the record and found against the defendant, the proper judgment is "that defendant answer over." Johnston *v.* Hubbell, Wright (Ohio) 69; Marston *v.* Lawrence, 1 Johns. Cas. (N. Y.) 97.

Non Pros. if Plaintiff does not Reply.—If plaintiff fails to file a replication to defendant's plea in abatement, defendant is entitled to a judgment of *non pros.* Gaston *v.* Parsons, 8 Port. (Ala.) 469.

1. Hutchinson *v.* Brock, 11 Mass. 124; Turner *v.* Carter, 1 Head (Tenn.) 520; Renner *v.* Marshall, 1 Wheat. (U. S.) 215.

Wrong Prayer—Judgment Final.—Where the defendant improperly commences or concludes his plea in bar and it contains matter only pleadable in abatement, or where he pleads in abatement *puis darrein continuance*, the judgment may be final. Turner *v.* Carter, 1 Head (Tenn.) 520.

Final by Statute—Massachusetts.—In *Massachusetts* since the act of 1840 a decision on any question arising on a plea in abatement by the superior court or common pleas is final, whether it be upon the face of the record, as by demurrer or otherwise, or upon the admission of evidence or instructions to the jury. Such a decision cannot be reviewed in the supreme court. Hamlin *v.* Jacobs, 99 Mass. 500.

2. **Courts of United States Final.**—Under the provisions of the 22d section of the Judiciary Act of 1789, the decisions or rulings of circuit and district courts of the United States on a plea in abatement are final and cannot be reversed by the supreme court. Piquignot *v.* Pennsylvania R. Co., 16 How. (U. S.) 104. See Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194; Chase *v.* Deming, 42 N.H. 274; Dodge *v.* Morse, 3 N. H. 232; Straus *v.* Weil, 5 Coldw. (Tenn.) 120; Hollingsworth *v.* Duane, Wall. (C. C.) 51; Myers *v.* Erwin, 20 Ohio 381; Moore *v.* Morton, 1 Bibb (Ky.) 234; Boston Glass Manufactory *v.* Landgon, 24 Pick. (Mass.) 49; 35 Am. Dec. 292; McCartee *v.* Chambers, 6 Wend. (N.Y.) 649; Alling *v.* Shelton, 16 Conn. 436; Haighs *v.* Holley, 3 Wend. (N. Y.) 258; Mehaffy *v.* Share, 2 P. & W. (Pa.) 361; Jewett *v.* Davis, 6 N. H. 518; Eichorn *v.* Le Maitre, 2 Wils. 367; Mechanics, etc., Bank *v.* Dakin, 24 Wend. (N. Y.) 411; Thompson *v.* Haislip, 14 Ark. 220; Witmer *v.* Scholatter, 2 Rawle (Pa.) 359; Babcock *v.* Scott, 1 How. (Miss.) 100; Rex *v.* Shakespeare, 10 East 83; Marsh *v.* Smith, 18 N. H. 366.

Statute allowing Pleas in Abatement and Bar.—In *Indiana* under the provisions of the code a defendant may plead in abatement and in bar at the same time. Under such provision, where defendant pleads in abatement only and the issue joined thereon is found against the defendant, the plaintiff is entitled to final judgment and defendant cannot plead over. Thompson *v.* Greenwood, 28 Ind. 327.

After Judgment against him Defendant cannot Plead in Bar.—Under the code of *Indiana*, all defences whether in bar or abatement must be pleaded in the same answer; and where a defendant, sued for goods sold, pleaded in abatement the non-joinder of a joint purchaser, and this issue was decided against him, *held*, it was proper to refuse him leave to withdraw his answer and plead in bar. Bond *v.* Wagner, 28 Ind. 462.

Defendant cannot Demur after Issue found against Plea.—After the defendant has pleaded in abatement to the jurisdiction, raising an issue of non-residence, and that issue has been found against him, it is too late for him to demur. Final judgment should be rendered for plaintiff, and the jury who found on the issue of non-residence should assess plaintiff's damages. Brown *v.* Illnois Cent. Mut. Ins. Co., 42 Ill. 366.

Final Judgment on Plea in Review.—Where defendant in a writ of review

Burden of Sustaining Plea.—The burden of sustaining the plea rests on the defendant.[1]

Trial.—A plea involving the question of records is to be tried by the court,[2] and only the records referred to in the plea can be examined.[3]

Attacking Declaration.—If defeated on his plea, defendant cannot attack the declaration.[4]

Bad Plea—Signing Judgment.—It has been held that plaintiff need not demur to a bad plea, but may sign judgment.[5]

VI. WAIVER OF PLEA.—The right of a defendant to plead in abatement may be lost or waived in various ways.

By Pleading to Merits.—Pleas in abatement were required to be pleaded before pleas in bar or to the merits, and it was and still

pleads in abatement thereof "that the writ has been materially altered since it was sued out," and the jury finds against defendant on this plea, the plaintiff in review is entitled to judgment in chief in his favor. Good *v.* Lehan, 8 Cush. (Mass.) 301.

Whole Plea not Proved.—Where a defendant, sued in the county court of Rutland, pleaded in abatement that she was not a resident of the county of Rutland, but was a resident of Woodstock in the county of Windsor, and on issue thereon joined the court found the fact "that defendant was not a resident of Rutland," but did not find where she resided, and rendered judgment for defendant "that the writ abate,"—*held*, on appeal, that this was error, as defendant had not proved the substantial allegations in the plea, and that judgment should have been rendered for the plaintiff in chief for the relief asked in the complaint. Vanderburg *v.* Clark, 22 Vt. 185.

Plea Sustained in Part Only.—In an action of ejectment the prayer of a plea in abatement was that the writ be quashed as to all the defendants for defects in the service. It was shown the service was defective only as to part of the defendants and was good as to the others, and the action was such that it might by law proceed against the defendant duly served only. *Held*, the prayer of the plea was too broad and it should be dismissed. Bliss *v.* Smith, 42 Vt. 198.

1. **Another Action Pending.**—The plea of another action pending is an affirmative plea, and the burden of proving it rests on the defendant, and he must sustain it by record evidence. Proof of the issuing of a writ for the same cause of action makes a *prima-facie* case and shifts the burden of proof to plaintiff. Fowler *v.* Byrd, 1 Hempst. (U. S.) 213.

Non-joinder.—On a plea that a joint promisor is not joined with defendant in the writ, the burden of proof rests on defendant. Jewett *v.* Davis, 6 N. H. 518.

Right to Office.—Where plaintiff's right to an office is put in issue by a plea in abatement, plaintiff must prove himself such *de jure* as well as *de facto*. Davis *v.* Moffitt, 4 Greene (Iowa) 92.

2. **Variance between Writ and Declaration.**—Where a plea in abatement raises the question of a variance between the writ and declaration, the question is to be determined by the court without the intervention of a jury. Dickinson *v.* Noland, 7 Ark. 25.

Another Action Pending.—Where, in an equity action, defendant pleads in abatement the pendency of another suit between the same parties, the question is to be determined by a master in chancery. McEwen *v.* Broadhead, 11 N. J. Eq. 129.

3. Pearson *v.* French, 9 Vt. 349; Bowman *v.* Stonell, 21 Vt. 309; Strickland *v.* Martin, 23 Vt. 484.

4. Shaw *v.* Dutcher, 19 Wend. (N. Y.) 216.

5. **Plea not Conforming to Rules of Pleading.**—Pleas in abatement are required to be precisely accurate in form; and where such a plea does not conform to the rules established as to such pleas, the plaintiff is not compelled to demur to it, but may treat it as a nullity and sign judgment. Anonymous, Hempst. (U. S.) 215.

is the rule in many jurisdictions that by pleading to the merits either before or at the same time he pleaded in abatement a defendant lost his right to plead in abatement.[1] So, too, a prior plea in abatement is waived by a subsequent plea to the merits.[2]

Affidavit of Merits—Going to Trial.—Filing an affidavit of merits[3] or

1. Reagan *v.* Irvin, 25 Ark. 86; Johnson *v.* Killian, 6 Ark. 172; Odle *v.* Floyd, 5 Ark. 248; Butts *v.* Grayson, 14 Ark. 445; Bacon *v.* Weston, 11 Cush. (Mass.) 164; Plantation No. 9 *v.* Bean, 40 Me. 218; Pattee *v.* Lowe, 35 Me. 121; Gilbert *v.* Tramell, 2 Coldw. (Tenn.) 282; Allen *v.* Reed, 66 Tex. 13; Drake *v.* Brander, 8 Tex. 351; Fugate *v.* Glasscock, 7 Mo. 577; Ferguson *v.* Wood, 23 Tex. 177; Burchard *v.* Record (Tex., 1891), 17 S. W. Rep. 241; Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122; Palmer *v.* Green, 1 Johns. Cas. (N. Y.) 101; Anoymous, 3 Cai. (N.Y.) 103; Hastings *v.* Bolton, 1 Allen (Mass.) 529; Foot *v.* Knowles, 4 Met. (Mass.) 386; Simonds *v.* Parker, 1 Met. (Mass.) 508; Wolcott *v.* Mead, 12 Met. (Mass.) 516; Wilson *v.* Hamilton, 4 S. & R. (Pa.) 238; Clymer *v.* Thomas, 7 S. & R. (Pa.) 181; Jones *v.* Cincinnati, etc., R. Co., 14 Ind. 89; New Albany, etc., R. Co. *v.* Wilson, 16 Ind. 402; State *v.* Ruhlman, 111 Ind. 17; Keller *v.* Miller, 17 Ind. 206; Hopwood *v.* Patterson, 2 Oregon 49; Delreauline *v.* Boisneuf, 4 Har. & M. (Md.) 413; Kerr *v.* Willetts, 48 N. J. L. 78; Bliss *v.* Burnes, McCahon, (Kan.) 91; Chaffee *v.* Ludeling, 34 La. Ann. 962; Silvernagle *v.* Fluker, 21 La. Ann. 188; Simmons *v.* Thomas, 43 Miss. 31; 5 Am. Rep. 470; Green *v.* Craig, 47 Mo. 90; Hatry *v.* Shuman, 13 Mo. 547; Brown *v.* Powell, 45 Ala. 149; Hart *v.* Turk, 15 Ala. 677; Lyman *v.* Central Vt. R. Co., 59 Vt. 167; Papke *v.* Papke, 30 Minn. 260; French *v.* Donohue, 29 Minn. 111; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U.S.) 65; Cook *v.* Burnley, 11 Wall. (U.S.) 659; Dowell *v.* Cardwell, 4 Sawy. (U.S.) 217; Spencer *v.* Lapsley, 20 How. (U. S.) 264; Fenwick *v.* Grimes, 5 Cranch (C. C.) 603; Sheppard *v.* Graves, 14 How. (U. S.) 512; Bayreau *v.* Campbell, McAll. (U. S.) 119.

Rule not Changed by Pleas by Answer.—The statute of *Massachusetts* authorizing pleas in abatement to be made by answer does not extend a defendant's time for filing such a plea, nor does it authorize him to answer in abatement and to the merits at the same time and in the same answer. Pratt *v.* Sanger, 4 Gray (Mass.) 84.

Due Order of Pleading.—Where a petition apparently shows jurisdiction, the question of want of jurisdiction can only be raised by a plea in abatement; and under the provisions of article 1262 of the *Texas* Revised Statutes, requiring the defendant to file his pleadings in due order of pleading, such a plea must be filed before an answer on the merits or it is too late. Hoffman *v.* Cleburne Bldg., etc., Assoc., 2 Tex. Civ. App. 688.

Death before Action brought Waived.—Where the defendant has pleaded the general issue after the death of the plaintiff has been suggested, her personal representative substituted, and the declaration amended accordingly, it is too late to raise the objection that plaintiff died before the action was originally brought, as this objection could be taken only by a plea in abatement and is waived by pleading to the merits. Mills *v.* Bland, 76 Ill. 381.

No Reply Necessary.—After pleading in bar, a plea in abatement for nonjoinder is a nullity and requires no response. Lewis *v.* State, 65 Miss. 468.

2. Hart *v.* Turk, 15 Ala. 675; Smith *v.* State, 19 Conn. 493; Chapman *v.* Davis, 4 Gill (Md.) 166; Sheppard *v.* Graves, 14 How. (U.S.) 505; Gilmore *v.* Howland, 26 Ill. 200; Burnham *v.* Webster, 5 Mass. 266; Wade *v.* Kelly, 2 Stew. (Ala.) 448; Hotchkiss *v.* Thompson, 1 Morr. (Iowa) 156; Davis *v.* Dickson, 2 Stew. (Ala.) 370; Robertson *v.* Lea, 1 Stew. (Ala.) 141.

Right Reserved to Appeal Waived.—Where, on the decision of a demurrer, the right is reserved to a defendant to ask the opinion of an appellate court on a plea in abatement interposed by him, such right is waived and lost by the defendant's filing a plea to the merits. Pattee *v.* Harrington, 11 Pick. (Mass.) 221.

3. Walpole *v.* Gray, 11 Allen (Mass.) 149; Whipple *v.* Rogerson, 12 Gray (Mass.) 347.

going to trial on the merits without objection has been held a waiver of a plea in abatement.[1] But pleading over after demurrer has been held not a waiver.[2]

Pleading Out of Order.—Pleas in abatement should be pleaded in due order, and by pleading a plea subsequent in the order of pleading it has been held that the right a plea naturally preceding it in the order of pleading is waived.[3] So, too, it has been held that where a defendant has once pleaded in abatement, he can afterwards only plead in bar.[4]

Withdrawing Plea to Merits.—After a plea to the merits the defendant cannot withdraw it and plead in abatement, except by leave of court, which will only be granted in general under very special circumstances.[5]

1. **Cannot Object in Appeal.**—By going to trial on the merits without objection, a defendant waives a plea in abatement and cannot afterwards object that it was not disposed of, or, if it was passed on, to the ruling of the court on it, to which no exception was taken. Starr *v.* Wilson, 1 Morr. (Iowa) 438; Cook *v.* Stuben County Bank, 1 Greene (Iowa) 447.

Trial on Merits—Waiver.—A defence which under the old practice was only available by way of plea in abatement must, under the *North Carolina* Code, be set up in some way by answer and insisted on before a trial on the merits is had, and if it be not so pleaded it will be considered as waived. Hicks *v.* Beam, 112 N. Car. 642.

2. **In Bar after Decision of Demurrer to Plea.**—Where, on demurrer to a defendant's plea in abatement, judgment is rendered in favor of the plaintiff, a subsequent plea in bar by defendant is not a waiver of such plea in abatement. Delahay *v.* Clement, 4 Ill. 201.

3. Brown *v.* Peevey, 6 Ark. 37; Taylor *v.* Kelley, 13 Ark. 101; Mitchum *v.* Droze, 11 Rich. (S. Car.) 196.

4. Houck *v.* Scott, 8 Port. (Ala) 169; Cook *v.* Yarwood, 41 Ill. 115.

But this does not apply where the declaration is amended after plea; in such case it has been held defendant may again plead in abatement. Mills *v.* Bishop, Kirby (Conn.) 6.

5. Meggs *v.* Shaffer, Hard. (Ky.) 70; Ripley *v.* Warren, 2 Pick. (Mass.) 593; Stone *v.* Proctor, 2 D. Chip. (Vt.) 114; Keller *v.* Miller, 17 Ind. 206; Riddle *v.* Stevens, 2 S. &. R. (Pa.) 537; Clymer *v.* Thomas, 7 S. & R. (Pa.) 178; Palmer *v.* Evertson, 2 Cow. (N. Y.) 417; Clapp *v.* Balch, 3 Me. 216; Engle *v.* Nelson, 1 Pa. St. 442; Hart *v.* Turk, 15 Ala. 675; Betzaldt *v.* American Ins. Co., 47 Fed. Rep. 705.

Power of Court. — The court has power in its discretion to allow a plea in bar or to the merits to be with drawn and a plea in abatement put in. Talby *v.* Hamilton, 1 Hall (N. Y.) 222; Evans *v.* Davenport, 4 McLean (U. S.) 76; Kern *v.* Huiderkoper, 103 U. S. 485.

Contra.—Bank of Columbia *v.* Scott, 1 Cranch (C. C.) 134; Yeatman *v.* Henderson, 1 Pittsb. (Pa). 20.

What is Withdrawal.—Filing a plea in abatement by special leave of court is in effect the withdrawal of a former plea to the merits. Kern *v.* Huidekoper, 103 U. S. 485.

Not Allowed although in Due Time.—The defendant will not be allowed to withdraw his answer pleading the general issue and put in a plea of coverture in abatement, although such plea in abatement is presented in due time, and defendant swears that the general issue was pleaded without his knowledge or consent by a person whom he never intended to retain as his attorney. Anonymous, 3 Cai. (N.Y.) 103.

Unknown at Time of Plea to Merits.—After an answer on the merits is filed, the court has no power to allow a plea in abatement to the effect that neither party lived in the county where the writ was returnable, although plaintiff is described in the writ as a resident of that county, and the fact that he was not such a resident was not known to the defendant at the time his answer on the merits was filed. Hastings *v.* Bolton, 1 Allen (Mass.) 529.

Exception to Rule.—In many of the states the rule that matter in abatement must be pleaded and disposed of before matter in bar does not obtain, and in them the defendant may plead matter in abatement and to the merits in the same answer, and the one is not held to be a waiver of or to overrule the other.[1] But it is still held that objections in abatement are waived if not taken by answer or demurrer.[2] Where pleas in abatement and to the merits are allowed at the same time, it has been held that there should be a separate decision or verdict on the pleas in abatement.[3]

1. **New York.**—In *New York* the provisions of the Code allow a defendant to plead as many defences as he chooses in one answer. The effect of this is practically to abolish the distinction between pleas in bar and in abatement, so far as the order of pleading them is concerned, so that by pleading to the merits a defendant does not waive a plea in abatement contained in the same answer. N. Y. Code of Civ. Pro. § 507; Sweet *v.* Tuttle, 14 N. Y. 465; Gardner *v.* Clark, 21 N. Y. 399; Merchants' Nat. Bank *v.* Macnaughton, 1 Abb. N. Cas. (N. Y.) 293*n*; Bridge *v.* Payson, 5 Sandf. (N. Y.) 210; Hamburger *v.* Baker, 35 Hun (N. Y.) 455.

Indiana.—In *Indiana* it was held that matter in abatement could be pleaded at the same time as matter in bar and was not overruled thereby. Thompson *v.* Greenwood, 28 Ind. 327; Bond *v.* Wagner, 28 Ind. 462.

But the Revised Stat. of 1881, § 365, restored the old rule and requires matter in abatement to be pleaded before matter in bar.

Iowa.—The *Iowa* Code of 1873, § 2732, provides that matter of abatement may be stated in the answer or reply, either together with or without causes of defence in bar, and no one of such causes shall be deemed to overrule the other; nor shall a party after a trial on matter in abatement be allowed in the same action to answer or reply matter in bar.

Arkansas. — Under the *Arkansas* Code the rule of the common law that matter in abatement is waived by pleading in bar does not prevail, and the two defences may be set up in the same answer. Erb *v.* Perkins, 38 Ark. 428; Grider *v.* Apperson, 32 Ark. 332.

Missouri.—Under the provisions of the *Missouri* Code, which contemplate but one answer, the question of the citizenship of the plaintiffs suing in a federal court may be raised in the answer and joined therein with other matters of defence, and not be set up primarily by a separate plea in abatement. Kingman *v.* Holthaus, 59 Fed. Rep. 305. And this is the same also as to other defences in abatement. Christian *v.* Williams, 111 Mo. 429; Little *v.* Harrington, 71 Mo. 390, *overruling* Rippstein *v.* St. Louis, etc., Mut. L. Ins. Co., 57 Mo. 86, and Fordyce *v.* Hathorn, 57 Mo. 120.

Wisconsin.—In *Wisconsin*, under the provisions of the Code, a defendant may plead in abatement at the same time with a plea on the merits, and the rule that the right to plead in abatement is lost, and a previous plea in abatement waived, by a plea to the merits, does not obtain there. Freeman *v.* Carpenter, 17 Wis. 126; Dutcher *v.* Dutcher, 39 Wis. 651.

Washington.—A plea in abatement is not necessary in common-law actions to raise the question of the jurisdiction of the United States Circuit Court, where the state practice dispenses with the necessity of such plea before answering on the merits. Green *v.* Tacoma, 53 Fed. Rep. 562.

Rhode Island.—In *Rhode Island* a plea in abatement is not waived by filing at the same time a plea to the merits or an affidavit of merits. Gardner *v.* Janes, 5 R. I. 235.

Georgia.—By the provision of the Code of *Georgia* a plea to the merits is not a waiver of a plea in abatement. Jernigan *v.* Carter, 51 Ga. 252.

2. N. Y. Code of Civ. Pro. § 499; Kromer *v.* Reynolds, 19 N. Y. Wkly. Dig. 383; Holbrook *v.* Baker, 16 Hun (N. Y.) 176; Briggs *v.* Carroll, 50 Hun (N. Y.) 586; Selye *v.* Zimmer, 15 N. Y. Supp. 881; 61 Hun (N. Y.) 623; DePuy *v.* Strong, 37 N. Y. 372; Garvey *v.* New York L. Ins., etc., Co. (Supreme Ct.), 14 N. Y. St. Rep. 909.

3. **Separate Findings.**—Where it is

By Demurring.—By demurring it is held that a defendant waives the right to plead in abatement.[1]

By Laches or Agreement.—The right to plead in abatement may also be lost or waived by laches[2] or by an agreement "to plead and try at the next term."[3]

After Imparlance.—It is held too late to so plead after a general imparlance.[4] But after a special imparlance it has been allowed.[5]

Proceeding in Cause.—The right to plead in abatement has been held to be lost by proceeding in the cause and not raising the objection.[6]

Plaintiff's Demurrer.—By demurring to a plea in abatement it has been held the objection that it was filed too late is not waived;[7] but the contrary has also been held.[8]

VII. PLEAS PUIS DARREIN CONTINUANCE—Matter Arising after Issue.—Where matter of abatement arises or occurs after issue joined it may, and must, to be available, be pleaded by plea *puis darrein continuance*, and may be so pleaded although the right to plead

allowed the defendant by the practice to plead several pleas, and hence the rule that pleading to the merits waives pleas in abatement does not prevail, the jury, where the case is tried before them, should be instructed to find separately on the issues in abatement and in bar. Gardner *v.* Clark, 21 N. Y. 399.

First Disposed of by Court.—Although the *Georgia* Code provides that a plea to the merits is not a waiver of a plea to the jurisdiction, it should be so construed as to require the plea to the jurisdiction to be disposed of first. Jernigan *v.* Carter, 51 Ga. 232.

1. Fergerson *v.* Rawlins, 23 Ill. 69; Knowlton *v.* Culver, 1 Chand. (Wis.) 16; Foreman *v.* Gibson, 15 Ark. 206; Indiana, etc., R. Co. *v.* Scearce, 23 Ind. 223; Meyer *v.* Smith (Tex. Civ. App., 1893), 21 S. W. Rep. 995.

2. Stiles *v.* Horner, 21 Conn. 507; York *v.* Gregg, 9 Tex. 85; Smith *v.* State, 19 Conn. 493.

3. Shaw *v.* Bowen, 1 Overt. (Tenn.) 249.

4. Webster *v.* Byrnes, 32 Md. 86; Roberts *v.* Sherman, 28 Ill. 79; Hinckley *v.* Smith, 4 Watts (Pa.) 433; Chamberlain *v.* Hite, 5 Watts (Pa.) 373; Holloway *v.* Freeman, 22 Ill. 202; Coates *v.* McCamm, 2 Browne (Pa.) 173; McCarney *v.* McCamp, 1 Ashm. (Pa.) 4; Chambers *v.* Haley, Peck (Tenn.) 159; Martin *v.* Com., 1 Mass. 347; Archer *v.* Claflin, 31 Ill. 306; Witmer *v.* Schlatter, 15 S. & R. (Pa.) 150; Coffin *v.* Jones, 5 Pick. (Mass.) 61; Wyman *v.* Dorr, 3 Me. 186; Otis *v.* Ellis, 78 Me. 75; Jennison *v.* Hopgood, 2 Aik. (Vt.) 31.

Cannot, although Declaration Amended.—Where, after a general imparlance and plea of the general issue, the plaintiff amends his declaration on leave obtained, the defendant cannot plead in abatement a variance between the writ and amended declaration, which variance existed between the writ and original declaration. Chapman *v.* Davis, 4 Gill (Md.) 166.

Ignorance of Ground of Abatement no Excuse.—When a cause of abatement arises after the first day of the term, defendant must inform himself of it and file his plea within a reasonable time or it is too late. Ignorance of the cause of abatement will not justify the filing of the plea after the proper time. James *v.* Morgan, 36 Conn. 348.

5. Purple *v.* Clark, 5 Pick. (Mass.) 206; McCarney *v.* McCamp, 1 Ashm. (Pa.) 4; Coates *v.* McCamm, 2 Browne (Pa.) 173.

Removal of Cause.—After removing an action to the Supreme Judicial Court in Massachusetts pursuant to the provisions of the statute of 1840, ch. 87, § 3, a defendant may plead in abatement. Colt *v.* Partridge, 7 Met. (Mass.) 570.

6. State *v.* Faust, 7 Coldw. (Tenn.) 109; Spalding *v.* Wathen, 7 Bush (Ky.) 659; Otis *v.* Warren, 14 Mass. 239; Barstow *v.* Fossett, 11 Mass. 250.

7. Jennison *v.* Hopgood, 2 Aik. (Vt.) 31.

8. Northum *v.* Kellogg, 15 Conn. 569.

it would have been lost under the rules of pleading had it arisen before issue.[1]

Supplemental Answer.—Under many of the codes such matter is to be set up by supplemental answer.[2]

Pleaded as Soon as Known.—Such matter should be pleaded as soon as it comes to the knowledge of the party.[3] It may be pleaded at a trial if not known until then,[4] but not after verdict.[5]

Waives Other Pleas.—Pleas *puis darrein continuance* are a waiver of all other pleas, which are considered as stricken from the record, and the party pleading them is compelled to stand on them alone as though he had pleaded no other plea.[6]

1. Straight *v.* Hanchett, 23 Ill. App. 584; Gaines *v.* Conn, 2 Dana (Ky.) 231; Bradley *v.* Welch, 1 Munf. (Va.) 284; Hunt *v.* Wilkinson, 2 Call. (Va.) 49; 1 Am. Dec. 534; Lacroix *v.* Macquart, 1 Miles (Pa.) 42; Wilson *v.* Hamilton, 4 S. & R. (Pa.) 38; Hostetter *v.* Kaufman, 11 S. & R. (Pa.) 146; Yeaton *v.* Lynn, 5 Pet. (U. S.) 224; Good *v.* Davis, Hempst. (U. S.) 16; Thompson *v.* U. S., 103 U. S. 480; Leavitt *v.* School Dist. No. 9, 78 Me. 574; Jennings *v.* Dockham (Mich., 1894), 58 N. W. Rep. 66.

2. N. C. Code C. P. § 136; Revd. St. Ohio, § 5119, L. 1880; Revd. St. Wis. § 2787, L. 1878; N. Y. Code Civ. Pro. § 544; Cal. Code C. P. § 464; Neb. Code C. P. § 149; Bullitt's Ky. Code, § 135; Kansas Civ. Pro. § 144; Iowa Code of 1886, § 2731; Ind. Revd. St. § 399, L. 1881; Colo. Code C. P. § 74; Oregon Code C. P. § 105.

Ejectment.—Any rights which may accrue to a defendant subsequent to the commencement of an action of ejectment must be alleged by a plea *puis darrein continuance.* Jennings *v.* Dockham (Mich., 1894), 58 N. W. Rep. 66.

Real Action.—If during the pendency of a real action the title and right of possession pass from plaintiff and become vested in defendant, this may be pleaded specially to bar the further maintenance of the action, but cannot be pleaded in bar of the suit generally. Leavitt *v.* School District No. 9, 78 Me. 574.

No Evidence of Fact not Pleaded.—In a *mandamus* proceeding to compel a township clerk to perform an official duty, he pleaded in his answer that he had resigned the office before process was served on him. At the trial he offered in evidence proof that a successor to him in the office had been appointed. *Held*, that such evidence was properly rejected because such appointment had not been set up by plea *puis darrein continuance.* Thompson *v.* U. S., 103 U. S. 480.

Disability of Plaintiff to Sue.—If a disability on the part of the plaintiff to sue exists, and existed at the time the action was commenced, the plaintiff may be nonsuited at the trial because of it; but if the disability arose during the pendency of the action, it must be pleaded by plea *puis darrein continuance*, and if not so pleaded is waived. Yeaton *v.* Lynn, 5 Pet. (U. S.) 224.

3. **After Continuance.** — Where new matter of abatement occurs after a continuance, defendant should plead it in abatement as soon as it comes to his knowledge, and not allow a continuance to intervene before doing so; but the court may for special reasons allow it to be pleaded *nunc pro tunc* after an intervening continuance. Wilson *v.* Hamilton, 4 S. & R. (Pa.) 238; Hostetter *v.* Kaufman, 11 S. & R. (Pa.) 146.

4. **At Trial.**—In an action tried by jury the refusal of the presiding justice, after the case had been opened to the jury, to allow defendant's counsel to file a supplemental pleading setting up a release made since the last continuance, and without the knowledge of the attorney for either party, but which had come to the knowledge of defendant's attorney on the preceding day, is erroneous, and his action in so refusing will be reversed on appeal. Seehorn *v.* Big Meadows, etc., Co., 60 Cal. 240.

5. **After Verdict or Report.**—After a verdict or report of referee a defendant cannot plead matter of abatement *puis darrein continuance*, because the defendant has no day in court. Alexander *v.* Fink, 12 Johns. (N. Y.) 218.

6. Spafford *v.* Woodruff, 2 McLean (U. S.) 191; Wisdom *v.* Williams,

Certainty.—Great certainty and precision are required in these pleas.[1] They should show that the matter arose since the last continuance,[2] and state the time when it arose.[3]

Judgment.—If the issue on a plea *puis darrein continuance* is found against the defendant, the judgment is peremptory and final.[4]

VIII. REPLICATION, ETC.—Same Rules apply to Plaintiff.—In relation to pleas in abatement the same rules apply to the plaintiff as to a defendant, and when plaintiff pleads in abatement to a cause of action set up by defendant he must observe those rules in his plea.[5]

Hempst. (U. S.) 460; Wallace *v.* McConnell, 13 Pet. (U. S.) 136; Elliott *v.* Teal, 5 Sawy. (U. S.) 188; Good *v.* Davis, Hempst. (U. S.) 16; Straight *v.* Hanchett, 23 Ill. App. 584.

Although Several Pleas Allowed.—Pleas *puis darrein continuance* by operation of law supersede all other pleas and defences, and the parties must settle the pleadings *de novo* as though no other pleas had been filed. These rules of the common law are in force in and not affected by the Practice Act of Illinois allowing defendant to plead as many matters of fact in several pleas as he deems necessary, and to file additional pleas any time before final judgment. Straight *v.* Hanchett, 23 Ill. App. 584.

1. Spafford *v.* Woodruff, 2 McLean (U. S.) 191; Field *v.* Coppers, 81 Me. 36; Augusta *v.* Moulton, 75 Me. 551; Templeton *v.* Clary, 1 Blackf. (Ind.) 288; Gileson *v.* Bourland, 13 Ill. App. 352; Straight *v.* Hanchett, 23 Ill. App. 584.

If Bad, Repleader Allowed.—Great certainty is required in pleas *puis darrein continuance* both in substance and form; and where such a plea sets up a release of the cause of action since issue joined, but fails to state the place where the release was made, and the day of the last continuance, or even that there had been any continuance, it is bad on demurrer. Where such a plea is held bad on demurrer a repleader may be allowed on terms. Field *v.* Coppers, 81 Me. 36.

2. Should show Day of Last Continuance.—Great certainty is required in pleas *puis darrien continuance*, and if the day of the last continuance is not shown the defect is fatal. Augusta *v.* Moulton, 75 Me. 551.

Stating Defense Arose since Continuance. Where a plea *puis darrien continuance* only states generally that the defense arose since the last continuance, without any further details and without the proper conclusion and verification, it is defective. Gileson *v.* Bourland, 13 Ill. App. 352.

Where matter of defence set up in a plea arose after the commencement of the suit it cannot be pleaded in bar of the action generally, but must be pleaded as to the further maintenance of the suit; and where it arises after pleas pleaded and issue joined it can only be pleaded *puis darrien continuance.* Such a plea must show the defense arose after the last continuance, and must meet the same requisites as to certainty, etc., as a plea in abatement. Straight *v.* Hanchett, 23 Ill. App. 584.

Need not show Arose since Continuance.—Where a plea in abatement alleged "that pending the writ, etc., the plaintiff had married, and that her husband was still living," it cannot be set aside on motion for not expressly alleging the coverture to have occurred *puis darrein continuance*, because the time of the alleged marriage was since the last continuance. Templeton *v.* Clary, 1 Blackf. (Ind.) 288.

3. Pleas in abatement *puis darrein continuance* are required to be stated with great certainty, the matter of defense must be clearly and specifically stated, and the time when it arose. Spafford *v.* Woodruff, 2 McLean (U. S.) 191.

4. Renner *v.* Mashall, ; Wheat. (U. S.) 215.

5. Defendant's Offset or Counter-claim.—Where defendant's answer sets up a set-off or other claim which may constitute an independent cause of action, the same rule applies thereto as to a complaint, to wit: if there be a defect

Demurrer.—If the plaintiff desires to test the legal sufficiency of defendant's plea in abatement, he must demur thereto.[1] A general demurrer is sufficient, and a special demurrer is not usually required.[2] On such demurrer it is held defendant cannot take advantage of defects in the declaration.[3]

Waiver.—By taking issue on a plea in abatement plaintiff has been held to waive defects in its verification.[4] But where the plea is a nullity, it is held that no act of apparent acquiescence is a waiver of objections to it.[5]

Defeating Plea without Replication.—In some cases a plaintiff has been allowed to practically defeat a plea in abatement without any replication by showing on the trial facts which rendered it nugatory.[6] But this is not always allowed.[7]

of parties, and such defect be apparent on the face of the answer, plaintiff may take advantage of it by demurrer; but if not apparent on the face of the answer, plaintiff must take advantage of it by plea. Talmage *v.* Bierhause, 103 Ind. 270.

1. Brooks *v.* Patterson, 1 Johns. Cas. (N. Y.) 328; Rex *v.* Cooke, 2 B. & C. 618; 9 E. C. L. 201; 4 D. & R. 114; Rex *v.* Clarke, 1 D. & R. 43; Ralph *v.* Brown, 3 W. & S. (Pa.) 395.

Stricken Out on Motion.—If no ground for abating the suit is presented by a plea in abatement, it may be stricken out on motion. Pridgen *v.* Andrews, 7 Tex. 461.

2. Clifford *v.* Cony, 1 Mass. 495; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308; Hart *v.* Turk, 15 Ala. 675; Shaw *v.* Dutcher, 19 Wend. (N. Y.) 216; Lloyd *v.* Williams, 2 M. & S. 484.

Special Demurrer in United States Courts.—Where the ground of demurrer is that a plea contains matter in bar, but begins and ends in abatement, it should be raised by special demurrer in the United States courts and not by general demurrer. Deshler *v.* Dodge, 16 How. (U. S.) 622.

3. **Defective Service.**—Where a plea in abatement to the service of a writ is demurred to, the demurrer does not reach back so as to enable the defendant to take advantage of a defect in the declaration. Bent *v.* Bent, 43 Vt. 42.

4. King *v.* Haines, 23 Ill. 340.

5. **Plea a Nullity.**—No act of a plaintiff in apparently acquiescing in a plea in abatement will be construed into a recognition of it where the plea is a nullity. Garratt *v.* Hooper, 1 Dowl. Pr. Cas. 28.

6. **Death of Person not Joined.**—Where defendant pleaded in abatement the non-joinder of a person who was the partner of plaintiff and jointly interested with plaintiff in the cause of action in suit, and alleged he was living at the commencement of the action, it was held that plaintiff could at the trial and without reply defeat this plea by proof that such person was dead and the plaintiff owned the entire cause of action; that as the object of the plea was to give a better writ and so protect defendant by a correct judgment, he obtained full protection by the proof of such facts on the trial. Groot *v.* Agens, 107 N. Y. 633.

Ratification of Agent's Act.—Where defendant pleads in abatement in an action on an attachment bond on the ground that the bond was not executed by the plaintiff, but does not deny that the suit was commenced by the authority of the plaintiff, the plea is negatived by the plaintiff appearing and prosecuting the suit. Dove *v.* Martin, 23 Miss. 588.

Substitution of New Sureties.—In an attachment proceeding the defendant pleaded in abatement that the sureties on the bond filed by plaintiff were insolvent, and thereafter the court on plaintiff's motion allowed plaintiff to substitute other sureties and then struck out defendant's plea in abatement. *Held* proper, as substituting a new bond was a full protection of defendant's rights, and when filed it related back to the commencement of the proceedings. Shaw *v.* Trunsler, 30 Tex. 390.

7. **Offer to give New Bond.**—Where defendant pleads in abatement for the want of the giving of a bond by a non-

IX. **In Equity—Same as at Law.**—In equity, pleadings in abatement are practically the same as at law and governed by the same principles.[1]

Construed as at Law.—They are construed with the same strictness as pleas at common law, and must be verified.[2] They must be clear, certain, and definite.[3] The pendency of a suit in a foreign state or country is not a good plea in abatement in equity any more than it would be at law.[4]

Must Raise Objections by Demurrer or Answer.—Objections which tend to abate the suit must be raised by plea in abatement or demurrer, or they are deemed waived.[5] The question of the pendency of another suit must be so raised;[6] also that the suit is prematurely brought;[7]

resident, the subsequent offer to give a valid bond does not avoid the plea. Cummins *v.* Cassily, 5 B. Mon. (Ky.) 74.

Bringing in Omitted Persons.—Where, after defendant pleads in abatement for non-joinder of defendants, the plaintiff amends by summoning the persons named in the plea, yet afterwards discontinues as to such persons, this does not avoid the plea and it still remains in force. Wilson *v.* Nevers, 20 Pick. (Mass.) 20.

1. They are called pleas in the nature of pleas in abatement, and are divided into those to the jurisdiction, to the person of the plaintiff or defendant, and to the bill or the frame of the bill. And those to the bill or frame of the bill are divided into and include another action pending, want of proper parties, multiplicity of suits, and multifariousness. Story's Eq. Pl. §§ 710, 722, 735.

2. Burk *v.* Brown, 2 Atk. 399; Dudgeon *v.* Watson, 23 Fed. Rep. 161; Beck *v.* Beck, 36 Miss. 72.

3. A plea in abatement to the jurisdiction of a court of general jurisdiction must allege that the court has not jurisdiction of the subject, and show by what means it is deprived of it, and also show what court has jurisdiction. Story Eq. Pl. § 715.

To Jurisdiction.—A plea to the jurisdiction, alleging as ground therefor "that the subject-matter of the suit is not cognizable in any municipal court of justice," is bad, being in fact a plea in bar and not a plea to the jurisdiction in abatement. A plea to the jurisdiction of a particular court must show a remedy to the party in some other court, but this plea shows there is no remedy in any court, and is bad as a plea to the jurisdiction. Nabob of Arcot *v.* East India Co., 1 Ves. Jr. 371, 3 Bro. C. C. 292.

4. Dillon *v.* Alvares, 4 Ves. 357; Foster *v.* Vassall, 3 Atk. 590; Houlditch *v.* Donegall, 1 Sim. & Stu. 491; Peruvian Guano Co. *v.* Bockwoldt, 23 Ch. Div. 225; Lynch *v.* Hartford F. Ins. Co., 17 Fed. Rep. 627; McHenry *v.* Lewis, 21 Ch. Div. 202; Scott *v.* Rand, 118 Mass. 215; Mutual L. Ins. Co. *v.* Brune, 96 U. S. 588; Urlin *v.* Hudson, 11 Vern. 332; Way *v.* Bragaw, 16 N. J. Eq. 213; 84 Am. Dec. 147; Tansey *v.* McDonnell, 142 Mass. 220.

Stay of One Suit.—The pendency of a suit in another state between the same parties and for the same cause of action cannot be pleaded in abatement of a suit in this state (*New Jersey*). The defendant's remedy is to procure a stay of proceedings until the suit in the foreign jurisdiction is discontinued. Kerr *v.* Willetts, 48 N. J. L. 70; Hadden *v.* St. Louis, etc., R. Co., 57 How. Pr. (N. Y. Supreme Ct.) 390; Nichols *v.* Nichols, 12 Hun (N. Y.) 428.

5. Story Eq. Pl. § 708; Dodge *v.* Perkins, 4 Mason (U. S.) 435; Livingston *v.* Story, 11 Pet. (U. S.) 393; Pierce *v.* Feagans, 39 Fed. Rep. 587; Hoyt *v.* Hoyt, 58 Vt. 538.

6. **Another Action.**—The pendency of another suit between the same parties for the same cause of action in the same court of equity or some other court of equity must be alleged and brought up by plea; it cannot be raised by answer. Battell *v.* Matot, 58 Vt. 271; Pierce *v.* Feagans, 39 Fed. Rep. 587; Buscher *v.* Knapp, 107 Ind. 340.

7. **Debt not Due.**—The defence that a suit is prematurely brought is properly raised by answer in equity; and where an attachment in the suit has been defeated by a plea in abatement on the

that the plaintiff is insane;[1] that proper parties are not brought in[2] unless they are necessary parties;[3] that plaintiff has no interest in the matter of the suit,[4] or no standing in court;[5] and that plaintiff has an adequate remedy at law.[6]

Cannot Withdraw Answer.—A defendant in equity cannot withdraw his answer and file a plea in abatement without leave of court.[7]

ground that the debt was not due, there can be no decree for the debt where the prematurity of the suit is relied on as a defence in the answer in the suit. Pigue *v.* Young, 85 Tenn. 263.

1. **Insanity.**—The objection that a plaintiff by reason of mental unsoundness is incapable of bringing or maintaining a suit must in equity be taken by plea in the nature of a plea in abatement and cannot be raised by answer. Hoyt *v.* Hoyt, 58 Vt. 538.

2. **Proper Parties.**—In equity, where the non-joinder of one who might be made a party does not operate to the prejudice of other parties to the suit, the objection to such non-joinder must be taken by plea; it cannot be raised for the first time at the hearing. Griffin *v.* Lovell, 42 Miss. 402; Snook *v.* Pearsall, 95 Mich. 534.

3. **Necessary Parties.**—The provision of the N. Y. Code that objections not taken by demurrer or answer are deemed waived apply in general to a defect of parties, but where by reason of such defect a complete determination of the matter cannot be had without prejudice to the rights of others, such defect is not waived by the omission to raise it by demurrer or answer, and may be taken advantage of on appeal. Bear *v.* American Rapid Tel. Co., 36 Hun (N. Y.) 400; Osterhoudt *v.* Ulster County, 98 N. Y. 239; Reed *v.* Hoyt, 51 N. Y. Super. Ct. 121; *aff'd* 109 N. Y. 659.

4. **Interest in Subject-matter.**—If, in a suit brought by two plaintiffs, one of them has no interest in the subject-matter of the suit, the objection may be taken by a plea in the nature of a plea in abatement; and if the plea is shown to be true, it is a good defence to the whole suit. Makepeace *v.* Haythorne, 4 Russ. 244.

5. **Plaintiff's Standing in Court.**—The question of the standing in court of a plaintiff who alleges sufficient facts to give him such standing should be raised by a plea in the nature of a plea in abatement, and not by averments in the answer to the effect that the facts as alleged by the plaintiff are untrue and that the bill is not filed in good faith. Mazet *v.* Pittsburgh, 137 Pa. St. 548.

6. **Remedy at Law—Plea.**—In an equity action the objection that the plaintiff has an adequate remedy at law, if not apparent on the face of the complaint, should be set up in the answer or it is waived. Thomas *v.* Grand View Beach R. Co., 76 Hun (N. Y.) 601; Mentz *v.* Cook, 108 N. Y. 509; Ostrander *v.* Weber, 114 N. Y., 95.

But "that no court of equity has jurisdiction" may, it seems, be raised on the trial. Le Bussiere *v.* Halladay, 4 Abb. N. Cas. (N. Y.) 111.

Demurrer—Remedy at Law.—Where it appears from the face of a complaint that no ground for equitable relief is stated, the objection that a court of equity would have no jurisdiction need not be taken by answer. Nutting *v.* Atwood (Super Ct.), 53 N. Y. St. Rep. 152; 23 N. Y. Supp. 816; Gullickson *v.* Madsen (Wis., 1894), 57 N. W. Rep. 965.

7. **Withdrawal of Answer.**—After the defendant has answered and there has been a replication thereto the defendant cannot file a plea in abatement on the ground of the disability of plaintiff unless he is given leave to withdraw his answer. Bush *v.* Linthicum, 59 Md. 344.

ABBREVIATIONS.

By S. R. PERRY.

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I. IN GENERAL.—The best practice requires words in legal instruments to be written out at length, but an abbreviation does not constitute legal error where its use for the full term has been so constant that its meaning is unvarying and a matter of general knowledge.[1]

Courts will Take Notice of such abbreviations as within judicial cognizance. The legality of an abbreviation as within the scope of judicial notice must be carefully distinguished from the admissibility of an abbreviation as evidence sufficient to justify a finding of its true meaning as a fact by the court or jury. An abbreviation may be evidence of its own meaning, or where coupled with averments in a pleading may be explained by parol evidence.[2]

1. *New York.*—New York Code Civ. Pro. sec. 22; Jackson *v.* Gumaer, 2 Cow. (N. Y.) 552; Dana *v.* Fiedler, 12 N. Y. 40; 62 Am. Dec. 130; Patterson *v.* People, 12 Hun (N. Y.) 139.

Illinois.—Lee *v.* Mendel, 40 Ill. 359; Rowley *v.* Berrian, 12 Ill. 198; Shattuck *v.* People, 5 Ill. 481; Livingston, *v.* Ketelle, 6 Ill. 116; 41 Am. Dec. 166; Holbrook *v.* Nichol, 36 Ill. 161.

Indiana.—Kearns *v.* State, 3 Blackf. (Ind.) 336; Buell *v.* State, 72 Ind. 523; Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51; U. S. Express Co. *v.* Keefer, 59 Ind. 263; Steinmetz *v.* Versailles, etc., Turnpike Co., 57 Ind. 460; Hedderich *v.* State, 101 Ind. 564; 51 Am. Rep. 768.

Missouri.—South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 361; Birch *v.* Rogers, 3 Mo. 227; Fenton *v.* Perkins, 3 Mo. 144.

New Hampshire.—Smith *v.* Butler, 25 N. H. 521; Berry *v.* Osborn, 28 N. H. 279.

New Jersey.—Scudder *v.* Coryell, 10 N. J. L. 344.

Texas.—Brown *v.* State, 16 Tex. App. 245.

Ohio.—Rice *v.* Buchanan (Ohio, 1844), 1 W. J. L. 395.

Arkansas.—Elliott *v.* State Bank, 4 Ark. 437.

United States.—Gordon *v.* Holliday, 1 Wash. (U. S.) 285.

And see other cases cited throughout this article.

2. *New York.*—Silberman *v.* Clark, 96 N. Y. 522; Lewis *v.* Few, 5 Johns. (N. Y.) 1; Storey *v.* Salomon, 6 Daly

II. WITHIN JUDICIAL KNOWLEDGE—1. Officials.—Courts have judicial knowledge of abbreviations customarily used to designate the official character of their functionaries and other public officials.[1]

2. Proper Names—a. INITIALS.—It is a presumption of law that every individual has a full Christian name, and exact practice requires that in all legal instruments a person should be designated by his Christian name and not by initials. Accordingly the general rule of common law is that the statement of the Christian name by initials is ground for plea in abatement[2] or motion to quash the indictment.[3]

Distinction between Vowels and Consonants.—In course of time this rule was modified to the extent of allowing judicial notice to be taken of an initial if a vowel, but not if a consonant.[4] The modern

(N. Y.) 531; Dana *v.* Fiedler, 1 E. D. Smith (N. Y.) 463; Collenden *v.* Dinsmore, 55 N. Y. 200; 14 Am. Rep. 224; Taylor *v.* Beavers, 4 E. D. Smith (N. Y.) 215.

Indiana.—Muirhead *v.* Snyder, 4 Ind. 486; Lasselle *v.* Hewson, 5 Blackf. (Ind.) 161; Louden *v.* Walpole, 1 Ind. 319; Jaqua *v.* Witham, etc., Co., 106 Ind. 545; Fraser *v.* State, 106 Ind. 471; Barton *v.* Anderson, 104 Ind. 578; Jordan Ditching, etc., Assoc. *v.* Wagoner, 33 Ind. 50; Burroughs *v.* Wilson, 59 Ind. 536; Locke *v.* Merchants' Nat. Bank, 66 Ind. 353.

Illinois.—Keith *v.* Sturges, 51 Ill. 142; American Express Co. *v.* Lesem, 39 Ill. 333.

Missouri.—McNichol *v.* Pacific Express Co., 12 Mo. App. 401.

Connecticut.—Comstock *v.* Savage, 27 Conn. 184.

Georgia.—Wilson *v.* Coleman, 81 Ga. 297.

Rhode Island.—Kinney *v.* Flynn, 2 R. I. 319.

Compare Ellis *v.* Park, 8 Tex. 205; Russell *v.* Martin, 15 Tex. 238.

1. In State *v.* Kinney, 81 Mo. 101, it was held that since a court is bound to take judicial notice of its own officers it will notice their signatures whether their official designation is added or not.

"J. P." Equivalent to Justice of the Peace.—Shattuck *v.* People, 5 Ill. 481; Scudder *v.* Coryell, 10 N. J. L. 344; Hawkins *v.* State (Ind., 1894), 36 N. E. Rep. 419. See also Com. *v.* Melling, 14 Gray (Mass.) 388; Livingston *v.* Kettelle, 6 Ill. 116; 41 Am. Dec. 166.

"N. P." for Notary Public.—Rowley *v.* Berrian, 12 Ill. 200, where the court says: "The letters 'N. P.' as clearly indicate the office of notary public as do 'J. P.' that of justice of the peace; and this court has repeatedly decided that such is the meaning of the latter initials."

"C. C. C." for Clerk of Circuit Court.—A jurat signed by a clerk of a circuit court as "C. C. C." is not invalid. Buell *v.* State, 72 Ind. 523.

"Com'sr., etc."—*Held*, these words are sufficiently descriptive of an officer qualified to take affidavits. Jackson *v.* Gumaer, 2 Cow. (N. Y.) 552.

"Adm'r" for Administrator.—Moseley *v.* Mastin, 37 Ala. 316.

"Sup't" for Superintendent.—South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 361.

2. Rust *v.* Kennedy, 4 M. & W. 586; 7 Dowl. Pr. Cas. 199; 3 Jur. 198; Myers *v.* Sealy, 5 Rich. (S. Car.) 473; Frank *v.* Levie, 5 Robt. (N. Y.) 599; Gerrish *v.* State, 53 Ala. 476; Melvin *v.* Clark, 45 Ala. 285; Cantley *v.* Moody, 7 Port. (Ala.) 443; Fisher *v.* Northrup, 79 Mich. 287; Willis *v.* People, 2 Ill. 399; Zellers *v.* State, 7 Ind. 659; Gardner *v.* State, 4 Ind. 632; Smith *v.* State, 8 Ohio 294.

In Miller *v.* Hay, 12 Jur. 985; 18 L. J. Exch. 487, it is stated that describing a defendant in a declaration by surname and the initial letter only of his Christian name is not amendable under 3 and 4 Will. IV, c. 42, § 11, but is an insufficient designation, of which advantage must have been taken by special demurrer.

3. Gardner *v.* State, 4 Ind. 632; State *v.* Kutter, 59 Ind. 572.

4. Kinnersley *v.* Knott, 7 C. B.

tendency of courts, however, has been to hold an initial, whether vowel or consonant, to be a proper, or at least an allowable, designation of a party to an action, since it answers all purposes of description and identification, and the rule now seems to be settled that an initial is equivalent to the full Christian name.[1]

980; 62 E. C. L. 978; 13 Jur. 658; Nash *v.* Calder, 5 Dowl. & L. 341.

In Lomax *v.* Landells, 6 C. B. 577; 60 E. C. L. 577; 6 Dowl. & L. 396, the court said: "A vowel which is in itself a word and may be pronounced separately may be a name; though a consonant, which is incapable of being pronounced without the addition of a vowel. cannot."

1. Wiggins *v.* State, 80 Ga. 468; State *v.* Johnson, 93 Mo. 317; State *v.* Wall, 39 Mo. 532; Fenton *v.* Perkins, 3 Mo. 144; Birch *v.* Rogers, 3 Mo. 227; Brown *v.* Piper, 91 U. S. 37 (*dictum*—that the court will notice customary abbreviations of Christian names); U. S. *v.* Winter, 13 Blatchf. (U. S.) 276; Wassels *v.* State, 26 Ind. 30; Anderson *v.* State, 26 Ind. 89; Lee *v.* Mendel, 40 Ill. 359; Vandermark *v.* People, 47 Ill. 122; Pickering *v.* Pulsifer, 9 Ill. 79; Ross *v.* Clawson, 47 Ill. 402; Greathouse *v.* Kipp, 4 Ill. 371; State *v.* Webster, 30 Ark. 166; State *v.* Seely, 30 Ark. 162; Thompson *v.* State, 48 Ala. 165; State *v.* Brite, 73 N. Car. 26; State *v.* Anderson, 3 Rich. (S. Car.) 172; Easterling *v.* State, 35 Miss. 210; Com. *v.* Certain Intoxicating Liquors, 142 Mass. 470.

In Tweedy *v.* Jarvis, 27 Conn. 45, Storrs, C.J., said: "We see no sensible or rational ground for any distinction between a vowel and a consonant, and think that either of them may be a name; and that name is denoted by the sound by which it is called or pronounced when it is spoken audibly as a letter." And in Reg. *v.* Dale, 15 Jur. 657; 5 Eng. L. & Eq. 360, Lord Campbell remarked that he had been reliably informed that an individual had been baptized by the name of "T."

Upon an appeal from an order granting a motion to dissolve an attachment because the initials only and not the Christian names of the parties were given, the court said: "The papers do not give the full Christian names of all the parties, but give the initial letters thereof only. This we think is sufficient. The reason upon which a different rule was once founded in *England* has never existed in this state. The full Christian name is now seldom written anywhere. Search the records of our courts, our statutes, the lists of members of the legislature, election returns, written contracts, and other written instruments, newspapers, etc., and everywhere it will be found that as a rule the initials only of the Christian name are used." Ferguson *v.* Smith, 10 Kan. 396.

In Perkins *v.* McDowell, 3 Wyoming 328, the plaintiff sued as "J. M. McDowell," and, on demurrer, the court, per Van Devanter, C.J., said: "While it does not occur frequently, there are many instances where single letters constitute the only Christian name. We cannot, then, judicially know that the letters "J.M." are not the Christian name of the plaintiff; it follows that there is no defect apparent on the face of the petition in this respect."

"I know no law, nor do I see any reason, why a man may not take the letters A W for his first name, or, as it is generally called, his Christian name; for, as there is no union here between church and state and no obligation on parents to baptize their children, this may be as often changed as the patronymic." Colcock, J., in City Council *v.* King, 4 McCord (S. Car.) 487.

Judgment cannot be Collaterally Attacked.—When a party has signed his Christian name, when its use is required in business, by initials only, such initials constitute his business Christian name, and a judgment against him designating his given name by initials cannot be collaterally attacked. Oakley *v.* Pegler, 30 Neb. 628.

Writ.—A defendant was described in a writ as "W. W. Kilpin." He entered an appearance as Williams Wells Kilpin. In the title of an affidavit he was described as William Wells Kilpin. *Held*, well entitled. Lomax *v.* Kilpin, 6 M. &. W. 94; 16 J. L. Exch. 23.

Indictment.—When the name of a person as the owner of property is introduced in an indictment, the designation of his Christian name by initials has been held sufficient. State *v.* Black, 31 Tex. 560.

A Middle Initial is no part of a man's name, and it is therefore immaterial that it is entirely disregarded[1]

But see Diggs *v.* State, 49 Ala. 311, where it is said an indictment against a defendant by the initial of his Christian name, or by his middle name only, or by the initial of his first and his middle name, is *prima facie* subject to a plea in abatement,

Bond.—An obligor on a bond may be sued in the name which he subscribed thereto, whether full or not. Com. *v.* Hughes, 10 B. Mon. (Ky.) 160.

Affidavit.—Where action was brought against defendant by initial of Christian name "W" and proceeded to execution so entitling him, an affidavit in support of an application against the sheriff for not returning a *fi. fa.* cannot be read if it describes the defendant by Christian name of "William." Reg. *v.* Surrey, 8 Dowl. Pr. Cas. 510; 4 Jur. 559.

Objection Waived by Judgment.—Where defendants to a bill of foreclosure allowed judgment to be given *pro confesso*, they were held to admit that the petitioner, who described himself by full Christian name, was the same individual as the mortgagee described only by initials. Ramsdell *v.* Eaton, 12 Mich. 117.

In Breedlove *v.* Nicolet, 7 Pet. (U. S.) 413, where the plaintiff's name as given in a pleading was "J. J. Sigg," and objection thereto was raised for the first time on a writ of error, Marshall, C. J., said: "He may have assumed the letters 'J. J.' as distinguishing him from other persons of the surname of Sigg. Objections to the name of the plaintiff cannot be taken advantage of after judgment."

Where the plaintiff sued as "O. B. Abbott," and obtained judgment, it was held that it would not be presumed, for the purpose of invalidating the judgment, that he had any other Christian name. Fewlass *v.* Abbott, 28 Mich. 270.

Cured by Answer.—Where the answer designates the plaintiff by full name and the complaint sets out only the initials, *held*, that the complaint, though defective, is cured by answer. Sherrod *v.* Shirley, 57 Ind. 13.

Cured by Verdict.—An indictment or other pleading defective from the abbreviation of a name is cured by a verdict. Smith *v.* State, 8 Ohio 294; State *v.* Webster, 30 Ark. 166; State *v.* Johnson, 93 Mo. 317; State *v.* McMillan, 68 N. Car. 440; Com. *v.* Melling, 14 Gray (Mass.) 388.

Identification. — Papers filed in a cause subsequent to pleading need only refer to a party or person with sufficient accuracy to identify him. Gordon *v.* State, 59 Ind. 75; Starks *v.* Stafford, 14 Oregon 317; Elting *v.* Gould, 96 Mo. 535.

Amendment.—Where only an initial is used the court may allow an amendment. Beggs *v.* Wellman, 82 Ala. 391.

Publication of Summons.—An order of publication which gave the party's name as "Q. Noland" instead of Quinces R. Noland conferred no jurisdiction. Skelton *v.* Sackett, 91 Mo. 377.

Indiana. — A judgment rendered against a person designated by the initials of his Christian name was held irregular but not void. Bridges *v.* Layman, 31 Ind. 384.

New Jersey.—Initials are insufficient in pleading except where parties are described by initials in bills of exchange, etc., under N. J. R. S. p. 852 § 28. State *v.* Richards, 42 N. J. L. 69. *Compare* State *v.* Leon, 42 N. J. L. 540.

Ohio.—The insertion of initial letter only in a writ is a fatal defect. Herf *v.* Shulze, 10 Ohio 263.

South Carolina.—It was held where a Christian name was given by initials there was no name at all. Norris *v.* Graves, 4 Strobh. (S. Car.) 32.

1. *New Jersey.*—Dilts *v.* Kinney, 15 N. J. L. 130.

New York.—Franklin *v.* Talmadge, 5 Johns. (N. Y.) 84; Cornes *v.* Wilkin, 79 N. Y. 129; Roosevelt *v.* Gardinier, 2 Cow. (N. Y.) 463; People *v.* Cook, 14 Barb. (N. Y.) 259, 307.

Pennsylvania.—Bratton *v.* Seymour, 4 Watts (Pa.) 329; Paul *v.* Johnson, 9 Phila. (Pa.) 32.

Illinois.—Tucker *v.* People, 122 Ill. 583; Bletch *v.* Johnson, 40 Ill. 116; Erskine *v.* Davis, 25 Ill. 228; Humphrey *v.* Phillips, 57 Ill. 132.

Indiana.—Miller *v.* State, 69 Ind. 284; Choen *v.* State, 52 Ind. 347; 21 Am. Rep. 179; West *v.* State, 48 Ind. 483; O'Connor *v.* State, 97 Ind. 104.

Ohio.—Wagner *v.* Zeigler, 44 Ohio St. 59.

New Hampshire.—Hart *v.* Lindsey,

or erroneously stated.[1]

b. CONTRACTIONS.—Courts will take judicial notice of the customary abbreviations or contractions of Christian names.[2]

c. PREFIXES AND SUFFIXES.—The commonly abbreviated prefixes and suffixes are not considered either as names in themselves or as parts of names.[3]

17 N. H. 235; 43 Am. Dec. 597; Wood *v.* Fletcher, 3 N. H. 61.

Vermont.—Walbridge *v.* Kibbee, 20 Vt. 543; Isaac *v.* Wiley, 12 Vt, 674; Allen *v.* Taylor, 26 Vt. 599.

Alabama.—Edmundson *v.* State, 17 Ala. 179.

Texas.—State *v.* Manning, 14 Tex. 402; McKay *v.* Speak, 8 Tex. 376.

United States.—Keene *v.* Meade, 3 Pet. (U. S.) 1.

England.—Rex. *v.* Newman, 1 Ld. Raym. 562.

Contra.—Com. *v.* Perkins, 1 Pick. (Mass.) 388; Com. *v.* Hall, 3 Pick. (Mass.) 262; Com. *v.* Shearman, 11 Cush. (Mass.) 546; Com. *v.* McAvoy, 16 Gray (Mass.) 235; Terry *v.* Sisson, 125 Mass. 560. See Rex *v.* Craven, Russ. & R. C. C. 14; Rex *v.* Deeley, 1 Moo. C. C. 303; Rex *v.* Owen, 1 Moo. C. C. 118.

1. Johnson *v.* Day, 2 N. Dak. 295; State *v.* Black, 12 Mo. App. 531; Girons *v.* State, 29 Ind. 93; Morgan *v.* Woods, 33 Ind. 23; Schofield *v.* Jennings, 68 Ind. 232; Miller *v.* People, 39 Ill. 457; Langdon *v.* People, 133 Ill. 395; Rooks *v.* State, 83 Ala. 79; Hicks *v.* Riley, 83 Ga. 332; Delphino *v.* State, 11 Tex. App. 30; People *v.* Lockwood, 6 Cal. 205; Milk *v.* Christie, 1 Hill (N. Y.) 102.

Contra.—Price *v.* State, 19 Ohio, 423; State *v.* Hughes, 1 Swan (Tenn.) 261; Com. *v.* Buckley, 145 Mass. 181; Parker *v.* Parker, 146 Mass. 320.

2. "**Th.**" **for Thomas.** — Ogden *v.* Gibbons, 5 N. J. L. 531; Studstill *v.* State, 7 Ga. 2.

"**Jas.**" **for James.**—Stephen *v.* State, 11 Ga. 241.

"**Christy**" **for Christopher.**—Weaver *v.* McElhenon, 13 Mo. 89.

"**Ben.**" **for Benjamin.**—Burnton *v.* State, 75 Ind. 477.

"**Isc.**" **for Isaac.**—An attestation of the execution of a bill of sale purported to be by "Isc. Simpson, clerk to F. L. L." The affidavit filed with it, commencing "I, Isaac Simpson, clerk to F. L. L.," etc., was signed "Isc. Simpson." *Held*, that by reasonable inference the attesting witness of the bill of sale and the deponent were the same person. Routh *v.* Boutell, 1 El. & El. 850; 5 Jur. N. S. 785; 14 L. T. N. S. 286; 35 L. J. C. P. 274; 14 N. W. 609.

"**Jos.**" **for Joseph.**—Com. *v.* O'Baldwin, 103 Mass. 210. But see U. S. *v.* Keen, 1 McLean (U. S.) 441, where a draft signed "Jos. Johnson" was held inadmissible under a count stating it to be signed by Joseph Johnson. In this case the court said that judicial notice could not be taken of the fact that "Jos." meant Joseph, since it might equally as well mean Josephus, Joshua, or some other Christian name.

"**Geo.**" **for George.** — Patterson *v.* People, 12 Hun (N. Y.) 139. In Wilson *v.* Shannon, 6 Ark. 196, however, a plea that the defendant's name was "George" and not "Geo." as stated in the declaration, was held a good defence.

"**Bart,**" **for Bartholomew—Variance.**—In Rives *v.* Marrs, 25 Ill. 277, the decision was contrary to the general rule. The court said: "We cannot judicially know that 'Bart.' is a contraction for Bartholomew. We are unable to know that it is not a full name or the contraction of some other. If the name is correctly given in the declaration, there should have been an averment that the bill was made payable to him by the name adopted, which would have entitled the party to prove that it was a contraction of and used for the full name." To same effect see Curtis *v.* Marrs, 29 Ill. 508.

3. "**Mrs.**" **and** "**Mr.**"—Thus a summons against "Mrs. Smith" has been held erroneous. Schmidt *v.* Thomas, 33 Ill. App. 109, where the court said: "It seems superfluous to cite authority that the abbreviation 'Mrs.' is not a name, yet it has been so decided." State *v.* Richards, 42 N. J. L. 69; State *v.* Gibbs, 44 N. J. L. 169.

It is ground of special demurrer that the Christian names of persons are omitted and "Mr." substituted if such omission or substitution occurs,

Surnames with Prefix.—Where surnames, however, having a prefix are ordinarily written with an abbreviation, it is sufficient to write them in the same manner in pleading.[1]

3. Time.—Abbreviations for words denoting periods of time such as month, forenoon, afternoon, etc., will be judicially noticed.[2]

4. Amount and Description.—Where such customary letters, symbols, or figures are used for amounts or in matters of description as clearly convey their meaning they are legal.[3]

not in describing a written instrument, but in stating a transaction between the parties, on which the action turns. *Held*, therefore, that a plea setting forth the terms of an illegal game was specially demurrable, because the treasurer and secretary were named only as "Mr. Richards" and "Mr. Selway." Gatty *v.* Field, 9 Ad. & El. 431; 58 E. C. L. 428. See also Tomlin *v.* Preston, 1 Chit. Rep. 397; 18 E. C. L. 114; Tomlin *v.* Snow, 1 Chit. Rep. 398.

"Jr." and "Sr."—The abbreviations "Jr." and "Sr." are no part of a name proper, and the omission of them does not constitute error,

California.—San Francisco *v.* Randall, 54 Cal. 408.

Vermont.—Jameson *v.* Isaacs, 12 Vt. 611; Brainard *v.* Stilphin, 6 Vt. 9; 27 Am. Rep. 532; Prentiss *v.* Blake, 34 Vt. 460; Blake *v.* Tucker, 12 Vt. 39; Keith *v.* Ware, 6 Vt. 680.

Massachusetts.—Kincaid *v.* Howe, 10 Mass. 203; Cobb *v.* Lucas, 15 Pick. (Mass.) 7.

Illinois.—Headley *v.* Shaw, 39 Ill. 354.

New Jersey.—State *v.* Atkinson, 27 N. J. L. 420.

New York.—People *v.* Cook, 14 Barb. (N. Y.) 259; Padgett *v.* Lawrence, 10 Paige (N. Y.) 170; 40 Am. Dec. 232; People *v.* Collins, 7 Johns. (N. Y.) 549; Jackson *v.* Prevost, 2 Cai. (N. Y.) 164; Fleet *v.* Youngs, 11 Wend. (N. Y.) 522.

Indiana.—Geraghty *v.* State, 110 Ind. 103; Ross *v.* State, 116 Ind. 495.

Ohio.—Wagner *v.* Zeigler, 44 Ohio St. 59.

Connecticut.—Coit *v.* Starkweather, 8 Conn. 293.

Maine.—State *v.* Grant, 22 Me. 171.

Kentucky.—Johnson *v.* Ellison, 4 T. B. Mon. (Ky.) 526; 16 Am. Dec. 163.

New Hampshire.—State *v.* Weare, 38 N. H. 314.

Wisconsin.—Clark *v.* Gilbert, 1 Pinney (Wis.) 354.

Missouri.—Neil *v.* Dillon, 3 Mo. 59.

England.—Hogdon's Case, 1 Lewin C. C. 236; Rex *v.* Bailey, 7 C. & P. 264; 32 E. C. L. 505; Lepoit *v.* Browne, 1 Salk. 7.

But see State *v.* Vittum, 9 N. H. 519; Boyden *v.* Hastings, 17 Pick. (Mass.) 200.

1. State *v.* Kean, 10 N. H. 347; 34 Am. Dec. 162. See also Moynahan *v.* People, 3 Colo. 367, *citing* above case; Campbell *v.* Wolf, 33 Mo. 459; Fenton *v.* Perkins, 3 Mo. 144.

2. "Octb." for October.—Kearns *v.* State, 3 Blackf. (Ind.) 336.

"Feby." for February.—Cutting *v.* Conklin, 28 Ill. 506.

"A.M." and "P.M." for Forenoon and Afternoon.—Hedderich *v.* State, 101 Ind. 564; 51 Am. Rep. 768.

"A.D." for Anno Domini.—Brown *v.* State, 16 Tex. App. 245; State *v.* Hodgeden, 5 Vt. 481; Com. *v.* Clark, 4 Cush. (Mass.) 596.

"Ms." for Months.—Dana *v.* Fiedler, 12 N. Y. 40; 62 Am. Dec. 130.

3. As "$" for dollar, "C.," "Ct.," "Cts." for cents, "M." for mills, "Vl." for valuation, "Tx." for tax, "Lt." for lot, "Bk." for block, "Pt." for part. Jackson *v.* Cummings, 15 Ill. 449; Atkin *v.* Hinman, 7 Ill. 437.

A statement of damages in a declaration "at one thou. dollars" was held valid. Rice *v.* Buchanan (Ohio, 1844), 1 W. L. J. 395.

Where the dollar mark was omitted and a perpendicular line used to separate dollars and cents, *held*, the meaning was sufficiently clear. Gutzwiller *v.* Crowe, 32 Minn. 70; Smith *v.* Headley, 33 Minn. 384.

But where the dollar mark has been omitted and there is no mark, dot, or line to separate dollars and cents, and to show what is meant, it has been held void. Tidd *v.* Rines, 26 Minn.

III. **MISCELLANEOUS.**—Other words, letters, and symbols which have obtained an invariable and universal meaning by continual use may be used for their full written equivalent.[1]

201; Lawrence *v.* Fast, 20 Ill. 339; 61 Am. Dec. 274; Lane *v.* Bommelmann, 21 Ill. 143; Avery *v.* Babcock, 35 Ill. 175.

A fee bill comprised of several items was footed up and the result expressed thus "15.10: total." *Held*, that the bill lacked the requisite certainty. Peter *v.* Hill, 13 Ill. App. 36.

Vermont.—The mark commonly used to denote dollars ($) is not part of the English language, within the statute of this state, which requires declarations and other pleadings to be drawn in the English language; and a declaration in *assumpsit* upon a promissory note in which the amount for which the note was given was only expressed in figures with the mark for dollars prefixed (thus, $226.15) was held insufficient on demurrer. Clark *v.* Stoughton, 18 Vt. 50; 44 Am. Dec. 361.

Tax Judgments.—A description of land by abbreviations is sufficient if the meaning is plain. As, "Matthias Wagoner, S. E. 1/4 of N. W. 1/4 Sec. 18 T. 21, N. R. 7 E., 40 acres." This was held a sufficient description. Jordan Ditching, etc., Assoc. *v.* Wagoner, 33 Ind. 50. To same effect see Frazer *v.* State, 106 Ind. 471 (S. E. 1/4 N. W. 1/4 Sec. 16, etc.), *appd.* in Wasson *v.* First Nat. Bank, 107 Ind. 206; Sibley *v.* Smith, 2 Mich. 486. *Compare* Detroit Young Men's Soc. *v.* Detroit, 3 Mich. 172; Smith *v.* Headley, 33 Minn. 384.

But a description of the land against which the judgment purports to be rendered, as "S. 2 N. E. 4 S. E. 4" of a designated section, township, and range, is fatally defective, and the judgment is upon its face of no effect. Keith *v.* Hayden, 26 Minn. 212.

Deed.—The description of land in a deed as "No. 8 Rg. N. W. P. Elliottsville" was held not sufficient to pass title to any particular parcel. Moulton *v.* Egery, 75 Me. 485. To like effect, Roberts *v.* Deeds, 57 Iowa 320.

Indictment—Description of Land.—An indictment charging a conspiracy to procure the allowance of a false and fraudulent claim against the United States for compensation for a survey of land claimed to have been made by defendant, describing the land as "Tp. 1 S. 1 W.; Tp. 1 S. R. 16 W. S. B. M.," and not otherwise locating the lands, *held*, defective. The court, per Field, J., said: "An indictment is to be read to the accused unless the reading is waived. The language should therefore be so plain that one of ordinary intelligence can understand its meaning. For that purpose common words are to be used as descriptive of the matter. Abbreviations of words employed by men of science or in the arts will not answer without full explanation of their meaning in ordinary language. The use of the initials 'A. D.' to indicate the year of our Lord is an exception because of its universality. Arabic figures and roman letters have also become indicative of numbers as fully as words written out could be. They are of such general use as to be known by all men. They therefore may be employed in indictments. But the initials here have reference to the public lands as marked in the public surveys. They are signs used in a particular department of public business and are not matters of general and universal knowledge by all speakers of the English language." U. S. *v.* Reichert, 32 Fed. Rep. 142.

1. **"Vs." for Against.**—Thus "vs." is a legal term for against. Nor are "vs." and like abbreviations subject to objection as being Latin, where statutes forbid the use of language other than English, they having become anglicized by use. Smith *v.* Butler, 25 N. H. 521.

"&c." for and so forth.—Berry *v.* Osborn, 28 N. H. 279; Bryan *v.* Bates, 15 Ill. 87, where a plea which read "as to the assault, etc.," was held to imply "battery."

"&" for and.—Brown *v.* State, 16 Tex. App. 245; Com. *v.* Clark, 4 Cush. (Mass.) 596.

"L. S." for Seal.—Smith *v.* Butler, 25 N. H. 521; Holbrook *v.* Nichol, 36 Ill. 161.

"Ads." for Ad Sectam.—Bowen *v.* Wilcox, 76 Ill. 11

"Co.," "Com." for Company.—Keith *v.* Sturges. 51 Ill. 142.

"U. States" for United States.—The declaration in an action for libel con-

tained the words "U. States," but in the paper produced in evidence it was written United States. *Held*, immaterial variance. The court, per Kent, Ch. J., said the jury might consider "U. States" as an abbreviation of "United States," especially if there was usage to warrant it. In a late proclamation of the President of the United States and in various public documents we find the words "U. States" used for United States. Lewis *v.* Few, 5 Johns. (N. Y.) 1.

"C. O. D." for Collect on Delivery.—"These letters are by no means cabalistic; they have no occult or mysterious meaning, as used in appellee's complaint. In the ordinary commerce of the country these letters have acquired such a fixed and determinate meaning that courts and juries, from their general information, will readily understand what is meant thereby when they are used as the appellees have used them in their complaint. If the complaint were defective, for the want of an averment of the meaning of those letters, the defect could only be reached by a motion to make more specific, and which would certainly be cured by the verdict." Per Howk, J., in U.S. Express Co. *v.* Keefer 59 Ind. 263. See State *v.* Intoxicating Liquors, 73 Me. 278.

But in Collender *v.* Dinsmore, 55 N. Y. 205, Allen, J., said: "The letters "C. O. D." followed by an amount of money have come to be very well understood in the community and by the public, but perhaps could not without the aid of extrinsic evidence be read and interpreted by the courts; that is, their meaning may not be considered as judicially settled or so well understood that judicial notice can be taken of the purpose for which these letters are used."

See also American Merchants' Union Express Co. *v.* Wolf, 79 Ill. 430; McNichol *v.* Pacific Express Co., 12 Mo. App. 401.

In *Illinois* it is held that in order to introduce parol proof of the sense in which the letters "C. O. D." were used it was necessary to aver in pleading that they were used in the sense contended for. American Express Co. *v.* Lessem, 39 Ill. 312.

Double Comma, " "—The use of the double comma to indicate repetition is sanctioned not only by common usage but by standard literary authority. Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 59.

Attorney's Fee Bill.—An attorney in rendering his bill may use such abbreviations as are commonly used in the English language, under the statutes of 2 George II, c. 23, and 12 George II, c. 13, s. 5. A bill containing the following abbreviations, "Drawg. declar. ffs. 15, Instrons. for case, attg. you in long confce, Preparing afft.," was held such as anybody would understand and therefore good. Frowd *v.* Stillard, 4 C. & P. 51; 19 E. C. L. 268.

"O. F. B. A."—Where a writ was endorsed "Dr. Peter Brudgeman, O. F. B. A.," it was held clear from the remainder of the writ that "Odd Fellows Building Association" was meant. Odd Fellows Bldg. Assoc. *v.* Hogan, 28 Ark. 261.

"C. B. & Q. R. R. Co."—Courts will not take judicial notice that "C. B. & Q. R. R. Co." stands for Chicago, Burlington and Quincy Railroad Co. Accolo *v.* Chicago, etc., R. Co., 70 Iowa 185.

Names of States.—The *Texas* courts hold that the ordinary abbreviations of the names of states, as "Mo." for Missouri, "La." for Louisiana, etc., are not within judicial cognizance. Ellis *v.* Park, 8 Tex. 205; Russell *v.* Martin, 15 Tex. 238.

Degree Mark.—The use of the degree mark, "°," is bad in *Vermont*. State *v.* Jericho, 40 Vt. 121; 94 Am. Dec. 387.

ABDUCTION.

I. INTRODUCTORY, 50.
II. THE INDICTMENT, 50.
III. INSTRUCTIONS, 52.

As to the Abduction of Children, see KIDNAPPING.

I. INTRODUCTORY.—An abduction is the act of taking away or detaining a woman either against her own will or, in the case of a minor, against the will of her parent or other person having the lawful charge of her.[1]

II.—THE INDICTMENT—The Form.—At common law an indictment for abduction was exceedingly technical in form. The offence being a statutory[2] one, all the elements thereof as con-

1. Sweet's Law Dict.; Anderson's Law Dict.; Am. & Eng. Ency. Law, vol. 1, tit. *Abduction*. This artiicle treats only of procedure in abduction proper; the kindred subjects of kidnapping and seduction are treated of under their respective titles.

2. The crime of abduction was defined by statute of 3 Hen. VII, c. 2.

The following was a good form of indictment under this stafute: "That A. B., late of, etc., on, etc., at, etc., in and upon one M. W., spinster, then and yet being under the age of fourteen years, and a maid, and only daughter and heir of P. W., then lately deceased, she the said M. W. then and there having substance in movable goods to the value of one thousand pounds of lawful money of Great Britain, and in lands and tenements to the value of fifteen hundred pounds by the year, of like lawful money, did make an assault, and her the said M. then and there did put in great danger of her life, and her the said M., with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, feloniously, and against the will of her the said M., violently did take, force, and convey away, with intention that he the said A. B., for lucre and the sake of her substance, feloniously should marry and have the said M. to wife; and that the said A. B. afterwards, to wit, on, etc., by the assent, procurement, and abetment of the said A. M., J. J., and C., the wife of F. C., late of, etc., gentleman, and W. C., late of the same parish and county, clerk, with force and arms, at, etc., feloniously and for lucre of the said substance of the said M. W., did marry, and had the said M. W. to wife; against the form of the statute, etc., and against the peace, etc. And the jurors, etc., do further present that the said A. M., J. J., C., the wife of F. C., and W. C., on the said fourteenth day of November, in the year aforesaid, at, etc., in the county of —— aforesaid, with force and arms, knowingly and feloniously were assisting, aiding, procuring, assenting, abetting, and maintaining the aforesaid A. B. in doing and committing the felony aforesaid, against the form of the statute, etc., and against the peace, etc." Chitty's Criminal Law, vol. 3, 818. See other precedents: Cro. C. C. 475; Trem. P. C. 34; Pla. Cor. 174; West. 224; Ra. Ent. 487; Stark. 432. See the indictment on which Sweden and his assistants were convicted for carrying away Miss Rawlins, 5 Harg. St. Tr. 465.

tained in the statute were set out in the indictment. But under the liberal rules of criminal practice which now obtain in the various states an information or indictment is sufficient if it follows the language of the statute and alleges all the acts and facts which the legislature has said shall constitute the offence, and is direct and certain as to the party to be charged, and the abduction itself.[1]

Allegations—Consent of Parent.—The indictment need not allege that the taking was without the consent of the parent or guardian.[2]

Custody.—But it is proper to state from whose custody the female was taken.[3]

Age of Female.—It is not necessary to allege that defendant knew that the female was under the statutory age.[4]

Charge of Malice.—Nor need the indictment allege that the accused acted maliciously, wilfully, or feloniously.[5]

Intention of Abduction.—It is not necessary to state that the abduction was done with the intention to marry or defile,[6]

1. People v. Fowler, 88 Cal. 136.

The following were held sufficient forms of indictment:

"The grand jurors of the State of Missouri, summoned from the body of Ralls County, empanelled, charged, and sworn, upon their oaths present that William H. Johnson, late of the county aforesaid, on the —— day of ——, 1887, at the county of Ralls, State aforesaid, did then and there bring one Rosa Price, a female under the age of eighteen years, to wit, seventeen years, unlawfully and feloniously take from one Lewis Price, her father, he the said Lewis Price then and there having the legal charge of the person of the said Rosa Price, without the consent and against the will of the said Lewis Price, for the purpose of concubinage, by having illicit sexual intercourse with him, the said William H. Johnson, against the peace and dignity of the state," State *v.* Johnson, 115 Mo. 486.

The defendant, at a time and place mentioned, "did unlawfully, wilfully, and feloniously take one Nora M. Greenslitt into a certain building (particularly described as a livery stable) for the purpose of sexual intercourse with him, the said Wesley Keith; . . . she, the said Nora M. Greenslitt, being then and there an unmarried female, and under the age of sixteen years, to wit, of the age of ten years; contrary to the form of the statute," etc. State *v.* Keith, 47 Minn. 559.

2. State *v.* Jamison, 38 Minn. 21.

3. State *v.* Jamison, 38 Minn. 21. But where the indictment alleges that the defendant took a female under 18 years of age from the custody of her mother, it is not necessary to allege that the mother had the legal charge of the person of the girl. People *v.* Fowler, 88 Cal. 136. Nor need the order of commitment recite that the father, mother, or guardian had legal charge of the female's person. *Ex p.* Estrado, 88 Cal. 316.

4. People *v.* Fowler, 88 Cal. 136.

5. Higgins *v.* Com. (Ky. 1893), 21 S. W. Rep. 23.

6. Cro. Car. 489. It is safe to insert such allegation, however. 1 Hale 660. But some of the states in their "abduction" statutes make mention of carnal intercourse and concubinage. This gives rise probably to a different rule than the one stated in the text. See the following cases:

"**For the Purpose of Prostitution.**"—An indictment charging the defendant with the abduction of a female "for the purpose of having illicit sexual intercourse with her" does not charge an abduction of a female "for the purpose of prostitution," within the meaning of the statute. 2 G. & H. 441, sec. 16; Osborn *v.* State, 52 Ind. 526.

Rev. St. Ind. 1881, § 1993, provides for the punishment of any person who "entices or takes away any female of previous chaste character from wherever she may be to a house of ill fame or elsewhere for the purpose of prostitution." *Held*, that, in an informa-

At common law it was necessary to state that the taking was for lucre.[1]

Place and Manner.—The place and the manner of the taking must also be set forth.[2]

Joinder of Counts.—The indictment for abduction may contain several counts.[3]

III. Instructions.—Where the statute defines different kinds of abduction, the court may read and explain all the kinds to the jury, although the defendant is only charged with one.[4]

tion under said section, an allegation that the enticing was done "with the felonious intent of rendering [the person enticed] a prostitute" was equivalent to alleging that it was done "for the purpose of prostitution." Nichols *v.* State, 127 Ind. 406.

Insufficient Indictment.—Under Gen. St. Ky. c. 29, art. 4, § 9, rendering any one who shall "unlawfully take or detain any woman, against her will, with intent to have carnal knowledge of her, liable to punishment," it is not sufficient that an indictment charges the defendant with having carnal knowledge of a woman against her will, with intent to have such knowledge. Krambiel *v.* Com. (Ky., 1887), 2 S. W. Rep. 555.

Surplusage.—An information, otherwise good, charging E. O. with the abduction of a female under the age of 18 years from her parents for the purpose of concubinage is not vitiated by the addition of the words "for the purpose of having sexual intercourse with him, the said E. O." State *v.* Overstreet, 43 Kan. 299.

1. Cro. Car. 484. But if the jury were not satisfied that the prisoner was actuated by motives of lucre, and they were satisfied that he used force to the person of the female, they might convict him of an assault under 7 Will. IV and 1 Vict. c. 85, s. 11. Reg. *v.* Barratt, 9 C. & P. 387; 38 E. C. L. 167, per Parke, B.

2. Cro. Car. 484. Where the allegation was that the female was enticed from the city of Muncie to the city of Indianapolis, this was held defective in not stating the particular house or place in which she was enticed. Nichols *v.* State, 127 Ind. 406. But a defect in not stating the house from which the girl was enticed is cured by verdict. Nichols *v.* State, 127 Ind. 406.

Contra.—It is not necessary to state from what place the girl was taken. State *v.* Keith, 47 Minn. 559. The manner of detention need not be stated. Cargill *v.* Com. (Ky., 1890), 13 S. W. Rep. 916.

3. Mason *v.* State, 29 Tex. App. 24, where the joinder of counts for kidnapping and abduction was sustained; State *v.* Tidwell, 5 Strobh. (S. Car.) 1, where counts under both the 3d & 4th sections of the stat. 4 & 5 Phil. &. M., ch. 8, were joined.

Somewhat analogous to the rule stated in the text is that which allows a declaration for enticing away a minor daughter from her father to contain a count for harboring and secreting her. Stowe *v.* Heywood, 7 Allen (Mass.) 118.

Not Separate Offences.—When an indictment charges an assault and battery only as a part of or mode of executing a forcible arrest and abduction, it is not subject to the objection that it contains two separate and distinct offences. People *v.* Ah Own, 39 Cal. 604.

An indictment for abduction which charges taking "for the purpose of prostitution and sexual intercourse" does not charge two offences. People *v.* Powell, 4 N. Y. Crim. Rep. 585.

4. People *v.* Brandt (Supreme Ct.), 14 N. Y. St. Rep. 419.

ABIDING THE EVENT.

By F. A. Card.

I. Definition, 53.
II. Stipulations and Agreements, 54.
III. Staying Proceedings, 56.
IV. Bonds and Recognizances, 57.
V. Costs, 59.
VI. Funds in Court, 61.

I. **Definition.**—"Abiding the event," or "to abide the event," mean either awaiting the event or acting in accordance with the event, as by obeying or conforming to the order or decree of the court.[1] The terms are most used to indicate awaiting the event without action,[2] but are frequently used to indicate action in

1. Anderson's Law Dict. p. 6; Jackson *v.* State, 30 Kan. 88.

Application of Term.—In determining the application of the term the question is not the abstract meaning of the words, but their meaning as applied to the facts of the particular case. Hodges *v.* Pingree, 108 Mass. 585.

Where the statute required a recognizance conditioned "that the defendant will appear before the proper court at the proper time and there remain to abide the judgment of the court of appeals," and a bond was given conditioned "that the defendant will appear and await the action of the court of appeals and not depart until discharged by order of the court," a motion to dismiss the appeal because the bond was not in accordance with the statute was granted, the court holding that the bond given did not require appellant to abide the judgment of the court, but only to await the action of the court, and was not a substantial compliance with the statute. Wilson *v.* State, 7 Tex. App. 38.

2. **In Arbitration Bonds** the words "abide the award" mean the same as to stand to the award, viz., to await the award without revocation. It does not mean that the parties will acquiesce in and not dispute the validity of the award when made. Vynior's Case, 8 Coke 82; Chamley *v.* Winstanley, 5 East 266; Shaw *v.* Hatch, 6 N. H. 162; Marshall *v.* Reed, 48 N. H. 36.

Where a bond was conditioned to pay stipulated damages in case defendant did not abide by and perform an award, *held*, an averment of an award in favor of plaintiff, and a refusal of defendant to pay the award on demand, showed a breach of the bond. Sleeper *v.* Pickering, 17 N. H. 461.

Where a Bond in Ne Exeat was given conditioned "to abide and perform the judgment of the court," and the surety on the bond, having placed his principal in the custody of the court, petitioned to be released from the bond, his attorney contending that the effect of the bond was to abide the event of the suit, the motion was denied, the court stating that it could not regard a bond to perform, etc., as equivalent to one to abide the event of the suit, and further holding that in *ne exeat* a surety had no right to surrender his principal. Griswold's Petition, 13 R. I. 126.

Agreement to Perfect Reference.—On a bond conditioned that defendant would in good faith abide by and fulfil his agreement in having and perfecting a reference, *held*, that evidence that de-

conformance with the event,[1] the word "event" meaning result.[2]

II. STIPULATIONS AND AGREEMENTS.—**Power of Attorney.**—The term "abide the event" is frequently found in stipulations between attorneys as to the conduct of actions. An attorney, as such, by virtue of his employment has power to bind his client by stipulation that but one of several actions shall be tried, and that the judgment in the action tried shall determine the judgment in the other actions.[3]

fendant prevented one of the referees from wholly completing and perfecting the reference showed a breach of the bond. Quimby *v.* Melvin, 35 N. H. 198.

1. **A Bond to Appear and Abide the Order of the Court** means to perform, execute, and conform to such order as the court makes. It is not satisfied by appearance merely. Taylor *v.* Hughes, 3 Me. 433; Hodge *v.* Hodgdon, 8 Cush. (Mass.) 297; Jackson *v.* State, 30 Kan. 88.

Where on appeal from a money judgment a bond was given "to abide and satisfy the judgment or order which the appellate court may give," it was held that it meant to execute, perform, and conform to the judgment or order and required the carrying it into complete effect. Erickson *v.* Elder, 34 Minn. 371.

Abiding Equity Decision in Partition Suit.—Where it was agreed that a partition at law should "abide the decision" in an equity suit brought for the same purpose, *held*, the title having been determined in the equity suit, that partition at law should be ordered in accordance with the decision in the equity suit as to title. Hodges *v.* Pingree, 108 Mass. 585.

2. The event is the result of all proceedings incident to the litigation. Field *v.* Great Northern R. Co., 39 L. T. 80, 3 Ex. Div. 261.

When Each Party Succeeds in Part the word "event" is to be read distributively, so that each will be entitled to his share of costs. Myers *v.* Defries, 42 L. T. 137.

Order for New Trial.—The "event" is the decision on the *particular ground* on which the new trial is granted; viz., if the new trial was decided on a different ground from that on which the motion therefor was granted, it would not be the event contemplated by the order for a new trial. Jones *v.* Williams, L. R. 8 Q. B. 280; Dawson *v.* Harris, 11 C. B. N. S. 801, 103 E. C. L. 799.

Witness Interested in Event.—Where the question was whether a witness was competent, viz., as being interested in the event of the action, *held*, that event meant result, and that the witness was incompetent if interested in the result of the action. Fitch *v.* Bates, 11 Barb. (N. Y.) 473.

3. Ohlquest *v.* Farwell, 71 Iowa 231; Slaven *v.* Germain, 64 Hun (N. Y.) 506; Eidam v. Finnegan, 48 Minn. 53; Dilworth *v.* Curts, 139 Ill. 508; North Missouri R. Co. *v.* Stephens, 36 Mo. 150, 88 Am. Dec. 138.

An attorney by virtue of his general employment is authorized to do all acts necessary to the prosecution or defence which pertain to the remedy. The choice of proceedings, manner of the trial, and the like, are within the sphere of his authority, and his client is bound by his acts. Hence he may consent to consolidate several actions for trial, or that the trial of one shall determine the others, for this pertains to the remedy, manner of trial, and is not an agreement for judgment or a compromise. Ohlquest *v.* Farwell, 71 Iowa 233.

Power of Special Counsel. — Where counsel was employed especially to argue a demurrer and was not the general counsel or attorney of the party, *held*, he had no power to stipulate that a decision on the demurrer should be final, and thus bind the party for whom he appeared to abide by the result of such decision. Baron *v.* Cohen, 62 How. Pr. (N. Y.) 367.

Partition Suits in Other States. — Where it was stipulated by and between the parties by written agreement that all real estate owned by them in common should be partitioned in New York, although some of it was in other states, such agreement was enforced by enjoining the prosecution of partition suits in other states, it

Form of Stipulations.—Such stipulations are usually in the form that those not tried shall abide the event or decision of the one tried. Usually such stipulations should be in writing or entered in the court minutes to be binding, and this is the safer practice.[1]

An Attorney for Infants has not power to bind them by such a stipulation without the consent and concurrence of the court.[2]

Meaning of Words in Stipulations.—When used in such stipulations the words mean that the parties shall acquiesce in and be bound by the judgment in the action tried.[3]

being held equivalent to an agreement to abide by the decision of the courts of New York as to the partition of said lands. Bowers *v.* Durant, 43 Hun (N. Y.) 348.

Defence Common to Two Actions.—Where it was stipulated that a defence common to two actions should abide an appeal in one of them, *held*, binding and enforced. Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 11.

Where, in a number of actions by different plaintiffs against the same defendant, it was stipulated by the respective attorneys "that two of the actions, representing the two classes of cases involved, should be tried, and that a like judgment should be entered in all the cases of the same class as in the one tried without a trial, and that if an appeal was taken all cases of the same class should abide the determination of the appeal, it being the intention to determine all questions involved by the trial of the two suits specified," —the defendant, being defeated and having appealed, subsequently moved to dismiss its own appeal on the ground of a mistake of fact in entering into the stipulation. On appeal from an order granting such motion, *held*, it was erroneous and should be reversed; that the stipulation was such as the attorneys had power to make, was fair, mutual and binding, and would be enforced. McKinley *v.* Wilmington Star Min. Co., 7 Ill. App. 392.

1. Where such a stipulation was entered into in open court, but was not reduced to writing and filed with the clerk or entered in the minutes, *held*, void, and that it was not rendered valid by an order subsequently obtained by one of the parties without the consent of the other to enter it on the minutes *nunc pro tunc*. Borkheim *v.* North British, etc., Ins. Co., 38 Cal. 623.

The Iowa Code provided that no evidence of an agreement of an attorney to bind his client should be received except the statement of the attorney or his written agreement filed or entered on the minutes. *Held*, the affidavit of the opposing attorney could not be received as evidence of an agreement as to the submission of several actions. Searles *v.* Lux (Iowa, 1892), 52 N. W. Rep. 327.

2. Where some of the parties to an action were infants and their attorney entered into a stipulation that the action should abide the event of another action, *held*, that the power of an attorney for infants, or of a guardian *ad litem* for infants, did not extend so far as to authorize such stipulation; that it would not be enforced as to the infants unless it had been ratified and approved by the court on evidence clearly showing it was for the interest of the infants; that the actions involved the same questions and the infants were represented by the same guardian *ad litem*. The judgment entered on such stipulation was reversed as to the infants and affirmed as to the adults. Eidam *v.* Finnegan, 48 Minn. 53.

3. Ohlquest *v.* Farwell, 71 Iowa 231; Eidam *v.* Finnegan, 48 Minn. 53; Slaven *v.* Germain, 64 Hun (N. Y.) 506; Holahan *v.* Sackett Harbor, etc., R. Co., 24 How. Pr. (N. Y.) 155.

Stipulation in Different Forms. — In one case the stipulation appeared in three forms, viz.: in clerk's minutes it was, "On stipulation this case was ordered over the term to abide the result of the case of H. now pending in General Term;" in judge's minutes, "Stipulated that issues in this case except question of damage abide result of H. case now pending in General Term;" in stenographer's minutes, "Stipulated that issues in this case except question of

III. STAYING PROCEEDINGS IN ONE ACTION TO ABIDE THE EVENT OF ANOTHER. See ANOTHER SUIT PENDING.

damages abide result of H. case now pending in General Term, and that if H. case is decided in favor of plaintiff all questions of fact and law in this case are thereby decided in favor of this plaintiff except the question of damages." The court held the meaning of these several entries was substantially the same; that the stipulation was binding, and no question could be tried except the question of damage, the H. case having been decided in favor of plaintiff by the General Term. Slaven *v.* Germain, 64 Hun (N. Y.) 506.

Actions of Ejectment.—Where in several actions of ejectment it was stipulated that all but one should be stayed and should abide the event of the one tried, and in case of judgment therein for defendant, the defendants in the others should deliver possession to plaintiff or purchase of him, *held*, plaintiff having been nonsuited in the action tried, that the stipulation was binding and estopped defendants or their grantees from claiming title to the property. Brown *v.* Sprague, 5 Den. (N. Y.) 552.

Where Two Actions on Covenant were Consolidated for trial under stipulation that they should be tried on the issue of title and judgment might include recovery on other issues as title might appear, *held*, to narrow the whole question to that of title and make judgment dependent on that issue alone. Welsh *v.* Cooley, 44 Minn. 446.

Decision of Appellate Court.—Where, on motion for a stay pending decision of another action by appellate court, a stay was ordered on condition that defendant stipulate that the action abide the result of said appeal, and a stipulation was entered into to the effect that unless the appellate court held the bonds involved in the action valid, defendant's answers should be stricken out and plaintiff have judgment as demanded, and the appellate court decided the appeal without passing on the question of the validity of the bonds, *held*, defendant was bound by the stipulation and it would be enforced. McNeill *v.* Andes, 40 Fed. Rep. 45.

Repeal of Statute Pending Action.—Where it was stipulated that one of several actions should be tried and the others abide the final judgment in the one tried, and a like judgment should be entered in each of the others, *held*, binding and enforced, although meanwhile the legislature had repealed the act on which the judgment rendered in the one tried was based. North Missouri R. Co. *v.* Stephens, 36 Mo. 150, 88 Am. Dec. 138.

Stipulation to Abide by "Issue."—Where it was stipulated between attorneys "that a certain action should abide by the issue in a specified case," and in the specified case the plaintiff finally succeeded and his attorney then moved for judgment in the action covered by the stipulation upon the stipulation and the proceedings in the specified case, and the motion was granted and judgment for plaintiff entered, *held*, proper; that to abide by the issue meant the ultimate result or end of the specified case, and that the only question left open by the stipulation was that of damages, as to which there was no error, and the judgment was affirmed. Niagara Ins. Co. *v.* Scammon, 35 Ill. App. 586.

Amending of Pleadings not Changing Issue does not Affect Stipulation.—Where it was stipulated between attorneys "that one of a number of actions should be tried as a test case and the others should abide the result of the test case," *held*, binding, although the judgment in the test case was once reversed and a new trial had on amended pleadings not substantially changing the issues. Judgment entered on such stipulation was affirmed. Galbreath *v.* Rogers, 45 Mo. App. 327.

Where in two cases it was stipulated and entered in the minutes "that one should be tried and proceedings in the other stayed until final judgment in the one tried, and that on such final judgment a judgment should be entered in the other action corresponding to and like the judgment in the one tried," *held*, that on final judgment for plaintiff in the case tried he was entitled to enter a like judgment in the case not tried, and that the fact that in the case tried a judgment for plaintiff was reversed and a new trial had on amended pleadings not substantially changing the issues did not affect the stipulation or render it nu-

IV. BONDS AND RECOGNIZANCES.—Criminal Proceedings.—The words "to abide the order, judgment, or decision of the court," or equivalent words, when used in bonds or recognizances given in a criminal or *quasi*-criminal proceeding, are usually held to require an awaiting of the order or decision.[1]

gatory, the new trial resulting in judgment for plaintiff as on the first trial. Gilmour *v.* American Cent. Ins. Co., 67 Cal. 368.

"To Await" Held Equivalent to "to Abide."—Where it was stipulated between attorneys "that a number of untried cases should be submitted to the court upon the same evidence given in a specified case tried, and that the findings in the case tried should be the findings in those not tried, and that the untried cases should await but not abide the decision of the case tried," *held*, its effect was to make the decision in the case tried conclusive in the other cases, and the sole function of the court was to enter judgment in the untried cases on the findings in the case tried, and that exceptions not taken in the case tried could not be raised in the other cases. State *v.* Hannibal, etc., R. Co., 34 Mo. App. 597.

Married Woman Bound by Attorney's Stipulation.—Where in a number of cases in which one of the defendants was a married woman it was stipulated between attorneys "that one of the cases should be tried and that the others should abide the result of the one tried, and that the pleadings in the case tried should be considered as filed in the other cases," and the court consented to the stipulation and ordered it filed, and an order thereon was entertained in each case; and plaintiff having recovered judgment in the case tried, judgment for him was entered in the other cases on motion and production of the stipulation and proceedings had in the case tried, —*held*, on appeal from one of the judgments so entered, that the stipulation was binding and judgment properly entered thereon; that the fact that one of the defendants was a married woman did not affect the stipulation that her attorney, as such, had power to and bound her by the stipulation. Galbreath *v.* Rogers, 30 Mo. App. 405.

1. State *v.* Holmes, 23 Iowa 458; People *v.* Clary, 17 Wend. (N. Y.) 374.

The obligation of the sureties is fulfilled when the accused appears and awaits the decision of the court or is put under the control of the court. State *v.* Holmes, 23 Iowa 458; People *v.* Clary, 17 Wend. (N. Y.) 374; People *v.* McCully, 1 Edm. Sel. Cas. (N. Y.) 270; State *v.* Stout, 11 N. J. L. 124.

In contempt proceedings the condition of such a bond is broken by failure of the accused to appear on the day named. Thomas *v.* Cameron, 17 Wend. (N. Y.) 59.

Respite by Court.—Where action was brought against the sureties in a criminal matter, the bond being conditioned that the accused would appear and abide the order of the court, and the defence was that the accused appeared on a certain day and the court, against the objection of the sureties, respited the recognizance to another day, *held*, a good defence and equivalent to a surrender; that the purpose of the bond was to secure the appearance of the accused and put him under the power of the court, and this had been practically performed. People *v.* Clary, 17 Wend. (N. Y.) 374.

Power of Justice.—Where a justice had power to take a bond for the appearance of the accused, and one was taken conditioned that he would appear and abide the judgment of the court, *held*, equivalent to a bond to appear, and within the power of the justice, although counsel for the sureties contended that taking a bond to abide the judgment of the court was beyond the power of the justice and rendered the obligation void. Sturges *v.* Sherwood, 15 Conn. 149.

Second Failure of Accused.—Where a bond for the appearance of the accused was taken, and was forfeited on his failure to appear, and afterwards the accused was rearrested and said forfeiture cancelled and set aside, *held*, sureties not liable for a second failure of the accused to appear, because when he was rearrested he was in the custody of the court, and thereby the sureties were relieved from liability; that the purpose of the bond was to secure appearance of the accused, and the sureties would be

Civil Actions.—But in bonds and recognizances given in civil actions and proceedings, they are generally held to require compliance with, or performance of, the order or decision.[1]

liable if he failed to appear or abide the judgment of the court. (The form of the bond was not stated.) State *v.* Holmes, 23 Iowa 460.

Continuous Appearance.—Where in a criminal case the condition of the recognizance was "to appear before the court and answer concerning the charge, and not to depart without leave of court," *held*, it bound not only to appear on the day named, but to continue to appear until the accused was acquitted or, if found guilty, until sentence was imposed. And where the accused appeared at the trial and was found guilty, but departed before sentence was pronounced on him, *held*, the sureties on the recognizance were liable. Dennard *v.* State, 2 Kelly (Ga.) 139.

Held to Bind to Performance of the Judgment.—Where the condition of the recognizance was "that the accused shall be and appear before the judge of the court to answer, and not depart without leave, and abide the order and judgment thereof," and the accused appeared for trial, was convicted, and fined; moved for a new trial, which was denied; then failed to appear and pay the fine, and the recognizance was declared forfeited, the sureties contended they were discharged by the appearance of the accused and his submission to trial. *Held*, the sureties were liable; that the condition bound the accused not only to appear, but to abide the judgment of the court, viz., to perform and satisfy it by payment of the fine imposed. State *v.* Whitson, 8 Blackf. (Ind.) 178.

But where, in a contempt proceeding, the accused, although not in court when called, is subsequently arrested, brought into court, and adjudged guilty of contempt and imprisoned, the obligation of the sureties is performed, and they were held not liable to prosecution on the bond, and an action against them thereon was perpetually stayed. Barton *v.* Butts, 32 How. Pr. (N. Y.) 456.

An appeal bond to appear and abide the judgment of the court does not prevent the imposition of sentence, under the Alabama statutes. *In re* Newton, 94 Ala. 431.

1. Jackson *v.* State, 30 Kan. 88; Hodge *v.* Hodgdon, 8 Cush. (Mass.) 294; Taylor *v.* Hughes, 3 Me. 433; Fowler *v.* Thorn, 4 Ark. 208.

In bastardy proceedings a bond to abide the order of the court requires performance of the order, and failure thereof renders the sureties liable. Jackson *v.* State, 30 Kan. 88.

In arbitration bonds the words "to abide the award" or "stand to the award" have been held to mean simply to await the award without revocation, not to perform it when made. Marshall *v.* Reed, 48 N. H. 35.

But by the mere submission to arbitration it is held the law implies a promise to abide by and perform the award. Kyd on Awards, pp. 11 & 278, Ed. of 1808; Knox *v.* Symmonds, 3 Bro. C. C. 361; Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 437.

A promise to pay the amount found due is implied from an agreement to abide by the decision of the arbitrators. Efner *v.* Shaw, 2 Wend. (N. Y.) 567.

In libels in admiralty a bond is required conditioned to abide and answer the decree of the court. 9 U. S. Stat. at Large, p. 181, Act of Mch. 3, 1847, § 1; The Gran Para, 10 Wheat. (U. S.) 498.

Such a bond requires performance of such a decree, as distinguished from merely awaiting the decree. The Palmyra, 12 Wheat. (U. S.) 19; The Wanata, 95 U. S. 611.

A bond on appeal to pay money or otherwise abide the decision of the court requires performance of such judgment. Fowler *v.* Thorn, 4 Ark. 210.

Miscellaneous.—Under the provision of the code of California, on appeal from a judgment for the delivery of personal property, the appellant must give a bond to obey the order of the appellate court, as well as an ordinary bond, before he can obtain a stay. Swasey *v.* Adair, 88 Cal. 203.

A bond to pay money according to the order of the court can be enforced only according to the true intent of the condition under which it was given and for the benefit of those for whom it was given. Elmendorf *v.* Lansing, 5 Cow. (N. Y.) 468.

V. Costs.—The term "costs to abide the event" has long been used.[1] It is the general rule, in the absence of statute to the contrary, that costs should abide the event of the suit or action and go to the prevailing party.[2] The event on which costs depend is usually the final disposition of the litigation.[3]

Where a New Trial is granted costs are usually given to abide the event.[4] In such case the costs of appeal go to the party

1. By Statute 9 Ann. ch. 20 it was provided that in disputes in relation to municipal officers the relator should receive or pay costs according to the event of the suit. 3 Blackstone Com. p. 264.

It was one of the usual terms of arbitration agreements or rules that costs should abide the event. 2 Chitty's General Practice p. 86.

2. McReynolds *v.* Cates, 7 Humph. (Tenn.) 29; Carroll *v.* Hardy, 21 Mo. 66; Turley *v.* Logan County, 17 Ill. 151; Clifton *v.* Sparks, 29 Mo. App. 560. See Costs.

3. Green *v.* Wright, 46 L. J. C. P. 427; Field *v.* Great Northern R. Co., 47 L. J. Q. B. 662; Reeves *v.* McGregor, 9 Ad. & El. 577, 36 E. C. L. 201; Meule *v.* Goddard, 5 B. & Ald. 766; First Nat. Bank *v.* Fourth Nat. Bank, 84 N. Y. 469; 2 Chitty's General Practice p. 86.

Parties should not be compelled to pay costs while a suit is still pending, but they should abide the event of the suit. Carroll *v.* Hardy, 21 Mo. 66.

Costs should only be awarded on the true merits as they appear at the final disposition of the case, and not at any intermediate stage. Turley *v.* Logan County, 17 Ill. 151.

Where an action is discontinued, that is such a final disposition as determines the right to costs. Van Wyck *v.* Baker, 11 Hun (N. Y.) 309.

Where costs were to abide the event in an action in which defendant interposed a counterclaim, *held*, the event on which costs depended was which party succeeded in getting judgment, the claims and demands of both parties being considered and adjusted. Chatfield *v.* Sedgwick, 4 C. P. Div. 459. *Contra*, Stooke *v.* Taylor, 5 Q. B. Div. 569.

Where costs are to abide or follow the event it means the result or outcome of the litigation; and if there are several issues, it is to be read distributively as "events," and costs follow to each party according to the issues or events on which they succeed. Myers *v.* Defries, 49 L. J. Ex. 266; Abbott *v.* Andrews, 51 L. J. Q. B. 641; Goutard *v.* Carr, 53 L. J. Q. B. 55; Hawke *v.* Brear, 54 L. J. Q. B. 315; Hardy *v.* Fetherstonhaugh, 10 B. & S. 628.

Where there were several issues and the arbitrator only made a general finding for one party, the case was sent back for findings on the several issues, so that the question of costs could be determined. Ellis *v.* Desilva, 50 L. J. Q. B. 328.

The general costs follow the general result or balance of the decision on the issues or events. Goutard *v.* Carr, 53 L. J. Q. B. 55; Lund *v.* Campbell, 54 L. J. Q. B. 281.

Where in an arbitration costs were to abide the event, it means such a event as in law would entitle to costs. Hence if successful party would not be entitled to costs under the rules or statutes governing costs, he cannot obtain costs although successful in the arbitration. Ward *v.* Mallinder, 5 East 489; Swinglehurst *v.* Altham, 3 T. R. 38.

Although costs be given to abide the event, the right to them depends on the right to general costs in the action; and if party finally successful is not entitled to general costs, he cannot have costs given to abide the event. New *v.* Anthony, 4 Hun (N. Y.) 52, 6 Thomp. & C. (N. Y.) 243; Snyder *v.* Collins, 12 Hun (N. Y.) 383.

4. U. S. *v.* Beaty, Hempst. (U. S.) 496; Walker *v.* Barrow, 6 Minn. 508; Robbins *v.* Hudson River R. Co., 7 Bosw. (N. Y.) 1; Jacobsohn *v.* Belmont, 7 Bosw. (N. Y.) 14; Den *v.* Johnson, 18 N. J. L. 101.

But where verdict is set aside as against the weight of evidence and new trial granted, costs should be awarded absolutely and not to abide the event, to be paid by the party on whose motion it is set aside. Peck *v.* Fonda, etc., R. Co., 85 N. Y. St. Rep. 95, 6 N. Y. Supp. 379, 53 Hun (N. Y.) 634; Maher *v.* Simmons, 47 Hun (N. Y.) 480.

finally successful in the action, although he may not have been the party successful on the appeal on which the new trial was granted.[1] But where costs to abide event are given to a party specified as the appellant or respondent, that party only in general can have costs of appeal.[2] Where judgment is reversed and new

Where a new trial is granted, costs to abide event, the event is the decision on the particular ground on which the new trial was granted. Jones *v.* Williams, L. R. 8 Q. B. 280; Dawson *v.* Harris, 11 C. B. N. S. 801; 103 E. C. L. 799.

Where new trial is granted, costs to abide the event, the new trial or the result thereof is the event which determines the right thereto. First Nat. Bank *v.* Fourth Nat. Bank, 84 N. Y. 470; Koon *v.* Thurman, 2 Hill (N. Y.) 357, *distinguishing* Union Trust Co. *v.* Whiton, 78 N. Y. 491, in which it was held the court would not interfere with the discretion of the lower courts on this point.

Where a decree of a surrogate admitting a will to probate was reversed and a new trial granted, costs to abide the event, to be paid out of the estate to the one finally successful, were given. Lake *v.* Ranney, 33 Barb. (N. Y.) 70.

1. First Nat. Bank *v.* Fourth Nat. Bank, 84 N. Y. 469; Donovan *v.* Vandemark, 22 Hun (N. Y.) 307; Tall *v.* Mohawk Valley, etc., Ins. Co., 15 How. Pr. (N. Y.) 315; Comly *v.* New York, 1 Civ. Pro. Rep. (N. Y.) 306; Carney *v.* Rider, 2 Cow. (N. Y.) 617; Mott *v.* Consumers' Ice Co., 8 Daly (N. Y.) 244; Sanders *v.* Townshend, 63 How. Pr. (N. Y.) 343; Lotti *v.* Krakauer, 1 Civ. Pro. Rep. (N. Y.) 312, note; Van Wyck *v.* Baker, 11 Hun (N. Y.) 309; Isaacs *v.* New York Plaster Works, 43 N. Y. Super. Ct. 397; Flynn *v.* Equitable Assur. Soc., 18 Hun (N. Y.) 212; Marx *v.* McCloud, 21 N. Y. St. Rep. 957, 3 N. Y. Supp. 74, 50 Hun (N. Y.) 603; Koon *v.* Thurman, 2 Hill (N. Y.) 357.

But in the first department (N. Y.) it is held only the appellant on the appeal can have the costs of appeal if he be finally successful, and that respondent cannot have them although he finally succeeds. Union Trust Co. *v.* Whiton, 17 Hun (N. Y.) 593; Sheridan *v.* Genet, 48 Hun (N.Y.) 17, note; Lydd *v.* Kenny, 1 Civ. Pro. Rep. (N. Y.) 310, note; Durant *v.* Abendroth, 48 Hun (N.Y.) 16, 15 N.Y. St. Rep. 342, 13 Civ. Pro. Rep. (N. Y.) 434; House *v.* Lockwood, 48 Hun (N. Y.) 550. And the court of appeals refused to interfere with this construction of its own orders by the lower court. Union Trust Co. *v.* Whiton, 78 N. Y. 491.

South Carolina.—But under statute of South Carolina as to costs, costs of appeal go to party successful on appeal whether finally successful or not. Huff *v.* Watkins, 25 S. Car. 245; Cleveland *v.* Cohn, 13 S. Car. 397.

Party Finally Successful not Entitled to Costs of Appeal.—Where an order granting a new trial with costs to abide the event was affirmed by the general term with costs, *held*, the party successful on appeal was entitled to costs of appeal although not finally successful. Stevenson *v.* Pusch, 40 How. Pr. (N.Y.) 91.

Party Successful Finally not Entitled to Costs of Intermediate Appeal.—Where plaintiff succeeded on trial and at general term, but judgment was reversed by court of appeals and reargument ordered at general term with costs to abide the event, *held*, plaintiff not entitled to costs of the first argument at general term. Bigler *v.* Pinkney, 24 Hun (N. Y.) 224.

2. Van Gelder *v.* Van Gelder, 84 N. Y. 658; Fischer *v.* Langbein, 31 Hun (N. Y.) 273; Donovan *v.* Board of Education, 1 Civ. Pro. Rep. (N. Y.) 311, note; Howell *v.* Van Siclen, 4 Abb. N. Cas. (N. Y.) 1.

But a Statute as to Costs Controls this Rule.—Where costs are governed by statute and go as a matter of right to the party finally successful, he is entitled to the costs of an appeal which were expressly given to his opponent to abide the event. Murtha *v.* Curley, 92 N. Y. 361, 65 How. Pr. (N. Y.) 86, 3 Civ. Pro. Rep. (N. Y.) 266; Revere Copper Co. *v.* Dimmock, 29 Hun (N. Y.) 299; Sanders *v.* Townshend, 11 Abb. N. Cas. (N. Y.) 217; Donovan *v.* Vandemark, 22 Hun (N. Y.) 307.

When costs are a matter of right, the discretion given by statute on granting new trials is limited to costs in the appellate court. Sturgis *v.* Spofford, 58 N. Y. 103.

trial granted with costs to abide the event, the finally successful party is entitled to the costs of the various trials,[1] and also all costs of the action up to that time, including costs in the appellate court.[2]

In Equitable Actions the discretion of the court usually controls the rule. See COSTS.

Test Action.—Where it is stipulated that one or more actions shall abide the event of another, the result of the test action determines the costs of the others.[3]

VI. FUNDS IN COURT.—In many cases property in possession or under control of the court is held to abide the event of the court's action.[4]

Where the decision of the appellate court was costs to abide event, but was erroneously entered as costs to appellant to abide event, the order will be corrected to conform to decision. Martine *v.* Huyler, 34 N. Y. St. Rep. 326, 12 N. Y. Supp. 66; 58 Hun (N. Y.) 608.

Where judgment for plaintiff was reversed, with costs to defendant to abide the event, and afterwards defendant had leave to amend his answer on payment of costs to that time, *held*, this did not deprive defendant of his contingent right to costs given by the order reversing the judgment. Havemeyer *v.* Havemeyer, 62 How. Pr. (N. Y.) 476.

1. Howell *v.* Van Siclen, 4 Hun (N. Y.) 425, 4 Abb. N. Cas. (N. Y.) 1, 70 N. Y. 595; Isaacs *v.* New York Plaster Works, 43 N. Y. Super. Ct. 397; Carpenter *v.* Manhattan Ins. Co., 25 Hun (N. Y.) 194; Powers *v.* Manhattan R. Co., 20 Civ. Pro. Rep. (N. Y.) 78.

But where plaintiff was nonsuited, and on appeal judgment was reversed, with costs to abide event, and plaintiff was again nonsuited, *held*, defendant could not tax the costs of the first trial. Lydd *v.* Kenny, 1 Civ. Pro. Rep. (N. Y.) 311, note.

2. Franey *v.* Smith, 126 N. Y. 661, 37 N. Y. St. Rep. 480; Powers *v.* Manhattan R. Co., 20 Civ. Pro. Rep. (N. Y.) 78, 14 Supp. N. Y. 130.

Where the court of appeals reverses a judgment and grants a new trial, with costs to abide the event, it means all costs of action up to and including the costs in the court of appeals, whether the action be legal or equitable, and the party finally successful is entitled to such costs. Franey *v.* Smith, 126 N. Y. 661.

Where in an action at law judgment for plaintiff was reversed by general term, with costs to abide event, but was affirmed by the court of appeals, with costs, and decision of general term reversed, *held*, plaintiff had a legal right to all costs of all courts. Revere Copper Co. *v.* Dimmock, 29 Hun (N. Y.) 299; Sanders *v.* Townshend, 11 Abb. N. Cas. (N. Y.) 217.

3. Where it was stipulated that but one of a number of cases pending on appeal should be argued, and that the decision of the appellate court in the one should stand as the decision in the others, *held*, that the party successful in the test case was entitled to costs of appeal in all the cases. Hauselt *v.* Godfrey, 3 Civ. Pro. Rep. (N. Y.) 116.

Where it was stipulated that several suits should abide the event of the one first tried, *held*, the party successful in the suit tried was entitled to costs in all the suits. Minturn *v.* Main, 2 Sandf. (N. Y.) 737.

4. **In Interpleader Proceedings** the fund in dispute must be brought into court to be held to await the event of the litigation. Van Zandt *v.* Van Zandt, 17 Civ. Pro. Rep. (N. Y.) 448, 26 N. Y. St. Rep. 963; Vosburgh *v.* Huntington, 15 Abb. Pr. (N. Y.) 254; Faivre *v.* Union Dime Sav. Inst., 36 N. Y. St. Rep. 79; Johnston *v.* Stimmel, 26 Hun (N. Y.) 435; First Nat. Bank. *v.* West River R. Co., 46 Vt. 633; Russell *v.* First Presbyterian Church, 65 Pa. St. 9.

References.—Where part of an estate was held to belong to certain heirs, a reference was ordered to determine their shares, and the fund directed to be paid into court to abide the decision of the referee. Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 323, note.

ABORTION.

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I. DEFINED.—Any person who does any act calculated to prevent a child being born alive is guilty of abortion.[1]

II. FORM OF THE INDICTMENT.—In drafting an indictment for abortion it is sufficient to follow the words of the statute defining the crime.[2]

1 Amer. and Eng. Ency. Law, tit. *Abortion*. See the full definition in N. Y. Penal Code, § 294.

2. The following forms of indictment were held sufficient:

Averring that the defendant on the 15th of January, 1857, at Ludlow, "with force and arms, maliciously and without lawful justification, did force and thrust a certain metallic instrument, which he, the said Wood, then and there had and held in his hand, into the womb and body of a certain woman by the name of Sarah Chaffee, she, the said Sarah, being then and there pregnant with child, with the wicked and unlawful intent of him, the said Wood, then and there thereby to cause and procure the said Sarah to miscarry and prematurely to bring forth the said child with which she was then and there pregnant as aforesaid; and the said Sarah," at said place and time, "by means of the said forcing and thrusting of said instrument into the womb and body of the said Sarah in manner aforesaid, did bring forth said child, of which she was so pregnant, dead; against the peace, and contrary to the form of the statute in such case made and provided." Com. *v.* Wood, 11 Gray (Mass.) 85. See Com. *v.* Jackson, 15 Gray (Mass.), 187; Com. *v.* Brown, 121 Mass. 69.

"That at said county of Orange, in the State of Indiana, on the 29th day of August, 1878, William F. Sherwood, Jr., and Arcus Lindley did then and there unlawfully and wilfully employ and use in and upon the body and womb of one Emma King, who was then and there a pregnant woman, as the said William F. Sherwood, Jr., and Arcus Lindley well knew, a certain instrument called a catheter, with intent then and there and thereby to procure and produce the miscarriage of the said Emma King, it not being then and there necessary to cause said miscarriage to preserve the life of the said Emma King." State *v.* Sherwood, 75 Ind. 15.

As to what form the indictment should take see the following cases, where indictments were construed: Dougherty *v.* People, 1 Colo. 514; State *v.* McIntyre, 19 Minn. 93;

III. CERTAINTY—Taking medicine.—The indictment, while it must be certain, need not be more than reasonably certain. It is not necessary to aver that the medicine advised to be taken was actually taken.[1]

The Kind of Wound.—The indictment need not show what kind of a wound an instrument used for abortion produced, nor what disease it caused.[2]

The Term "Womb."—The term "womb" need not be used. Any equivalent words are sufficient.[3]

Description of Person.—The indictment need not expressly allege that the abortion was committed on a "woman." Giving her name is sufficient.[4]

"Maliciously and Feloniously."—Nor need the indictment allege that the crime was done "maliciously and feloniously."[5]

IV. ALLEGATION OF PREGNANCY.—The allegation of pregnancy is a material one, and its omission is fatal.[6]

Attempting to Procure.—But where the indictment is only for attempting to procure an abortion such allegation is not necessary.[7]

People *v.* Stockham, 1 Park. Cr. Rep. (N. Y.) 424; U. S. *v.* May, 2 McArthur (D. C.) 512, an indictment in the *District of Columbia*. See also 3 Chitty's Criminal Law, 797, for a form under the old English practice.

1. State *v.* Murphy, 27 N. J. L. 112. And where the indictment is for procuring the woman to take drugs, it is not necessary to allege that she swallowed them. State *v.* Owens, 22 Minn. 238. But see Lamb *v.* State, 67 Md. 524, where it was held that the indictment must allege that the woman took the drugs.

2. Rhodes *v.* State, 128 Ind. 189.

3. Baker *v.* People, 105 Ill. 452, where the term "private parts" was used. *Compare* Com. *v.* Corbin, 136 Mass. 429; Traylor *v.* State, 101 Ind. 65.

4. Com. *v.* Boynton, 116 Mass. 343. But the verdict must show that the crime was committed on the person named in the indictment; where the verdict found the defendant guilty of using instruments "upon the person of a pregnant woman," without naming her, this was held defective. Cobel *v.* People, 5 Park. Cr Rep. (N. Y.) 348.

5. Com. *v.* Jackson, 15 Gray (Mass.) 187; Com. *v.* Sholes, 13 Allen (Mass.) 554; Holland *v.* State, 131 Ind. 568, holding that the use of the words "feloniously and unlawfully" in an indictment applies to both the intent and the act.

In Com. *v.* Thompson, 108 Mass. 461, it was held that the averment that the defendant "maliciously and without any lawful justification," sufficiently alleged the crime under a statute making it a crime to "unlawfully" cause a miscarriage.

6. Com. *v.* Bangs, 9 Mass. 386; Com. *v.* Parker, 9 Met. (Mass.) 263; 43 Am. Dec. 396; State *v.* Reed, 45 Ark. 333; State *v.* Emerich, 13 Mo. App. 492; State *v.* Emerich, 87 Mo. 110. But not where the statute defining the crime omits to state that the offense must be committed on a pregnant woman. Com. *v.* Wood, 11 Gray (Mass.) 86; Com. *v.* Follansbee, 155 Mass. 274; Com. *v.* Taylor, 132 Mass. 261.

Equivalent Words.—Instead of using the words "pregnant woman" the indictment may charge the offence to have been committed upon "a woman with child." Eckhardt *v.* People, 83 N. Y. 462; 38 Am. Rep. 462.

Good for Misdemeanor.—The omission of an allegation of pregnancy, while fatal to the indictment as a charge of felony, is still good as charging a misdemeanor, if the other elements are alleged. State *v.* Reed, 45 Ark. 333.

Allegation of death.—The indictment need not allege that the woman either did or did not die. Com. *v.* Thompson, 108 Mass. 461.

7. Com. *v.* Tibbetts, 157 Mass. 519; Mills *v.* Com., 13 Pa. St. 630.

V. ALLEGATION OF INTENT.—The intent to commit the abortion must be alleged.[1]

But the allegation of intent need not always be expressly made; it may be inferred from other allegations.[2]

VI. SPECIFYING MEANS—Naming Medicine.—The particular kind of medicine used to accomplish the abortion need not be stated.[3]

Describing Instruments.—Nor need the indictment describe the instruments used.[4]

VII. NEGATIVING EXCEPTIONS—General Rule.—Where an act is made criminal, with exceptions embraced in the same clause of the statute which creates the offence, so as to be descriptive of the offence intended to be punished, the indictment stating the act to have been done must negative the exceptions so as to show affirmatively that the precise crime defined has been committed.[5] Therefore, as the statutes defining the crime of abortion contain certain exceptions, these exceptions must be negatived.[6]

1. People *v.* Lohman, 2 Barb. (N.Y.) 216; State *v.* Drake, 30 N. J. L. 422, where it was held that the intent to both cause *and* procure the miscarriage must be alleged.

2. Scott *v.* People, 141 Ill. 195, where the allegation of the use of instrument was held sufficient as showing intent. Navarro *v.* State, 24 Tex. App. 378, an allegation of assault.

Miscarriage of Mother.—Alleging that the defendant intended to cause the miscarriage of the mother, instead of charging the intent to cause the abortion of the child, is sufficient. Mills *v.* Com., 13 Pa. St. 670.

Omission to Aver.—Where an indictment omits to aver an intent to destroy the child, a conviction may be had thereon for a misdemeanor. Lohman *v.* People, 1 N. Y. 379; 49 Am. Dec. 340. *Compare* Crichton *v.* People, 41 N. Y. 341.

3. Carter *v.* State, 2 Ind. 617; State *v.* Reed, 45 Ark. 333; Com. *v.* Morrison, 16 Gray (Mass.) 224; State *v.* Van Houten, 37 Mo. 357; Watson *v.* State, 9 Tex. App. 237.

Sufficient Averment.—The averment that it was a drug calculated to produce abortion is sufficient. Watson *v.* State, 9 Tex. App. 237.

Must Allege that the Medicine was Administered.—A charge in the indictment that the defendant administered a certain poison, or drug, or medicine is bad where it does not charge that he administered the whole of the prohibited things, nor any one of them. State *v.* Drake, 30 N. J. L. 422.

Finding by Jury.—The jury in their finding need not find the character or quality of the drug. State *v.* Owens, 22 Minn. 238.

Precedents of Indictments.—See the following cases, where the kind of medicine was stated in the indictment: Rex *v.* Cadman, 1 Moo. C. C. 114; Rex *v.* Scudder, 1 Moo. C. C. 216; Rex *v.* Harley, 4 C. & P. 369; 19 E. C. L. 423; Rex *v.* Coe, 6 C. & P. 403; 25 E. C. L. 458; Reg. *v.* Farrow, Dears. & B. C. C. 164; Rex *v.* Phillips, 3 Campb. 77.

4. Com. *v.* Thompson, 159 Mass. 56. But the indictment alleged that the instrument was unknown. And where it is charged that the abortion has been made with several different instruments, it is sufficient if the proof shows that any one of the instruments was used. Scott *v.* People, 141 Ill. 195. See State *v.* Barker, 28 Ohio St. 583.

5. Beasley *v.* People, 89 Ill. 571.

6. The most usual exception in abortion statutes is that which allows an abortion to be committed on the advice of a certain number of physicians. This exception must be negatived. State *v.* Meek, 70 Mo. 355; 35 Am. Rep. 427; State *v.* McIntyre, 19 Minn. 93.

New Jersey.—If the negative allegation that the mother or child did not die, which lessens the punishment under the statute, be necessary in the indictment, § 53 of the Criminal Procedure Act requires that any objection to the omission shall be taken before

Manner of Negativing.—The precise words of the statute need not be negatived. Equivalent words are sufficient.[1]

VIII. JOINDER OF COUNTS.—The indictment for abortion may contain several counts.[2]

Specifying Different Means.—The use of different counts is generally adopted for the purpose of alleging the same abortion to have been committed by different means. It is the practice in charging the same crime in different ways. Such practice is allowable.[3]

the jury is sworn, and it is then amendable. State *v.* Gedicke, 43 N. J. L. 87.

Texas.—In an indictment under Pasch. Dig., art. 2196, for abortion, it is not necessary that the indictment should negative the existence of the circumstances which would justify the act under art. 2197. State *v.* Russe, 41 Tex. 33.

1. **Sufficient Negative Allegations.**—The allegation "it not being then and there necessary to cause such miscarriage for the preservation" of the life of the patient sufficiently negatives the exception in the statute providing that "unless the same were done as necessary for the preservation of the mother's life." Beasley *v.* People, 89 Ill. 572.

An allegation "that procurement of miscarriage was not necessary to preserve life" is equivalent to "that miscarriage was not necessary to preserve life" and sufficient. Willey *v.* State, 52 Ind. 246. See also Hatchard *v.* State, 79 Wis. 357.

Insufficient Negative Allegations.—"The employment of said instrument not being necessary to preserve the life of the woman" does not negative the exception that "the miscarriage was not necessary to save the life of the woman." Bassett *v.* State, 41 Ind. 303.

Averring that the use of instruments was not necessary to save the life of the woman does not negative "unless miscarriage is necessary to save the life of the woman." Bassett *v.* State, 41 Ind. 303; Willey *v.* State, 46 Ind. 363. See State *v.* Vawter, 7 Blackf. (Ind.) 592.

2. Com. *v.* Follansbee, 155 Mass. 274; State *v.* Slagle, 82 N. Car. 653.

Abortion and Manslaughter.—Abortion and involuntary manslaughter may be charged in one count. Traylor *v.* State, 101 Ind. 65.

3. People *v.* Davis, 56 N. Y. 95; Davis *v.* People, 2 Thomp. & C. (N. Y.) 212; State *v.* Owens, 22 Minn. 238, where the indictment alleged in the alternative the use of different means; Lyons *v.* People, 68 Ill. 271; Beasley *v.* People, 89 Ill. 571; Com. *v.* Thompson, 159 Mass. 56; Rhodes *v.* State, 128 Ind. 189, where the indictment showed both miscarriage and death; Com. *v.* Brown, 14 Gray (Mass.) 419, where an allegation about the insertion of the hand was held surplusage; Com. *v.* Holmes, 103 Mass. 440, where it was held that the omission to aver that the different counts were different descriptions of the same offence was cured by verdict; Com. *v.* Adams, 127 Mass. 15; Com. *v.* Snow, 116 Mass. 47; Wandell *v.* State (Tex. Cr. App. 1894), 25 S. W. Rep. 27, where the indictment was held bad for duplicity, in having only one count. See Railing *v.* Com., 110 Pa. St. 100.

Result of Different Means.—Where the indictment has two counts, one charging the crime to have been committed by instruments, the other by means of medicines, under such an indictment it may be shown that the abortion was the result of both means. Tabler *v.* State, 34 Ohio St. 127. See State *v.* Baldwin, 79 Iowa 71; Com. *v.* Brown, 14 Gray (Mass.) 419; Montgomery *v.* State, 80 Ind. 338; 41 Am. Rep. 815; Com. *v.* Grover, 16 Gray (Mass.) 602; People *v.* Aiken, 66 Mich. 460; 11 Am. St. Rep. 512; Armstrong *v.* People, 37 Ill. 459; State *v.* Hollenbeck, 36 Iowa 112.

ACCESSORIES AND THE LIKE.

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I. Defined—1. Principals.—The principal in the commission of a crime may be in one of two degrees.[1]

Principal in the First Degree.—A principal in the first degree is he that is the actor or actual perpetrator of the crime.[2]

Principal in the Second Degree.—A principal in the second degree is he who is present aiding and abetting the fact to be committed.[3]

2. Accessories—Before the Fact.—An accessory *before* the fact is he that, being absent at the time of the actual perpetration of the felony, procures, counsels, commands, incites, or abets another to commit it.[4]

After the Fact.—An accessory after the fact is where a person knowing a felony to have been committed receives, relieves, comforts, or assists the felon.[5]

1. Chitty on Criminal Law, vol. 1, 255; 1 Hale, 233, 615; 4 Bla. Com. 34; 4 Burr 2074.

2. Chitty on Criminal Law, vol. 1, 255; Com. *v.* Knapp, 9 Pick. (Mass.) 516, 517; 1 Hale 233, 615; 4 Bla. Com. 34; 4 Burr 2074.

3. Chitty on Criminal Law, vol. 1, 255; 4 Burr 2074; 1 Hale 233, 615; 4 Bla. Com. 34.

Constructive Presence.—It is not necessary, however, that this presence be strict, actual, and immediate so as to make the person an eye- or ear-witness of what passes; it may be a constructive presence. Com. *v.* Knapp, 9 Pick. (Mass.) 517.

4. Chitty on Criminal Law, vol. 1, 262; 1 Hale 615; 4 Bla. Com. 36.

5. Chitty on Criminal Law, vol. 1, 264; 1 Hale 618; 4 Bla. Com. 37; Com. Dig., Justices, T. 2. See People *v.* Dunn, 53 Hun (N. Y.) 381.

II. **PRINCIPALS IN THE SECOND DEGREE—No Distinction by Early Law.**—A principal in the second degree was unknown to the early common law. He was regarded as an accessory before the fact, and he was not liable to be brought to trial till the principal offenders were convicted or outlawed.[1]

Distinction Made.—But as this rule was productive of much mischief, the judges by degrees adopted a different rule, and at length it became settled law that all those who were present, aiding and abetting, are principals in the second degree, and could be prosecuted though the principal in the first degree is neither outlawed nor found guilty.[2]

May Be Charged as Principal in the First Degree.—The principal in the second degree may now be charged as principal in the first degree.[3]

No Evidence Showing Principal in First Degree Guilty.—But one cannot be convicted as principal in the second degree where there is no evidence of the guilt of the principal in the first degree.[4]

Form of Indictment.—When several are present and abet a fact, an indictment may lay it generally as done by all, or specially as done by one and abetted by the rest.[5]

Joinder of Offenders.—The principal in the second degree may be included in the indictment with the principal in the first

1. Russell on Crimes, vol. 1, 49; Coalheavers' Case, 1 Leach 66; Fost. 428; Rex *v.* Towle R. & R. 314; Chitty's Criminal Law, vol. 1, 256; 1 Hale 437.

2. Russell on Crimes, vol. 1, 49. This law was by no means settled till after the time of Edw. III. Russell on Crimes, vol. 1, 49; 9 Co. 67 b; Plowd. 98 a; 1 Hale 437; Hawk, b. 2, c. 29, s. 37; Chitty's Criminal Law, vol. 1, 256.

3. Com. *v.* Chapman, 11 Cush. (Mass.) 422; Com. *v.* Fortune, 105 Mass. 592. See People v. Bearss, 10 Cal. 69; Thompson *v.* Com., 1 Metc. (Ky.) 13.

Surplusage.—Where the indictment charges one as principal in the second degree, but alleges such acts on his part as make him a principal in the first degree, the words "principal in the second degree" may be rejected as surplusage. Hansford *v.* State, 54 Ga. 55.

To be Convicted as Charged.—On an indictment charging a defendant as principal in the first degree, he cannot be convicted as principal in the second degree. Washington *v.* State, 36 Ga. 222; Shaw *v.* State, 40 Ga. 120. See McCoy *v.* State, 52 Ga. 287. And conversely, one indicted as principal in the second degree cannot be convicted as a principal in the first degree. Kessler *v.* Com., 12 Bush (Ky.) 18.

4. Jones *v.* State, 64 Ga. 697. See Hansford *v.* State, 54 Ga. 55; State *v.* Clayton, 11 Rich. (S. Car.) 581; State *v.* Carver, 49 Me. 588; State *v.* Jenkins, 14 Rich. (S. Car.) 215.

5. Russell on Crimes, vol. 1, 5-7; 2 Hawk. P. C. c. 23, s. 76, and c. 25, s. 64; Rex *v.* Young, 3 T. R. 98.

No Difference in Punishment.—And even in offences in which there would have been only one principal in the first degree, as in rape, a charge against all as principals in the first degree is valid, if there be no difference in the punishment between the principals in the first and those in the second degree. Rex *v.* Vide, Fitz. Corone, pl. 86; Rex *v.* Burgess, Tr. T. 1813; Russell on Crimes, vol. 1, 57.

Presence.—An indictment against the principal in the second degree in murder should show distinctly that he was present when the mortal stroke was given. Rex *v.* Winifred, 1 Leach 515; Russell on Crimes, vol. 1, 57; Heydon's Case, 4 Co. 41 a, 42 b; Rafferty's Case, 2 Lewin 271; Reg *v.* Ramsden, 1 Cox C. C. 37.

degree. All the offenders may be included in the same indictment.[1]

III. Accessory Before the Fact—Must be Indicted as Such.—The distinction between principal and accessory is not a formal one, but material, and relates to the regularity of criminal proceedings; and therefore one indicted as principal cannot be convicted as accessory before the fact. He must be indicted as an accessory.[2]

Joinder with Principal.—It is usual and proper to include both the principal and the accessory before the fact in the same indictment.[3]

Indicted Alone.—But the accessory before the fact may be indicted alone.[4]

Principal Must be Convicted.—It was a drastic principle of the common law that an accessory before the fact could not be convicted unless the principal was.[5]

1. Chitty's Criminal Law, vol. 1, 267; 2 Hale 173; 2 Burr 984; 1 Sess. Cas. 426; Hawk. b. 2, c. 25, s. 89; Com. Dig. Indictment, F; Bac. Abr. Indictment, G. 5; Cro. C. C. 41, 42; Burn J. Indictment, IV; Rex *v.* Hartall, 7 C. & P. 475; 32 E. C. L. 589; Rex *v.* Haynes, 4 M. & S. 221; Rex *v.* Nelms, 6 C. & P. 347; 25 E. C. L. 432; Heydon's Case, 4 Co. 41 a. See also State *v.* Taylor, 21 Mo. 477; Rex *v.* O'Brian, 1 Den. C. C. 9; Rex *v.* Hargrave, 5 C. & P. 170; 24 E. C. L. 260; State *v.* Pile, 5 Ala. 72; Parker's Case, 2 Dy. 186 a.

2. People *v.* Katz, 23 How. Pr. (N. Y. Supreme Ct.) 93; State *v.* Wyckoff, 31 N. J. L. 65; Keithler *v.* State, 10 Smed. & M. (Miss.) 192; George *v.* State, 39 Miss. 570; Phillips *v.* State, 26 Tex. App. 228; Josephine *v.* State, 39 Miss. 613; Hughes *v.* State, 12 Ala. 458; Norton *v.* People, 8 Cow. (N. Y) 137; Hatchett *v.* Com., 75 Va. 925. See State *v.* Mairs, 1 N. J. L. 453.

3. Chitty's Criminal Law, vol. 1, 272; Keech *v.* State, 15 Fla. 592; Loyd *v.* State, 45 Ga. 57; State *v.* York, 37 N. H. 175; Holmes *v.* Com., 25 Pa. St. 221; Mulligan *v.* Com., 84 Ky. 229; Fost. 365; 1 Hale. 623; Burn. J. Accessories, IV; Williams J. Accessories, V Com. Dig. Justices T. 3; Sampson *v.* Com., 5 W. & S. (Pa.) 385.

Form of Indictment.—Where the parties are thus joined in the same proceeding, the proper course is first to state the guilt of the principal, as if he alone had been concerned, and then to state "that C. D.. late of, etc., before the committing of the said felony and murder in form aforesaid, to wit, on, etc., with force and arms, etc., did maliciously and feloniously incite, move, procure, aid, and abet the said A. B. to do and commit the said felony in manner aforesaid, against the peace." Chitty's Criminal Law, vol. 1, 272. See form 1, Leach 515; Williams J. Accessories, V.

Two Counts.—The indictment may contain two counts, one charging both defendants as principals, the other charging one defendant as principal and the other as accessory before the fact. Josephine *v.* State, 39 Miss. 615.

4. Chitty's Criminal Law, vol. 1, 273; Bishop on Criminal Procedure, vol. 2, s. 11.

Necessary Averments.—In an indictment against the accessory alone, after the conviction of the principal, it is not necessary to aver that the latter committed the felony, but it is sufficient to recite with certainty the record of the conviction. Chitty's Criminal Law, vol. 1, 273. See 7 T. Rep. 465; Fost. 365; Com. Dig. Justices T. 3; State *v.* Crank, 2 Bailey (S. Car.) 67.

5. Tully *v.* Com., 11 Bush (Ky.) 154; State *v.* Serau, 28 N. J. L. 519; Armstrong *v.* State, 28 Tex. App. 526; Com. *v.* Phillips, 16 Mass. 423; Anderson *v.* State, 7 Ohio 250; Com. *v.* Kaas, 3 Brews. (Pa.) 422; Holmes *v.* Com., 25 Pa. St. 221. Where the principal and accessory were tried together, the principal must first be convicted; if the jury acquitted him, this acquit-

Accessory to Several Defendants.—But where there are several offenders, some of whom have been convicted, the accessory may be tried for being accessory to those convicted.[1]

IV. Accessory After the Fact—Joinder with Principal.—The accessory after the fact could be joined in the same indictment with the principal.[2]

Averment of Knowledge.—The averment of knowledge is indispensably requisite.[3]

Allegations of Manner.—It is not necessary to use the word "accessory" in the indictment, or to set forth the manner and means by which the accessory after the fact received, concealed, or comforted the principal.[4]

Acquittal of Principal.—The acquittal of the principal acquitted the accessory after the fact.[5]

V. Distinction Between Accessories and Principals Abolished—1. Generally.—In some states the distinction between accessories

ted the accessory. Chitty's Criminal Law, vol. 1, 272. And even if the principal died before conviction, the accessory could not be tried without his consent. Com. *v.* Phillips, 16 Mass. 422.

Verdict Against Accessory.—If the accessory were tried separately, and a verdict of guilty rendered, and subsequently the principal was acquitted, no judgment could be rendered on such a verdict. The accessory was entitled to go free. Bowen *v.* State, 25 Fla. 645; McCarthy *v.* State, 44 Ind. 214. See Groves *v.* State, 76 Ga. 808; Loyd *v.* State, 45 Ga. 58.

1. Stoops *v.* Com., 7 S. & R. (Pa.) 491; Com. *v.* Knapp, 10 Pick. (Mass). 477; Starin *v.* People, 45 N. Y. 333; Baron *v.* People, 1 Park. Cr. Rep. (N. Y.) 246. See Com. *v.* Glover, 111 Mass. 395; Com. *v.* Adams, 127 Mass. 15; Sampson *v.* Com., 5 W. & S. (Pa.) 385.

2. Chitty on Criminal Law, vol. 1, 272; Fost. 365; 1 Hale 623; Burn J. Accessories, IV; Williams J. Accessory, V.; Com. Dig. Justices T. 3.

Form of Indictment.—Where a man is indicted as an accessory after the fact, together with his principal, the original felony is to be stated as though against the principal alone, and the conclusion must aver that the accessory did receive, harbor, and maintain the principal felon, well knowing he had committed the felony. Chitty's Criminal Law, vol. 1, 273.

Same Count.—Principals and accessories after the fact may be included in the same count of the indictment. Bullock *v.* State, 10 Ga. 48.

Massachusetts.—The principal and accessory may be joined in an indictment for stealing and receiving stolen goods. Com. *v.* Adams, 7 Gray (Mass.) 43.

The form of the indictment in such case is as a "felonious accessory." Com. *v.* Andrews, 3 Mass. 126. See Rohan *v.* Sawin. 5 Cush. (Mass.) 287. But this is probably the case of making one guilty of receiving stolen goods an accessory *before* the fact, instead of *after*.

3. 1 Hale 622; Com. Dig. Justices T. 2; Hawk. b. 2, c. 29, s. 33; Burn J. Indictment, III; 2 Lev. 208; State *v.* Davis, 14 R. I. 281; Chitty's Criminal Law, vol. 1, 273. See also Blakeley *v.* State, 24 Tex. App. 616, where the form of the allegation of knowledge was approved; Tully *v.* Com., 11 Bush (Ky.) 155.

4. Chitty's Criminal Law, vol. 1, 273; 3 P. Wms. 477; Co. Ent. 56, 57; Rast. Ent. 48, 51; 9 Co. 114; Hawk. b. 2, 29, s. 17.

Surplusage.—Where an indictment for an offence of being accessory after the fact to a theft alleged, as acts constituting the aid and assistance given the principal, that the defendant concealed him, it was held that the indictment was not vitiated by the allegation of other acts besides the concealment. State *v.* Smith, 24 Tex. 285.

5. Chitty on Criminal Law, vol. 1, 272. And this was so even if the principal was acquitted on the ground of infancy. Edwards *v.* State, 80 Ga. 127.

before the fact and principals is abolished, and all of them are made principals.[1]

2. Accessory may be Charged as Principal.—Where this is the case the accessory may be indicted and convicted as though he were a principal.[2]

3. May be Treated as Accessory.—Though the statute abolishes the distinction between accessory before the fact and principal, the accessory may still be treated as such; the indictment may charge the accessory as a principal, or allege the matter according to the facts.[3]

4. How to Allege the Offence when Accessory Treated as Principal.—It is sufficient to allege in the indictment that the accessory himself committed the crime.[4]

5. Alleging Offence when Accessory Treated as Such—Common-law Indictment Sufficient.—If an indictment charges facts sufficient to constitute the defendant an accessory before the fact at common law, it sufficiently charges him as principal under the statute, and need not allege further matter which might be proved without pleading if the defendant had been charged directly as principal.[5]

1. People *v.* Bearss, 10 Cal. 68; Baxter *v.* People, 8 Ill. 368; Wicks *v.* State, 44 Ala. 398. See also the other cases collected under this section.

Distinction not Abrogated.—A statute which provides that an accessory before the fact "may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice," does not abrogate the distinction between principal and accessory, but clearly preserves the difference between the two. State *v.* Ricker, 29 Me. 84.

2. State *v.* Pugsley, 75 Iowa 742; Com *v.* Hughes, 33 Leg. Int. (Pa.) 44; Campbell *v.* Com., 84 Pa. St. 187; Brandt *v.* Com., 94 Pa. St. 290; State *v.* Cassady, 12 Kan. 551; State *v.* O'Neal, 1 Houst. Cr. Cas. (Del.) 58; State *v.* Chapman, 6 Nev. 320; State *v.* Orrick, 106 Mo. 111; Bonsell *v.* U. S., 1 Greene (Iowa) 111.

Punishment the Same.—When principals in the first and second degrees are punished alike no distinction need be made between them in the indictment. Leonard *v.* State, 77 Ga. 764.

3. State *v.* Payton, 90 Mo. 220; State *v.* Anderson, 89 Mo. 313; Territory *v.* Guthrie, 2 Idaho 398.

It is better practice to treat the accessory in the indictment as such than as principal. People *v.* Schwartz, 32 Cal. 161.

Contra.—When a statute makes all accessories principals, they must be indicted as principals and not otherwise. Coates *v.* People, 72 Ill. 303, 304; Dempsey *v.* State, 47 Ill. 323; Baxter *v.* People, 8 Ill. 369; People *v.* Campbell, 40 Cal. 129.

4. People *v.* Rozelle, 78 Cal. 84; State *v.* Chapman, 6 Nev. 320; State *v.* Pile, 5 Ala. 72. See State *v.* Rose, 20 La. Ann. 143; State *v.* Littel (La. 1893), 12 So. Rep. 750.

When Necessary to Set Out the Aiding and Abetting.—Where the distinction between accessories and principals is abolished, in all cases of felony, where by the statute creating the offence, or by the existing common law, only persons of a certain class, or standing in a certain relation, are competent to commit such felony, the indictment against aiders and abettors not belonging to such class, or standing in such relation, must set out the aiding and abetting in which alone the crime consists. Shannon *v.* People, 5 Mich. 72, where the crime charged was the counselling the abandoning a child.

5. People *v.* Rozelle, 78 Cal. 84. The acts of the accessory should be stated as fully in the indictment as they are in the statute. People *v.* Schwartz, 32 Cal. 161. See People *v.* Campbell, 40 Cal. 129.

Must Show Principal Committed the Offence.—The indictment must show that the principal committed the offence.[1]

Name of Principal.—The name of the principal is a material allegation in such form of an indictment.[2]

Statutory Allegation.—When a statute provides that the indictment shall allege that the defendant was an accessory, an omission of this allegation is fatal even after verdict.[3]

6. **May be Charged as both Principal and Accessory.**—Although a statute may abolish the distinction between principal and accessory, it is yet optional for the pleader to treat an offender as both a principal and an accessory before the fact in the same indictment.[4]

7. **Principal need not be first Convicted.**—The chief effect of the statute abolishing the distinction between principal and accessory is that it is no longer necessary to first convict the principal before convicting the accessory. He may be convicted although the principal is not tried at all or has been acquitted.[5]

8. **May be Convicted as either Principal or Accessory—Indicted as Principal.**—One indicted as principal may be convicted as an accessory before the fact.[6]

Indicted as Accessory.—And conversely, one indicted as accessory may be convicted on evidence showing him a principal.[7]

1. People *v.* Crenshaw, 46 Cal. 66; People *v.* Thrall, 50 Cal. 415; People *v.* Schwartz, 32 Cal. 161; Ulmer *v.* State, 14 Ind. 52.

2. People *v.* Coyodo, 40 Cal. 586.

3. Sage *v.* State, 120 Ind. 201.

4. People *v.* Davidson, 5 Cal. 134; People *v.* Valencia, 43 Cal. 552; People *v.* Shepardson, 48 Cal. 187.

Separate Counts.—An indictment against two persons may charge in one count one as principal and the other as accessory, and in another count the latter as principal and the former as accessory. People *v.* Valencia, 43 Cal. 552. See Methard *v.* State, 19 Ohio St. 363.

One Count.—Both the offences of being principal and accessory may be charged in one count. Hartshorn *v.* State, 29 Ohio St.. 635. *Comp.* State *v.* Hollenscheit, 61 Mo. 303; State *v.* Davis, 29 Mo. 392; State *v.* Taylor, 21 Mo. 477; Allen *v.* State, 10 Ohio St. 288.

5. Hartshorn *v.* State, 29 Ohio St. 635; Com. *v.* Kelly, 10 L. Bar. (Pa.) 107; People *v.* Kief, 126 N. Y. 661; People *v.* Newberry, 20 Cal. 440; People *v.* Bearss, 10 Cal. 68; People *v.* Outeveras, 48 Cal. 19; People *v.* Ah Fat, 48 Cal. 61; Gains *v.* State, 46 Ohio St. 457; State *v.* Anderson, 89 Mo. 312; Noland *v.* State, 19 Ohio 131; Brown *v.* State, 18 Ohio St. 497. See People *v.* Lyon, 99 N. Y. 210.

Evidence must Show Principal Guilty.—Although the principal has not been convicted, still the evidence must show him guilty. Searles *v.* State, 6 Ohio Cir. Ct. 331; Baxter *v.* People, 7 Ill. 578.

North Carolina.—The statute dispenses with the necessity of the conviction of the principal felon before an accessory can be tried and punished, but the common-law rule, that an acquittal of the principal is an acquittal of the accessory, is still in force. State *v.* Jones, 101 N. Car. 719.

6. Dempsey *v.* People, 47 Ill. 323; Hanoff *v.* State, 37 Ohio St. 178; State *v.* Hessian, 58 Iowa 68; Bonsell *v.* U. S., 1 Greene (Iowa) 111; State *v.* Brown, 25 Iowa 561; State *v.* Thornton, 26 Iowa 79; State *v.* Comstock, 46 Iowa 265; Collins *v.* State, 88 Ga. 347.

Contra.—People *v.* Trim, 39 Cal. 75; People *v.* McGungill, 41 Cal. 429; Smith *v.* State, 37 Ark. 274; Williams *v.* State, 41 Ark. 173.

7. State *v.* Ross, 29 Mo. 32. See Benge *v.* Com., 92 Ky. 1.

9. Statute does not Affect Accessory After the Fact—Not to be Charged as Principal.—The statute only abolishes the distinction between principal and accessory before the fact. The accessory after the fact is left as at common law; he must be indicted as such, and cannot be treated as a principal.[3]

3. State *v.* Allen, 37 La. Ann. 685; Wade *v.* State, 71 Ind. 535; Reynolds *v.* People, 83 Ill. 479; People *v.* Gassaway, 28 Cal. 405; People *v.* Keefer, 65 Cal. 232.

Contra.—He may be convicted as an accessory after the fact, though indicted as principal. Yoe *v.* People, 49 Ill. 410.

The reason that an accessory after the fact cannot be treated as a principal depends not upon questions of procedure so much as it does on the nature of his crime. "The offense of which an accessory after the fact may be guilty is not included, nor has it any connection with the principal crime. This is apparent from the definitions given in our statute and in the common law. The one cannot be committed until the principal offense is an accomplished fact. Persons occupying a certain relation to the offender are excluded from the operation of the statute. The guilty knowledge, which is the essence of the offense, comes after the principal crime is committed, and of course they can have no connection with each other. But no better test need be sought than the fact that a party indicted as a principal and acquitted may yet be indicted as an accessory after the fact, or if indicted as an accessory after the fact and acquitted he may be indicted as a principal; and the reasons assigned in the common-law authorities is that they are offenses of several natures. Hence a conviction for one is no bar to a prosecution for the other." Per Scott, J., in Reynolds *v.* People, 83 Ill. 479, 481.

"There is an important and material difference between an accessory before the fact and an accessory after the fact. The former is a principal and is to be punished as a principal. If found guilty as an accessory to the commission of a robbery before the act of robbery is perpetrated, he may be punished by imprisonment in the state prison for any length of time between one year and the time of his death. But if a person be found guilty as an accessory after the fact, the statute provides that he shall be imprisoned for any term not exceeding two years, and fined in a sum not exceeding five thousand dollars, according to the circumstances of the case and the enormity of the crime." Per Curry, J., in People *v.* Gassaway, 28 Cal. 405, 406.

Evidence.—But the fact that one indicted as a principal cannot be convicted as an accessory after the fact should not be confounded with the rule of evidence that the acts of the accused done after the commission of the crime are evidence against him. Wade *v.* State, 71 Ind. 535, 542.

Georgia.—For the proper form of the indictment and mode of trial of an accessory after the fact, in larceny, whose offense consists in receiving the stolen goods, under *Georgia* Code, see Jordan *v.* State, 56 Ga. 92.

ACCORD AND SATISFACTION.

By W. L. CRAWFORD.

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I. WHAT IS PLEA OF ACCORD AND SATISFACTION.—The plea of accord and satisfaction is the technical pleading which sets up that the defendant has extinguished the demand of plaintiff by an accord and satisfaction.[1]

II. MAY BE PLEADED IN ALL ACTIONS.—Accord and satisfaction generally is a good plea in all actions where damages only are to be recovered.[2]

1. Chitty on Pleadings, vol. 3, p. 924. **Distinguished from Payment and Release.**—The subject of accord and satisfaction is often confounded with the kindred subjects of "payment" and "release"; but they are all perfectly segregated in law and should not be used interchangeably or as synonyms. The following are definitions of accord and satisfaction: "A right of action for a breach of contract cannot be discharged by any payment or performance, or tender of payment or performance, without the consent and acceptance of the promisee; for the promisee, after breach, becomes entitled to the compensation or remedy provided by process of law, and is not bound to accept any tender or offer made in satisfaction of his legal rights. He may, however, agree to do so; and an agreement to accept something in satisfaction, accompanied by the delivery or performance of what is so agreed upon, satisfies and discharges his right of action. Such an arrangement is called in technical language an accord and satisfaction, and, when completely executed, forms a good defence to an action." Leake's Digest of the Law of Contracts, 876, Ed. 1878. See also 3 Black. Comm. 15.

2. Bac. Abr. "Accord and Satisfaction"; Cooper *v.* Parker, 14 C. B. 118, 78 E. C. L. 118; Waters *v.* Smith, 2 B. & Ad. 889, 22 E. C. L. 205; Wilkinson *v.* Byers, 1 Ad. & El. 106, 28 E. C. L. 48.

Chitty gives forms of the plea in actions of assumpsit, covenant, case,

III. MATTER MUST BE PLEADED.—**At common law,** accord and satisfaction might have been given in evidence under the plea of non-assumpsit;[1] but by Hilary Rules (4 Will. 4) the matter had to be pleaded specially.[2]

Under the Codes.—The American code practice requires that all matter of accord and satisfaction shall be pleaded.[3]

and trespass. Chitty on Pleadings, vol. 3, pp. 924, 1002, 1031, 1062.

1. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Paramore *v.* Johnson, 1 Ld. Raym. 566; Martin *v.* Thornton, 4 Esp. 181; Burge *v.* Dishman, 5 Blackf. (Ind.) 272. See Page *v.* Prentice, 7 Blackf. (Ind.) 322, where it was held optional to either plead specially or give in evidence under general issue.

But in Longstreet *v.* Ketcham, 1 N. J. L. 170, it was held that accord must be pleaded; and in Kenyon *v.* Sutherland, 8 Ill. 99, it was held that accord and satisfaction must be specially pleaded in an action of trespass.

Need for Special Plea.—"Anciently matters in discharge which admitted that once there was cause of action must uniformly have been pleaded specially; afterwards a distinction was made between express and implied assumpsits; in the former these matters were required to be pleaded, but not in the latter; at length, however, they were allowed to be given in evidence under the general issue. . . . So also payment, accord and satisfaction, etc., . . . might have been given in evidence under the plea of non-assumpsit, although there were also a special plea, in which the ground of defence might not have been correctly stated." Chitty on Pleading, vol. 1, 478.

Directions for Pleading.—"Where a thing is pleaded by way of concord it is issuable; but if the concord be not executed by giving and receiving, it cannot be pleaded in bar to the action. Therefore the best way of pleading it is by setting forth that the thing was given and received in the full satisfaction, etc., according to the resolution in Pinnell's Case. But both are traversable, as, for instance: The condition of a bond was that if the defendant compounded with one Earle for his lands, then he should pay the plaintiff thirty pounds; in an action of debt brought on this bond the defendant pleaded that he had not made any composition with Earle, etc.; the plaintiff replied that Earle did grant a rent charge in fee to the defendant in satisfaction of his title, and so he made a composition; the defendant *protestando* that Earle *non concessit, pro placito dicit* that he did not accept it in satisfaction, and it was adjudged a good plea." *Per Curiam* in Young *v.* Rudd, 5 Mod. 86.

The best and safest way, says Lord Coke, to plead an accord is to plead it by way of satisfaction and not by way of accord; for if it be pleaded by way of accord, a precise execution thereof in every part must be pleaded; and if there be a failure in any part, the plea is insufficient; but if it is pleaded by way of satisfaction, the defendant need plea no more but that he paid the plaintiff 10*s.* (or whatever it be) in full satisfaction for the action, which sum he received. 4 Min. Inst. 146, *citing* Peytoe's Case, 9 Co. 80 b.

It is customary, however, and it is believed safer to allege (1) the accord or agreement; (2) the satisfaction performed in pursuance of the accord; (3) the acceptance of the satisfaction as such. 4 Min. Inst. 146, *citing* Sibree *v.* Tripp, 15 M. & W. 23; Curlewis *v.* Clark, 3 Exch. 375; Boosy *v.* Wood, 3 H. & C. 484.

2. See R. G. T. T. 1853, r. 8.

Sham Plea.—Accord and satisfaction could not at common law be pleaded as a sham plea. Richley *v.* Proone, 1 B. & C. 286, 8 E. C. L. 123.

3. Taylor *v.* Frink, 2 Iowa 84; Colęs *v.* Soulsby, 21 Cal. 47; Sweet *v.* Burdett, 40 Cal. 97; Glazer *v.* Cliff, 10 Cal. 303; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Fitch *v.* Brockmon, 2 Cal. 578. *Contra*, Gavin *v.* Annan, 2 Cal. 494. *Compare* Wallace *v.* Chandler, 16 Ark. 651; Jackson *v.* Olmstead, 87 Ind. 92; Frick *v.* Algeier, 87 Ind. 255.

See Pomeroy's Code Remedies, 3d Ed. § 665, where the author is of the opinion that if "payment" may be shown under a general denial, accord and satisfaction should be allowed to be shown.

Plaintiff's Evidence Supplying Place of Plea.—When, in an action brought

IV. At What Time to be Pleaded.—Puis Darrein Continuance.—Usually the plea of accord and satisfaction is pleaded in answer to plaintiff's declaration or petition. But an accord and satisfaction arising after the last pleading, which goes simply in discharge of the original cause of action, must generally be availed of by plea *puis darrein continuance.*[1] When pleaded *puis darrein continuance* it is a plea in bar to plaintiff's declaration[2] and need not be accompanied by an affidavit of its truth,[3] and waives all previous defences.[4]

May be shown in Appellate Court.—Matter of accord and satisfaction happening after trial may be shown in the appellate court, and the appellate court has a right to hear and consider evidence of

upon a claim, the plaintiff, as part of his case, proves the payment and the circumstances under which it was made, the defendant may rely upon the facts as constituting an accord and satisfaction, though not pleaded as such in the answer. Looby *v.* West Troy, 24 Hun (N. Y.) 78.

Agreement of Composition.—Where, to an action upon a promissory note, an agreement of composition between the debtor and his creditors, including the plaintiff, is relied upon as a defence, such agreement must be specially pleaded, and cannot be considered under a plea of accord and satisfaction by the giving of new notes. Smith *v.* Owens, 21 Cal. 11.

Fact treated as in Issue.—Where the record discloses that the fact of accord and satisfaction, though not presented by the pleadings, is treated as in issue, and evidence introduced touching it, without objection, and it is submitted to the jury, this court will treat the objection to the pleadings as having been waived, and will examine the defence as though it had been specially pleaded. Berdell *v.* Bissell, 6 Colo. 162.

Instruction to Jury.—Where the only issue made by the pleadings is as to the fact of a warranty as to the disposition of certain horses sold by the defendant to the plaintiff, and there is no plea or proof of accord and satisfaction or payment, there is no foundation for an instruction as to the verdict which the jury should render, if they should find that there had been a settlement between the parties, and it is error to give such instruction. Gibbs *v.* Wall, 10 Colo. 153; see also American *v.* Rimpert, 75 Ill. 228; Bruce *v.* Bruce, 4 Dana (Ky.) 530.

Not Interfering with Assignment.—Where the plaintiffs held defendant's accommodation note, and agreed with him that if he would not interfere with an assignment made by the payee they would release him, it was held that, although a good defence, it should have been pleaded. Wimpfheimer *v.* Ludwig (City Ct.), 1 N. Y. Supp. 432.

Matter held an Accord and Satisfaction.—An agreement entered into after defendant had commenced a prosecution against plaintiff for an assault and battery, but before the return of the warrant, to the effect "that the parties would mutually drop the matter and be friends, and never do or say anything more in relation thereto, and that defendant would abandon the prosecution and plaintiff would pay costs," and its performance by defendant, is an accord and satisfaction which must be specially pleaded, and cannot be given in evidence under the general issue. Phillips *v.* Kelly, 29 Ala. 628.

1. Washington *v.* Louisville, etc., R. Co., 136 Ill. 49; Good *v.* Davis, Hempst. (U. S.) 16.

2. Robertson *v.* Burkell, 3 Ill. 278.

3. *Ibidem.*

Motion to Dismiss Appeal.—Where, after a judgment in a justice's court and previous to an appeal, the suit between the parties is settled, and the defendant notwithstanding prosecutes an appeal, the plaintiff cannot allege the accord and satisfaction by way of plea *puis darrein continuance;* his proper course is to apply to the C. P. by motion to dismiss the appeal. Schenck *v.* Lincoln, 17 Wend. (N. Y.) 506.

4. Good *v.* Davis, Hempst. (U. S.) 16.

an accord and satisfaction outside of the record transmitted from the trial court.[1]

Right may be Curtailed.—The plea of accord and satisfaction being a strictly legal defence, the court may require it to be made within the time limited by law.[2]

V. FORM OF THE PLEA.—**At common law** the pleading, like all other pleadings, was a certain set one and followed approved precedent.[3]

Under the Codes.—But under the codes of procedure in America, and the new procedure in England, the form of the pleading amounts to little, provided the plea embodies the substance of a good accord and satisfaction.[4]

Verification.—Where an answer sets up an accord and satisfaction between the maker and the payee of a note, as a defence to an action by the indorsee, the Colorado statute requires the same to be verified or else the genuineness of the note is admitted.[5]

1. Atlantic, etc., R. Co. *v.* Blanton, 80 Ga. 562; Salmon *v.* Pixlee, 2 Day (Conn.) 242, citing Cheong May *v.* U. S., 113 U. S. 216; Dakota County *v.* Glidden, 113 U. S. 222; San Mateo County *v.* Southern Pac. R. Co., 116 U. S. 138. See also Hartell *v.* Searcy, 32 Ga. 190; Kirtland *v.* Macon, 62 Ga. 747; Howard *v.* Durand, 36 Ga. 346, 91 Am. Dec. 767.

Alluding to Accord and Satisfaction in Testimony.—Where the plaintiff in his testimony alluded to a written agreement with a railroad for a settlement with him for the right of way, which agreement was not pleaded as a defence nor produced at the trial, the appellate court held that it was not before the court for the purpose of basing upon it a defence of accord and satisfaction. Combs *v.* Smith, 78 Mo. 32.

2. Tilton *v.* Morgaridge, 12 Ohio St. 98, where the court refused to permit one of several defendants to set up by answer that since the commencement of the suit, and prior to the last two continuances, one of his codefendants had made an accord and satisfaction with the plaintiff.

3. **Common-law Form.**—The following was an approved form: "Because he says, that after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiff against him the said defendant in this behalf, to wit, on, etc., at, etc., aforesaid, he the said defendant delivered to the said plaintiff one pipe of wine, of great value, to wit, of the value of £100, in full satisfaction and discharge of the said several promises and undertakings, and of all the said sums of money in the said declaration mentioned, and which said pipe of wine he the said plaintiff then and there accepted and received of and from the said defendant in full satisfaction and discharge of the said several promises and undertakings, and of all the sums of money in the said declaration mentioned." Chitty on Pleadings, vol. 3, p. 925.

4. **Code Form.**—The defendant answers to the complaint: I. That on the —— day of ——, 18—, at ——, he delivered to the plaintiff the promissory note of A. B. for —— dollars. II. That the plaintiff accepted the same in full satisfaction of the claim set up in the complaint. New York Code, vol. 6 (Book of Forms).

Form now used in England.—"That he satisfied and discharged the plaintiff's claim by doing work and providing materials for the same for the plaintiff, and by delivering goods to the plaintiff, which work and materials and goods were so done and provided and delivered by the defendant, and were accepted by the plaintiff respectively in satisfaction and discharge of the said claim." Bullen & Leake's Precedents, 414.

5. Parkison *v.* Boddiker, 10 Colo. 503.

VI. NECESSARY ALLEGATIONS OF ACCORD AND SATISFACTION.—Allegation of Value.—The money value of the thing given as an accord need not be stated.[1]

Allegation of Time.—The allegation of time is not a material one.[2]

Allegation of Acceptance.—The allegation that the plaintiff accepted and received the matter in full satisfaction is a material one and its omission fatal.[3]

1. Chitty on Pleadings, vol. 3, p. 926, note; see form in Stephen on Pleading, 235, where the allegation of value is omitted.

But the plea must show that the matter accepted was of some value. Davis *v.* Noaks, 3 J. J. Marsh. (Ky.) 497. See Bank of Com. *v.* Lethcher, 3 J. J. Marsh. (Ky.) 196.

Amount Stated under Videlicet.—Where a note is given as an accord and satisfaction, its amount may be stated under a *videlicet*; nor need the date of the note be set out. Dunham *v.* Ridgel, 2 Stew. & P. (Ala.) 402.

Money Paid in Goods, etc.—To a complaint by an executor upon a due bill, the defendant answered that he had paid the deceased the full amount of the principal and interest due, "and the sum of money was paid in goods, wares, and merchandise, and was paid in full satisfaction of said note, and was so received by deceased in his lifetime." It was held that this was substantially a good plea of accord and satisfaction. Hart *v.* Crawford, 41 Ind. 197.

Equity of Redemption.—To an action on the bond, against mortgageor, plea that plaintiff had become possessed of the equity of redemption by purchase must aver that the value of the premises was equal to the amount due on the bond. Spencer *v.* Harford, 4 Wend. (N. Y.) 381.

2. **Immaterial Variance.**—Upon a plea of accord and satisfaction by payment and acceptance of a sum less than the debt, testimony to a payment of such sum at a date subsequent to the date of the accord is an immaterial variance. Sonnenberg *v.* Riedel, 16 Minn. 83.

What Sufficient Allegation.—An averment that, prior to the suing out of the writ, the debt was discharged, is sufficient as to time. Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

Time of Delivery of Property. — If a plea of accord and satisfaction, by the delivery to plaintiff of certain property, does not state a time when the delivery was made, it is bad on special demurrer. Pence *v.* Smock, 2 Blackf. (Ind.) 315.

Ambiguous Plea.—To a count by A against B for goods sold and delivered, B pleaded, as to 4*l.* parcel, etc., that on a certain day, at the request of A, he delivered to C, for A, certain goods; that it was "then," to wit, on the day and year aforesaid, in consideration thereof, agreed between A and B that A should accept such delivery to C in full satisfaction and discharge of the premises as to the 4*l.*, etc., and that A did "then" accept such delivery in full satisfaction and discharge. It was ruled on special demurrer for ambiguity, that the plea was bad, inasmuch as it might mean either that the agreement to accept the delivery of the goods to C in satisfaction took place *at the same time* as the delivery or at *a subsequent period.* Stead *v.* Poyer, 1 C. B. 782, 50 E. C. L. 782.

3. Drake *v.* Mitchell, 3 East 256; Paine *v.* Masters, 1 Stra. 573; Young *v.* Jones, 64 Me. 563, 18 Am. Rep. 279; Johnson *v.* Hunt, 81 Ky. 321; Shaw *v.* Burton, 5 Mo. 478; State Bank *v.* Littlejohn, 1 Dev. & B. (N. Car.) 563; Hearn *v.* Kiehl, 38 Pa. St. 147; Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

Lacking Averment of Satisfaction.—To a declaration on a contract for the delivery of 600 loads of timber at Dantzic, the defendant pleaded that after the accruing of the causes of action and before suit it was agreed between the plaintiffs and defendants that the defendants should deliver to the plaintiffs in London certain other timber, and that such other timber should be accepted and received by the plaintiffs in full satisfaction and discharge of all causes of action upon the contract in the declaration mentioned; that the defendant in part performance of the agreement delivered to the plaintiffs, and they accepted and received of him, 143

Allegation of Mistake.—The allegation of a mistake in a contract may be necessary at times to show a consideration for the accord.[1]

loads on the terms aforesaid, in full satisfaction and discharge of the causes of action in the declaration mentioned, so far as they related to 143 loads of timber in the contract mentioned, and that the defendant within a reasonable time tendered to the plaintiffs the residue of the timber to complete the contract. It was held on demurrer, that this was not good as a plea of accord and satisfaction for want of an averment of satisfaction. Gabriel *v.* Dresser, 15 C. B. 622, 80 E. C. L. 620.

After Writ Sued Out.—And where the accord and satisfaction takes place after the writ is sued out, the plea should allege that the plaintiff accepted the thing in satisfaction of the costs and damages sustained by the non-performance of the promises. Francis *v.* Crywell, 1 D. & R. 546.

Good after Verdict.—A plea of accord and satisfaction which fails to state that the matter relied on as an accord was accepted as a satisfaction by the creditor suing is bad on demurrer, but good after a verdict sustaining it. Wilkerson *v.* Bruce, 37 Mo. App. 156.

Acceptance from Stranger.—In an action of covenant plea of acceptance of satisfaction from a stranger is bad. Clow *v.* Borst, 6 Johns. (N. Y.) 37; Daniels *v.* Hallenback, 19 Wend. (N. Y.) 408; Bleakley *v.* White, 4 Paige (N. Y.) 654.

Agency.—Where the plea was that on statement of account defendant delivered notes to C. for plaintiff without averring that C. was plaintiff's agent, nor that the notes were received in satisfaction, is bad. Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

Acceptance of Draft.—A plea of accord and satisfaction alleging delivery and receipt of a draft is bad unless the draft was paid or there was an express agreement extinguishing the debt. May *v.* Gamble, 14 Fla. 467.

No Presumption of Acceptance.—To a declaration alleging a breach of an agreement therein set forth, and consequent damage to the plaintiffs, it was pleaded that a certain agreement had been come to between the plaintiffs and defendants after dispute had arisen. The plea did not in terms admit or deny the alleged breach, nor did it in terms state that the agreement pleaded had been accepted by the parties in accord and satisfaction of the causes of action alleged in the declaration. *Held*, on demurrer, reversing the judgment of the court below, that such plea was bad. It could not be assumed that an agreement, the defendant's version of which was set out in the plea, had been accepted in accord and satisfaction. Barclay *v.* Bank of New South Wales, 5 App. Cas. 374.

Allegation of Satisfaction.—To an action by assignees of a bankrupt assurance association the defendant pleaded that before the bankruptcy it was agreed between the association and the defendant that policies which had been effected by the defendant with the association, and which were existing, should be forthwith cancelled and delivered up to the association, which should thereupon be exonerated and discharged from the insurances, and that the premiums thereupon paid or payable by the defendant, or a ratable proportion thereof, after deducting so much as would be fairly payable in respect of risks already incurred, should be allowed in account to the defendant, and set off against the moneys due from the defendant to the association, and that the defendant thereupon should be acquitted, exonerated, and discharged from the payment of so much of the moneys as the premiums so to be allowed should amount to. The plea stated that the amount of premium so to be allowed was a certain sum, and averred that, in pursuance of the agreement, the defendant delivered up the policies and that they were cancelled, and that the defendant was in consequence thereof exonerated and discharged from the payment of that sum. *Held*, that, the plea was bad in substance; for that, the agreement being to deliver up the policies to be cancelled and to allow the premiums, the plea ought to have alleged that such allowance was made. Graham *v.* Gibson, 4 Exch. 768.

1. **Mistake in Contract.**—In an action to recover a balance on a contract to deliver beef, defendant pleaded that the agreement, as understood by both parties, was $3.50 per hundred for steers, with 20 per cent deduction for

Release of an Equity of Redemption.—Where the subject-matter of the plea is the release of an equity of redemption the plea will receive a liberal construction and be upheld if possible.[1]

Courts Liberal in Construction.—The courts are liberal in their construction of the plea of accord and satisfaction, and will often hold a plea good although informal.[2]

Replication.—An equitable replication may be pleaded to a plea of accord and satisfaction. Where the accord and satisfaction are received by the creditor on the faith of representations which are false, this may be set up in reply to the plea.[3]

all cows delivered, which latter clause was accidentally omitted from the contract, and that plaintiff had accepted a settlement on that basis in full satisfaction of all claims thereunder. On plaintiff's motion to strike out, *held*, treating the plea as one of accord and satisfaction, the allegation of mistake was necessary, as showing a consideration for the settlement, and it constituted a legal defence. Torrey *v.* U. S., 42 Fed. Rep. 207.

1. In an action of debt upon a writing obligatory, a plea that the defendant was the owner of the equity of redemption in certain property purchased by the plaintiff at a sale made by a sheriff under execution, and that before the time for redemption expired the plaintiff, in consideration that defendant would waive and release to plaintiff his right of redemption, agreed to release and discharge defendant from the payment of the obligation, and that in pursuance of such agreement the defendant did waive, release, and quitclaim his said right of redemption to the plaintiff, is substantially a good plea of accord and satisfaction. Bailey *v.* Cowles, 86 Ill. 333.

Release and Quitclaim.—Where a release and quitclaim of an equity of redemption in real estate is pleaded as an accord and satisfaction, it is not necessary that the plea should allege that such release and quitclaim were under seal. Bailey *v.* Cowles, 86 Ill. 333.

2. **Assigning Effects.**—A plea that defendant agreed with plaintiff and others to assign effects to them in full satisfaction of their claims, and that in pursuance thereof the assignment was made by defendant, states a good accord and satisfaction. Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386.

To Promissory Note.—A plea in a suit showing that before the assignment of a note the payee was indebted to each of the defendants in certain sums of money, and that the payee and another person were indebted in a certain other sum to the defendants, which debts amounted to —— dollars, and stating that such indebtedness was made so many payments on the note, described in the declaration, and was received and accepted by the payee as a payment on the note, before its assignment,—although informal, is good. Woods *v.* Harris, 5 Blackf. (Ind.) 585.

Executing New Bond to New Partnership.—Where the obligees of a bond are partners, and a new partner is taken into the firm, a plea of accord and satisfaction is good which recites that the obligor executed a new bond to the new partnership which was accepted in satisfaction of the first bond. Pope *v.* Tunstall, 2 Ark. 209.

Allegation of Agency. — Where the plea alleges that the defendant's note was given to a third person for the plaintiff, it must be averred that he was the agent of the plaintiff. Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

Affidavit of Defence.—An affidavit of defence setting up an accord and satisfaction under a written agreement must be specific and contain the material provisions of the agreement. Simon *v.* Kendig, 4 Kulp. (Pa.) 493.

3. Stears *v.* South Essex Gas Light, etc., Co., 9 C. B. N. S. 180. 99 E. C. L. 179, where a plea of accord and satisfaction set up the delivery of deeds and securities as accord and satisfaction, an equitable replication as to to the deeds and securities, that they were accepted on the faith of representations which were false, was allowed. See Perry *v.* Attwood, 6 El. & Bl. 691; Turner *v.* Browne, 4 D. & L. 201; Jones *v.* Sawkins, 5 C. B. 142, 57 E. C. L. 141.

The reply may set up the facts which nullify the plea, although such facts are admissible under a general denial.[1]

VII. Insufficient Allegations of Accord and Satisfaction.—**Received on Account.**—Although a less sum may, under certain circumstances, be an accord and satisfaction of a greater sum due, it must not only be paid as such, but the plea must aver that it was received as such. An omission to state the latter allegation gives rise to the presumption that the amount received was received on account.[2]

To Whom Satisfaction was Made.—A plea of accord and satisfaction must show to whom satisfaction was made.[3]

"Satisfied and Discharged."—The allegation that the claim of plaintiff has been "satisfied and discharged" is not the statement of an accord and satisfaction.[4]

Statement of Legal Conclusion.—Under the codes an accord and satisfaction cannot be pleaded as a mere legal conclusion. The facts must be set out warranting the conclusion.[5]

A replication which traverses the allegations of agreement to accept in a plea of accord and satisfaction need not notice the allegations of payment or acceptance. Bainbridge *v.* Lax, 9 Q. B. 819, 58 E. C. L. 818.

1. Pottlitzer *v.* Wesson (Ind. App. 1893) 35 N. E. Rep. 1030, where the answer alleged that a certain sum was received in settlement, and the reply set out that the sum was only received *pro tanto* and not in extinguishment of the whole claim. It was held that this reply was not demurrable, although a general denial would have sufficed.

Denying Conveyance of Land, etc.—Where to an action on a note the defendant pleaded an accord and satisfaction by the sale and conveyance of a tract of land which plaintiff accepted and received in discharge and satisfaction of the note, to which plea the plaintiff replied, denying both the conveyance of the land to him and his acceptance of it, it was held on demurrer to the replication that it was a good answer to the plea, and was neither double, uncertain, nor objectionable. Dent *v.* Coleman, 10 Smed. & M. (Miss.) 83.

2. Insurance Co. *v.* Insurance Co., 1 Clev. Rep. (Ohio) 81, where an averment in defence to an action on a reinsurance policy, that the original insurer had compromised the claim of the insured at 60 cents on the dollar, and thereupon the reinsurer had paid to the insurer a specified sum, in full satisfaction and discharge of all claims, was held demurrable.

3. Nill *v.* Comparet, 15 Ind. 243.

4. **Action on Notes.**—An answer in an action on notes which denies that certain of the first four notes have not been paid, and alleges that they have been "satisfied and discharged," does not plead an accord and satisfaction. Hogan *v.* Burns (Cal. 1893) 33 Pac. Rep. 631.

5. Where an action was brought by a husband and wife against undertakers to recover damages for not properly keeping a body in a vault as they had agreed, the answer alleged, in substance, that the plaintiffs had failed to pay the agreed compensation; that the defendants, by mistake, had shipped the body to some point of interment not remembered by them at the time the body was demanded by the plaintiffs; that they so notified the plaintiffs, and promised them to immediately find the place of interment and without delay return the body; that the plaintiffs expressed themselves as satisfied with this arrangement; that shortly afterwards said body was returned to the defendants, and was taken by the plaintiffs and interred; that the return of the corpse was taken and received by the plaintiffs in full and perfect satisfaction of all wrongs and injuries incident to the mistake made by the defendants. *Held*, that the last averment of the answer was the statement of a mere conclusion, not warranted by any

Several Counts in the Declaration.—The plea must answer all the counts in the declaration, otherwise it is demurrable.[1]

All Elements to be Embodied.—While the courts are liberal in their construction of pleas of accord and satisfaction, still they insist that all the necessary legal elements requisite to this defence should be embodied in the plea. A failure in this respect makes the plea a nullity.[2]

VIII. MISCELLANEOUS.—1. Nul Tiel Record.—Accord and satisfaction may be pleaded with *nul tiel record* to debt on judgment.[3]

premises preceding it. *Held* also, that the answer was bad, inasmuch as it was the duty of the defendants to procure a return of the corpse, and there is no averment that the plaintiffs agreed with the defendants that they would accept such return in satisfaction of the cause of action upon which the complaint is based. Renihan *v.* Wright, 125 Ind. 536.

1. Hopkinson *v.* Tahourdin, 2 Chit. Rep. 303, 18 E. C. L. 343, where the plea professed to answer the whole declaration, which contained several counts, and stated that the goods were delivered and accepted in satisfaction "of the cause of action." It was held demurrable.

2. Neither Accord nor Satisfaction.—A plea to an *indebitatus* count which states that plaintiff was to pay himself out of some of defendant's moneys which he was to receive, and through his own default he received nothing, is bad as being neither an accord nor a satisfaction. Gifford *v.* Whittaker, 6 Q. B. 249, 51 E. C. L. 247; Griffiths *v.* Owen, 13 M. & W. 58.

Account Stated.—A plea of account stated, though it avers a balance and plaintiff's promise to pay, is bad on general demurrer. It is a mere accord. Bump *v.* Phœnix, 6 Hill (N. Y.) 308.

Execution Levied.—To debt on a judgment, defendant pleaded that it was confessed on a stipulation that it should be levied only on particular goods, and that the goods were levied upon and sold, and yielded an amount more than sufficient to pay the debt. *Held*, a plea not of accord and satisfaction, but that the debt had been levied, and so the amount of the levy was not issuable. Welch *v.* Lynch, 7 Barb. (N. Y.) 380.

Held no Accord and Satisfaction.—A., H., and S. jointly commit a trespass on lands forming the homestead of the former owner, at that time held by the widow by virtue of her dower and quarantine rights, and oust the widow, who brings an action for such trespass. Subsequently she files a bill in chancery against H. and A. for dower and quarantine in said lands, and in such suit recovers judgment against them for about four thousand dollars. In consideration of three thousand dollars, the widow releases H. from all liability for the trespass, reserving in said release the right to enforce the balance of the decree against A., who pays it. These facts were held to constitute no bar to her action for the trespass and ouster against S., and a plea setting up these facts is demurrable. Smith *v.* Gayle, 62 Ala. 446.

Plea Construed.—In an action on a sealed contract by which plaintiffs rented to defendants a number of ewes at a certain rent, the ewes to be returned at the termination of the lease, or $1.25 a head to be paid for all not returned by reason of "accident," and $1.50 for those disposed of "in any other manner," a plea of accord and satisfaction is bad that sets up that defendants entered into a new contract with plaintiffs, whereby one of defendants agreed to hold the balance of the ewes, after having redelivered a part, and to pay therefor 20 cents per head annual rent, instead of 25 cents as stipulated by the original contract, and that the new contract was executed by that defendant's continuing to hold the sheep thereunder, and that it was agreed that this new contract should be a full and complete satisfaction of the original contract. Armijo *v.* Abeytia (N. Mex. 1891), 25 Pac. Rep. 777.

3. Kershaw *v.* Robinson, 1 Brev. (S. Car.) 380.

Are Inconsistent.—Where a proceed-

2. Tender.—Where a sum of money is the subject-matter of the accord and satisfaction, or where the property tendered is capable of production in court, it must accompany the plea.[1]

3. Pro Tanto.—The part execution of an accord and satisfaction may be pleaded as satisfaction *pro tanto*.[2]

4. Question for Jury.—Where an accord and satisfaction is pleaded the subject-matter of which is that matters in dispute have been submitted to arbitration and passed on, the question is one for the jury.[3]

5. Estoppel.—A plea of accord and satisfaction needs only be supported by the same amount of evidence as any other plea. It is error to apply to such a plea the doctrine of estoppel.[4]

6. Admission.—The plea of accord admits the allegations of the declaration; and where bonds are sued on, they may be introduced in evidence although they vary from the description of them in the declaration.[5]

7. Chancery.—Chancery will not assist one where he has had an opportunity to plead the accord at law.[6]

8. Affirming an Accord.—The filing a supplemental plea of accord and satisfaction, made in settlement of the action, is a ratification of the accord.[7]

ing by *scire facias* was brought to revive a judgment and the defendant pleaded *nul tiel record*, statute of limitations, and accord and satisfaction, it was held that although the defences of *nul tiel record* and accord and satisfaction were inconsistent, yet they were not obnoxious to demurrer, and a defendant does not waive his objection to the sustaining a demurrer to his plea of accord and satisfaction by going to trial on the plea of *nul tiel record*. Tucker *v.* Edwards, 7 Colo. 209.

1. Guion *v.* Doherty, 43 Miss. 538. But probably this case is one on "tender" only, for an accord is no defence unless the plaintiff has accepted it.

2. Where there is no plea that a promise by a wrong-doer was made and accepted in satisfaction of the tort, any charge of the court as to rescission for non-performance of the promise is irrelevant, the tort being the subject-matter of the action. A mere accord, though partly performed or executed, does not extinguish the original right; the part execution may be pleaded as satisfaction *pro tanto*. A promise of future performance will amount to satisfaction if expressly accepted as such, but generally not otherwise. For such a promise to be available in bar, it must be pleaded, and its acceptance averred. Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534.

3. Madden *v.* Blain, 66 Ga. 49.

4. Cheeves *v.* Danielly, 74 Ga. 712.

5. Dickinson *v.* Burr, 7 Ark. 34.

General Issue.—The sheriff, to satisfy an execution against the defendant, wrongfully levied on property belonging to a third person. The sheriff delivered the property to warehousekeepers to keep; the third person then brought suit in trespass against such warehousemen. The warehousemen pleaded not guilty, and also accord and satisfaction. It was held that the plea of accord and satisfaction was not an admission of the cause of action when the general issue was pleaded. Prince *v.* Puckett, 12 Ala. 832.

6. Burton *v.* Hynson, 14 Ark. 32; Stark *v.* Thompson, 3 T. B. Mon. (Ky.) 302.

7. Whitlock *v.* Coulter, 1 City Ct. Rep. (N. Y.) 428.

ACCOUNTS AND ACCOUNTING.

By W. L. CRAWFORD.

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As to Bills of Particulars in account cases, see *BILLS OF PARTICULARS.*

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I. Common Law Action of Account—1. Generally Fallen into Disuse.—Account, sometimes called account render, was a form of action at common law against a person who, by reason of some fiduciary relation, was bound to render an account to another but refused to do so.[1] In *England* the action early fell into disuse.[2] And, as it is one of the most dilatory and expensive actions known to the law, and the parties are held to the ancient rules of pleading, and no discovery can be obtained, it never was adopted to a great extent in the *United States.*[3]

States Having no Chancery Courts.—But the action of account was adopted in several states, principally because there were no courts of chancery in which a bill for an accounting lay.[4]

2. When it Lies—Privity.—To maintain an action of account there must be either a privity in deed by the consent of the party, or a privity in law.[5]

For a Tort.—The action does not lie against a disseisor or other wrongdoer, or to recover damages, as for a tort.[6]

Against Guardian.—An action of account for rents and profits could be maintained by the heir, after he had attained the age of 14 years, against the guardian in socage.[7]

Against Bailiff.—So, at the common law, account will lie against a bailiff or receiver, and in favor of trade and commerce, by one merchant against another.[8]

Joint Tenants and Tenants in Common.—But this action did not lie for one joint tenant or tenant in common against his companion, although he should have taken the whole profits to his own use, unless he had been appointed a bailiff to render an account.[9] But by statute 4 Anne, c. 16, §27, an action of account could be maintained by one joint tenant or tenant in common against the other for receiving more than his share or proportion.[10]

1. Abb. L. Dict.
2. 3 Black. Com. 162–3.
3. McMurray *v.* Rawson, 3 Hill (N. Y.) 59.
4. The reason assigned for its adoption in *Pennsylvania* was that there was no adequate remedy in chancery; it was made to subserve all the purposes of a bill in equity. James *v.* Browne, 1 Dall. (Pa.) 339.

In *Connecticut*, while a suit in chancery lay for an accounting, yet this remedy could not be sought if the action of account afforded an adequate remedy. Stannard *v.* Whittlesey, 9 Conn. 556. But the action was never as broad in *Connecticut* as the equity proceeding of accounting. Dexter *v.* Hitchcock, 10 Conn. 209.

In *Illinois*, although there are courts of chancery, the action of account is used at the present time with an enlarged scope. Garrity *v.* Hamburger Co., 136 Ill. 499. See Bedell *v.* Jannsey, 9 Ill. 193.

5. Selwyn Nisi Prius, 1.
6. Brinsmaid *v.* Collard, 9 Vt. 31; Selwyn Nisi Prius, 1.
7. Selwyn Nisi Prius, 1. And it is the only action other than one on his bond that can be brought against a guardian, *qua* guardian, in a court of law. Green *v.* Johnson, 3 Gill. & J. (Md.) 389.
8. Selwyn Nisi Prius, 1–4.
9. Selwyn Nisi Prius, 4.
10. Selwyn Nisi Prius, 4.

To be Charged as Bailiff.—The statute only empowers the plaintiff to charge the defendant as bailiff, and not as receiver. Selwyn Nisi Prius, 4. But the defendant is only answerable for so much as he has actually received, not for what he might have made without his wilful default. Selwyn Nisi Prius, 4.

Merchant and Broker.—In case of a running account between a merchant and a broker, the proper remedy for recovering the balance was by an action of account and not of assumpsit.[1]

Executors and Administrators.—At common law executors in general could not have this action for an account to be made to the testator, because the account rested in privity.[2] But the statute West. 2, 13 Edw. I, Stat. 1, c. 23, gave this action to executors; and the statute 31 Edw. III, Stat. 1, c. 11, to administrators.[3]

Partnership Affairs.—The action of account was sometimes used to settle the accounts of a partnership.[4]

3. The Declaration — Form.—The declaration was somewhat like a bill in equity for an accounting, but, unlike such bill, it did not ask that an account be taken, but concluded, as all declarations at law do, praying damages for the refusal to account.[5]

Allegations of Receipt.—The declaration must allege what moneys were received, and of whom received.[6]

More than Two.—When there are more than two co-tenants, the action of account does not lie between them. Lacon *v.* Davenport, 16 Conn. 341.

Joinder of Parties.—Tenants in common cannot join in an action of account; each must bring his separate action. And, conversely, two or more cannot be sued, unless they are partners, in the same action. McPherson *v.* McPherson, 11 Ired. (N. Car.) 391; 53 Am. Dec. 416.

1. Selwyn Nisi Prius, 4. But generally the fact that an account will lie is no objection to bringing assumpsit if defendant is not thereby essentially prejudiced. Tousey *v.* Preston, 1 Conn. 179; Wetmore *v.* Woodbridge, Kirby (Conn.) 165.

2. Coke Inst. 1, 89 b.

3. Coke Inst. 89 b, 2.

Between Co-executors. — The action does not lie between co-executors. Smith *v.* Chapman, 5 Conn. 26.

4. Stanford *v.* Demit, 1 Root (Conn.) 317; Whelen *v.* Watmough, 15 S. & R. (Pa.) 153; Griffith *v.* Willing, 3 Binn. (Pa.) 317.

Partnership Claims Uncollected.—But it is doubtful if it lay while any of the partnership claims were still uncollected or property undisposed of. Day *v.* Lockwood, 24 Conn. 197.

Part-owners of Vessels. — Part-owners of vessels could use this action for the adjustment of the expenses and profits of such vessels. Pingree *v.* Maguire, 30 Me. 508; Hardy *v.* Sprowl, 33 Me. 508.

5. See Godfrey *v.* Saunders, 3 Wils. 73, where the declaration and all the proceedings are set out *in extenso.* This case is replete with learning on this form of action. Care must be taken in drafting the declaration to allege facts warranting a common-law remedy. See May *v.* Williams, 3 Vt. 239.

Making Demand.—It was not necessary to make a demand before commencing the action or filing the declaration. Sturges *v.* Bush, 5 Day (Conn.) 457.

Attachment.—The declaration might be accompanied with an attachment proceeding which commenced the action. Humphreys *v.* Matthews, 11 Ill. 472.

Necessity of Declaration.—Where the cause is sent to a referee there need be no declaration. Barde *v.* Wilson, 3 Yeates (Pa.) 149. As the action lay before a justice of the peace, it may be questioned whether in such a case the elaborate declaration of the common law was necessary. See Bulkly *v.* Lewis, 1 Root (Conn.) 217.

6. May *v.* Williams, 3 Vt. 239; Jordan *v.* Wilkins, 2 Wash. (U. S.) 483, where a nonsuit was granted because the evidence showed that the money received belonged to plaintiff jointly with his partners, and the declaration charged that the money was plaintiff's. See also Starkey *v.* Peters, 18 Conn. 186; Barnum *v.* Landon, 25 Conn. 148.

Partnership Affairs. — But between partners it is not necessary to specify particularly. It is sufficient to charge the defendant generally with the

Joinder of Counts.—Several counts may be joined in the same declaration.[1]

Prayer.—As the plaintiff could have judgment for a greater amount of damages than that laid in the declaration, the prayer was not material.[2]

4. The Plea—When to be Filed.—Pleas in bar of the action must be filed prior to the interlocutory judgment to account.[3]

What Should be Pleaded.—The defendant should plead before the court, in the first instance, any matter which shows that he is not liable to account, whether it is that he never was liable, or that the liability has been in some way discharged.[4]

No General Issue.—In the action of account there is no general issue, and it cannot be pleaded.[5]

5. Judgment Quod Computet—Nature.—There are two judgments in the action of account; the first judgment is that the defendant do account, usually termed a judgment *quod computet.* This is in the nature of an award of the court, interlocutory only, and not definitive.[6]

receipt of money for their joint benefit. James *v.* Browne, 1 Dall. (Pa.) 339; Robinson *v.* Wright, Brayt. (Vt.) 22.

1. **Bailiff and Tenant in Common.**—Counts charging the defendant as bailiff and also as tenant in common may be joined. McAdam *v.* Orr, 4 W. & S. (Pa.) 550.

Common Book Account.—A count in common book-account form cannot be joined with other counts in this action. May *v.* Williams, 3 Vt. 239.

Different Counts for Same Cause of Action.—The same cause of action may be stated in several different counts to meet the proof. Lacon *v.* Davenport, 16 Conn. 344. See Smith *v.* Smith, 2 Root (Conn.) 42.

2. Gratz *v.* Philips, 5 Binn. (Pa.) 564.

3. Closson *v.* Means, 40 Me. 337; Black *v.* Nichols, 68 Me. 227.

4. Lee *v.* Abrams, 12 Ill. 111.

Estoppel.—All matter of estoppel must be pleaded or it will be considered waived. Brinsmaid *v.* Mayo, 9 Vt. 31.

Never Bailiff or Receiver.—He may plead that he was never bailiff or receiver. Chitty on Pleadings, vol. 1, 488; Selwyn Nisi Prius, 4. See Spalding *v.* Dunlap, 1 Root (Conn.) 319, as to what evidence will support this plea.

Fully Accounted.—Or that he has fully accounted. Bishop *v.* Baldwin, 14 Vt. 145; Lee *v.* Abrams, 12 Ill. 111; Chitty on Pleadings, vol. 1, 488; Selwyn Nisi Prius, 4; Brinsmaid *v.* Mayo, 9 Vt. 31. *Contra*, Mott *v.* Downer, 1 Root (Conn.) 425.

"Plene computavit" and "Nothing in arrear."—The plea of *plene computavit* is to be distinguished from the plea before the auditors of "nothing in arrear." See Lee *v.* Abrams, 12 Ill. 111; Pickett *v.* Pearsons, 17 Vt. 470.

Accounted before Auditors.—Or that he has accounted before auditors assigned by the plaintiff. Selwyn Nisi Prius, 4.

Release.—A release may form the subject-matter of the plea. Chitty on Pleadings, vol. 1, 488.

Statute of Limitations.—The statute of limitations is pleadable in bar before the interlocutory judgment. Black *v.* Nichols, 68 Me. 227; Chitty on Pleadings, vol. 1, 488.

5. Bishop *v.* Baldwin, 14 Vt. 145; Chitty on Pleadings, vol. 1, 488.

6. Selwyn Nisi Prius, 4; Closson *v.* Means, 40 Me. 337; McPherson *v.* McPherson, 11 Ired. (N. Car.) 391; 53 Am. Dec. 416; Garrity *v.* Hamburger Co., 136 Ill. 501; Black. Com. vol. 3, 162. This judgment determines nothing beyond a liability to account. Lee *v.* Abrams, 12 Ill. 111; Hawley *v.* Burd, 6 Ill. App. 454; Newbold *v.* Sims, 2 S. & R. (Pa.) 317.

Form of Judgment.—The following form was used in Godfrey *v.* Saunders, 3 Wilson 88: "Therefore it is considered that the defendant account with the plaintiff of the time aforesaid

Necessity of this Judgment.—It is essentially necessary that this judgment should be entered.[1]

Opening.—A judgment *quod computet*, being interlocutory, is within the control of the court, and may be opened at a term after it was rendered.[2]

6. Proceedings before the Auditors. See REFERENCES.

7. Final Judgment — Upon what Based.—The final judgment is based upon the auditor's report, and only indirectly upon the declaration.[3]

Form.—The final judgment is that the plaintiff do recover so much as the auditors have found is due him from defendant.[4]

II. ACCOUNT STATED—1. Generally—Defined.—An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions and promising payment.[5]

Inserting Count.—At common law it was always advisable in all declarations in assumpsit to insert a count on an account stated.[6]

in which he and the said S. S. were the bailiffs of the plaintiff, and had the care and administration of the aforesaid goods and merchandises to be merchandised and made profit of for plaintiff." Where an order is entered "that the defendant do account with the plaintiff, and that the plaintiff do account with the defendant," this is virtually a judgment *quod computet*. Garrity *v.* Hamburger Co., 136 Ill. 500.

1. Selwyn Nisi Prius, 4.

Contra.—McLean *v.* Wade, 53 Pa. St. 146; but this was by virtue of a statute. Unless the pleadings present an issue calling for such a judgment, it is not necessary before sending the case to auditors. Spalding *v.* Day, 37 Conn. 428.

2. Kitchin *v.* Strawbridge, 4 Wash. (U. S.) 81. It may be opened for the purpose of allowing the plaintiff to amend his declaration. Garrity *v.* Hamburger Co., 136 Ill. 499; but the proceedings were in assumpsit, and the amendment made it an action of account. See also Sweigart *v.* Lowmarter, 14 S. & R. (Pa.) 200; Bredin *v.* Dwen, 2 Watts (Pa.) 95; Lee *v.* Abrams, 12 Ill. 111.

3. Garrity *v.* Hamburger Co., 136 Ill. 501.

4. Selwyn Nisi Prius, 6.

Writ of Error.—A writ of error lies upon this last judgment only; but although it be found erroneous and is reversed, the judgment of *quod computet* stands in force, for the two judgments are distinct. Selwyn Nisi Prius, 6.

Affirmed by Appellate Court.—Where the final judgment of the trial court in an action of account is affirmed, the judgment of the appellate court is final, both in respect to the principal and ultimate facts upon which the right of recovery or ground of defence is claimed or based, and in respect to the evidentiary and subordinate facts. Garrity *v.* Hamburger Co., 136 Ill. 501.

Execution.—"It is not unworthy of remark that this action [of account] is the first of a civil nature in which process of execution against the person was given. This process is given by Stat. Westm. 3, 13 Edw. I, c. II, but under this act the guardian in socage cannot be committed to prison, for he is *in loco parentis*, and the words of the statute are *de serventibus baliviis*." Selwyn Nisi Prius, 6.

5. Zacarius *v.* Palotti, 49 Conn. 38. See Toland *v.* Sprague, 12 Pet. (U. S.) 335; Am. & Eng. Ency. Law, tit. ACCOUNT STATED.

6. Chitty on Pleadings, vol. 1, 358. The rules of Hil. Term, 4 Wm. IV, expressly allowed this count to be joined with any other count for a money demand. Chitty on Pleadings, vol. 1, 359.

2. Must be Declared on as Such.—To enable one to recover as upon an "account stated," he must declare upon it as such.[1]

Complaint not to be Dismissed.—But if the complaint claims to recover a balance alleged to be due on an account stated, and the averments fail to show an account stated, but are sufficient to show plaintiff entitled to an accounting under the Codes, the complaint should not be dismissed, but a judgment for an accounting should be rendered.[2]

Amendment.—It is within the discretion of the court to allow an amendment of the complaint which will make the action one of account stated.[3]

3. The Complaint or Declaration—Sufficient Complaint.—A complaint to recover on an account stated is sufficient under the Codes, though it be as general in its allegations of the particulars of the cause of action as the old form of a declaration in assumpsit.[4]

Allegations of Assent.—The defendant's assent to the settlement must be averred.[5]

1. McCormick Harvesting Mach. Co. *v.* Wilson, 39 Minn. 467; Truman *v.* Owens, 17 Oregon, 523; Northern Line Packet Co. *v.* Platt, 22 Minn. 413; Bump *v.* Cooper, 20 Oregon 527.

Exception.—An exception that the court erred in treating the action as one upon an account stated cannot apply to an instruction that the plaintiff's action rests not merely upon an account stated, but upon an express promise to pay the balance; but such exception operates as a waiver of any error therein. Hawley *v.* Harran, 79 Wis. 379.

2. Emery *v.* Pease, 20 N. Y. 62. If the original pleading relies on the original transactions or the items included in the account, they are open to proofs by the other party. McCormick Harvesting Mach. Co. *v.* Wilson, 39 Minn. 467; Northern Line Packet Co. *v.* Platt, 22 Minn. 413; Sichel *v.* Davies (Supreme Ct.), 15 N. Y. St. Rep. 317; Zent *v.* Watts (Supreme Ct.), 1 N. Y. Supp. 702. See Blewett *v.* Gaynor, 77 Wis 378, where the action was held not to be merely an action upon an account stated, and yet the plaintiff was allowed to recover.

Contra.—But where the pleading is so framed as to show that the plaintiff relies solely on an account stated, he may not fall back on the accounts. Goings *v.* Patten, 1 Daly (N. Y.) 168.

3. **Assent.**—The complaint may be amended by inserting the necessary allegation of assent by defendant. Volkening *v.* De Graaf, 81 N.Y. 268.

Parties.—There may be an amendment dismissing one defendant and adding new causes of action against the other. Oden *v.* Bonner, 93 Ala. 393.

4. Cudlipp *v.* Whipple, 4 Duer (N.Y.) 610.

The Form.—The following is an approved form: "A. B., by C. D. his attorney, sues E. F. for money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them." Chitty on Pleadings (16th Am. ed.), vol. 2, 34. And see McFarland *v.* Cutter, 1 Mont. 383; Heimrich *v.* England, 34 Minn. 395; and Bouslog *v.* Garrett, 39 Ind. 338, where the complaints were held to state a cause of action. But a mere allegation that the plaintiff and the defendant "have had accountings and settlements" is not an averment of an account stated. Ward *v.* Farrelly, 9 Mo. App. 370.

Texas.—In *Texas*, when the plaintiff relies upon a parol settlement of accounts, he must set forth the original accounts. Neyland *v.* Neyland, 19 Tex. 433; Pridgen *v.* Hill, 12 Tex. 374.

5. Van Blarcom *v.* Donovan, 16 Mo. App. 535.

Insufficient Averment.—An averment that one party made a statement of an account, and delivered it to the other party, who made no objection to it, is

Allegations of Breach.—The allegations of breach are not technically construed. The courts will draw the inference of breach from any equivalent expressions.[1]

Bill of Particulars.—No bill of particulars need be filed.[2]

4. The Answer or Plea—Defence must be Pleaded.—Any defense not admissible under a general denial must be pleaded.[3]

Error and Mistake.—The defense of error or mistake must be specially pleaded.[4]

Fraud.—But where the evidence shows that an account stated is fraudulent, the account may be inquired into though not surcharged or falsified in the pleading of the party questioning it.[5]

Prematurely Brought.—The defense that the action is brought before the account was fully stated must be specially pleaded.[6]

Denial and Non-Assumpsit.—Under a plea of non-assumpsit the defendant may show that the accounts which form the basis of the account stated are incorrect.[7] But under the Codes the defendant, under a denial of an account stated, cannot be permitted to attack the correctness of the items of which the account settled is composed.[8] Under a general denial the defendant has a right

not sufficient. Emery *v.* Pease, 20 N.Y. 62; St. Louis Lager Beer Bottling Co. *v.* Colorado Nat. Bank, 8 Colo. 70.

1. The allegation that an account was stated between the plaintiff and defendant, "and upon such statement a balance of $19,702 was found to be due from the defendant to the plaintiff," is a sufficient charge that there was a breach of contract. Johnston *v.* Ferris (C. Pl.), 12 N. Y. St. Rep. 666. A sufficient allegation of breach at common law was: "The defendant hath not paid any of said moneys, or any part thereof." Debenham *v.* Chambers, 3 M. & W. 128.

2. Salem Gravel Road Co. *v.* Pennington, 62 Ind. 175; Auzerais *v.* Naglee, 74 Cal. 60.

Electing to File.—The plaintiff may elect to file a bill of particulars. Rundlett *v.* Weeber, 3 Gray (Mass.) 267.

3. Hendy *v.* March, 75 Cal. 566; Barker *v.* Hoff, 52 How. Pr. (N. Y. Supreme Ct.) 382; Anthony *v.* Day, 52 How. Pr. (N. Y. Supreme Ct.) 35; Weeks *v.* Hoyt, 5 Hun (N. Y.) 347; Zeller *v.* Sommer, 132 Pa. St. 33; St. Louis Lager Beer Bottling Co. *v.* Colorado Nat. Bank, 8 Colo. 70; Barker *v.* Hoff, 52 How Pr. (N. Y. Supreme Ct.) 382; Beach *v.* Kidder (Supreme Ct.), 8 N. Y. Supp. 587; Dunbar *v.* Johnson, 108 Mass. 519. And the evidence is confined to the issue made by the pleadings. Hawley *v.* Harran, 79 Wis. 379.

4. Hendy *v.* March, 75 Cal. 566; Barker *v.* Hoff, 52 How. Pr. (N. Y. Supreme Ct.) 382; Anthony *v.* Day, 52 How. Pr. (N. Y. Supreme Ct.) 35; Weeks *v.* Hoyt, 5 Hun (N. Y.) 347; St. Louis Lager Beer Bottling Co. *v.* Colorado Nat. Bank, 8 Colo. 70. See Sichel *v.* Davies (Supreme Ct.), 15 N. Y. St. Rep. 317.

Mistake Appearing.—Though the mistake appear in the evidence and is relied on by the defendant, yet if no such issue is made by the pleadings, a nonsuit should be granted. Beach *v.* Kidder (Supreme Ct.), 8 N. Y. Supp. 587.

Sufficient Form.—It is sufficient to allege that an investigation showed an indebtedness to the defendant, setting forth the items from which the error in the account arose. Zeller *v.* Sommer, 132 Pa. St. 33.

5. Liscomb *v.* Agate, 67 Hun (N. Y.) 388.

6. Baird *v.* Crank, 98 Cal. 293. But where the answer sets up this defense, it is available though the answer is not verified. Johnston *v.* Johnson, 44 Kan. 666.

7. Thomas *v.* Hawkes, 8 M. & W. 140. The denial of an account stated was in the form of *non-assumpsit*; the plea of "never indebted" could not be made at common law. Jacobs *v.* Fisher, 1 C. B. 178; 50 E. C. L. 177.

8. Warner *v.* Myrick, 16 Minn. 91; Moody *v.* Thwing, 46 Minn. 511. *Contra.*—Errors may be shown under

to give any evidence which shows that there is actually no account between him and the plaintiff, and that he has had no dealings at any time with him.[1]

III. Actions on Accounts—1. Particularity.—A complaint on an account should identify and describe the claim with reasonable particularity.[2]

Copy of Account.—If the account consists of several items, a copy thereof should be filed in the action.[3]

2. Statutory Provisions.—Statutes have been passed in most of the states dealing with the subject of actions on accounts. The most usual form of such statutes is that which prescribes that it is not necessary for a party to set forth in a pleading the items of an account therein alleged; but in that case he must deliver to the adverse party within a certain time a bill of particulars.[4]

3. Pleading by Copy.—The statute sometimes takes the form of allowing an action, counter-claim, or set-off founded upon an account to be brought by simply setting forth a copy of the account, with all credits thereon, and stating that there is due on such account a specified sum.[5]

When it may be Adopted.—An action may be brought under the above form of statute, although there was a special contract, if it has been fully performed, or if the additions or modifications have been sanctioned by the defendant.[6]

a general denial. Bouslog *v.* Garrett, 39 Ind. 378.

1. Field *v.* Knapp, 108 N. Y. 87.

2. Bay *v.* Saulspaugh, 74 Ind. 397; Love *v.* Doak, 5 Tex. 343; Wilkinson *v.* Thuelemeyer, 44 Tex. 470. And in an action on an account the answer must be particular in stating the defence. Savage *v.* Aiken, 21 Neb. 605. The items of an account relied on must be stated or filed under the rules of pleading which apply to the court in which the suit is instituted. Smith *v.* McGehee, 1 Tex. App. Civ. Cas. § 940.

Sufficient Particularity.—In a petition on an open account an allegation of contract in writing to pay the debt at a particular place is sufficient, without setting out the contract. Whittaker *v.* Wallace, 2 Tex. App. Civ. Cas. § 558. Nor is it necessary to specify the articles, in an action on account for merchandise sold and delivered. Freas *v.* Truitt, 2 Colo. 489.

3. Biddle *v.* Reed, 33 Ind. 329; Wolf *v.* Schofield, 38 Ind. 175; Jones *v.* Dronberger, 15 Ind. 443.

Itemized.—The account should be itemized. Gulick *v.* Fortson, 1 Tex. App. Civ. Cas. § 425; Bremond *v.* Seeligson, 1 Tex. App. Civ. Cas. § 636. Several items of an account may be joined in one paragraph. Gaff *v.* Hutchinson, 38 Ind. 341. And it is not necessary that the plaintiff should prove each item of charge, if the correctness of the account is otherwise established. Pryor *v.* Johnson, 32 Ala. 27; Gaunt *v.* Tucker, 18 Ala. 27; Johnson *v* Kelly, 2 Stew. (Ala.) 490; Holmes *v.* Gayle, 1 Ala. 517; Ohio Creek Coal Co. *v.* Hinds, 15 Colo. 173. As to the necessity of setting out an account, and as to its effect, etc., see Bryant *v.* Harris Co., 70 Miss. 683; Buehler *v.* Reed, 11 Iowa 182; Semmes *v.* Lee, 3 Cranch (C. C.) 439; Lovejoy *v.* Wilson, 1 Cranch (C. C.) 102. The practice of furnishing a bill of particulars of the items of an account is treated of under the article Bills of Particulars.

4. See § 531 *New York* Code Civil Procedure. For the law upon such forms of statutes, see the article Bill of Particulars.

5. See Rev. Sts. *Ohio*, § 5086.

6. Cincinnati *v.* Cameron, 33 Ohio St. 357.

What Constitutes an "Account."—To constitute an account within the meaning of such statute, it is not necessary

Account must be Specific.—The account annexed must be specific. It should contain the particulars of the claim, as well as the description and price of the goods; the same strictness is required as would be necessary under the old practice in furnishing a bill of particulars.[1]

Allegation that Amount is "Due."—The allegation in the petition of the amount due on the account, after deducting all credits thereon, is a material one.[2]

Remedies for Defective Accounts.—If an account on which the plaintiff seeks to recover is attached to and made a part of the complaint, an objection that it is unintelligible can only be raised by demurrer.[3]

4. Probated Accounts—Generally.—Some states allow an account coming from another county or state to be sued on, and its verification by affidavit is conclusive unless the account is denied under oath. This mode of procedure is adopted to expedite the collection of claims to which there is no defence. It is a step toward recognizing the distinction between litigious claims and those debts to which there is no real defence.[4]

Meaning of "Account."—By an "account" is meant such in its

that the items be entered in an account-book, provided they are such as usually form the subject of book accounts. Black *v.* Chesser, 12 Ohio St. 621. See Boston, etc., Iron Works *v.* Montague, 135 Mass. 319; Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 562. But a petition is good as against a general demurrer when the account consists of one or more items which are the proper subjects of a book account, and of other cash items which are not ordinarily the subjects of such account. McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23. See Dudley *v.* Geauger Iron Co., 13 Ohio St. 169.

Counter-claim—A counter-claim may be based on any items of an account. Roots *v.* Nye, 2 Handy (Ohio) 230.

1. Goodheart *v.* Powers, 1 Handy (Ohio) 559.

What is Sufficient.—But it is a sufficient giving of an account to set down in writing in the form of an account the items thereof, without having previously made any entries in the account-book. Black *v.* Chesser, 12 Ohio St. 626. See Ralston *v.* Kohl, 30 Ohio St. 92.

2. It is not an allegation of value or damage; it must be controverted by the answer or else the court may render judgment for the amount claimed without proof. Dallas *v.* Ferneau, 25 Ohio St. 635.

Word "Indebted."—Alleging that the defendant is "indebted," instead of that there is "due," is bad on demurrer. Archer *v.* Moore Co., 11 Cinn. L. Bull. (Ohio) 224. See also Beck *v.* Ball, 1 Clev. Rep. (Ohio) 147; Higdon *v.* Gardner, 2 Ohio Cir. Ct. Rep. 340.

3. Goldsmith *v.* Sawyer, 46 Cal. 209.

Failure to Attach Copy.—Failure to attach a copy of an account is ground for demurrer. O'Brien *v.* Chicago Co., 64 Iowa 411. The copy must be attached no matter how simple the account may be. Winters *v.* Page County, 70 Iowa 300.

Only a Few Items Defective.—But demurrer to all the items of an account, when some of them are properly the subject of a book account and some not, is not the proper remedy. The demurrer should be to the objectionable items. McKemy *v.* Goodall, 12 Cinn. L. Bull. (Ohio) 295.

Motion.—Some authorities hold that the proper remedy for a defective account is a motion that the same be made more specific or definite. Flanders *v.* Ish, 2 Oregon 320; McKemy *v.* Goodall, 1 Ohio Cir. Ct. Rep. 23.

Demanding Bill of Particulars.—It has also been held that the remedy for an imperfect account is to demand a bill of particulars. Gibson *v.* Ohio Farina Co., 2 Disney (Ohio) 497.

4. See § 4529 Code *Tennessee.*

popular and not technical sense, and the word applies to transactions between persons in which, by sale upon the one side and purchase upon the other, the title to personal property is passed from the one to the other, and the relation of debtor and creditor is thereby created by general course of dealing.[1]

Petition or Declaration.—A sworn account attached as an exhibit to a petition does not relieve the pleader from making all the necessary allegations of delivery and price under the contract of which the exhibit might be the evidence. The petition in itself should contain these averments, stated in such direct and explicit manner as to show a clear cause of action, without reference to the account.[2]

How Issue Made up.—An account from another county or state may be probated and sued on to any amount; and a denial by defendant on oath makes up an issue and puts the plaintiff to prove the account.[3]

The Affidavit.—As the practice of suing on probated accounts is in derogation of the common law, the statute is construed strictly. The omission in the affidavit of any of the material averments prescribed by the statute is fatal to it for the purposes of proof.[4]

1. Texas, etc., R. Co. *v.* Smith, 2 Tex. App. Civ. Cas. § 51; Galveston, etc., R. Co. *v.* Schwartz, 2 Tex. App. Civ. Cas. § 758.

Book Accounts.—In *Iowa* the statute only allows the action to be for items of account properly provable by books of original entries. Lyman *v.* Bechtel, 55 Iowa 437.

Torts.—The statute applies only to matters of account and not to torts. A claim against a common carrier for failure to deliver goods cannot be the subject of a probated account. Western, etc., R. Co. *v.* Mead, 4 Sneed (Tenn.) 107; Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 677.

Texas.—In an action for postdating items of an account (Hart. Tex. Dig. art. 2380), the petition should allege that defendant was a merchant or a trader. Watson *v.* Loop, 12 Tex. 11.

2. Hemming *v.* McRea, 1 Tex. App. Civ. Cas. § 752.

Must State Account is Probated.—The declaration must state that the account is a probated one, and make profert of same. Otherwise the defendant need not deny it under oath. Hunter *v.* Anderson, 1 Heisk. (Tenn.) 1; Wilkhorn *v.* Gillespie, 6 Heisk. (Tenn.) 329. But permitting the account to be read to the jury is a waiver of the right to except for failure to make profert in the declaration. App *v.* Tiernan, 10 Heisk. (Tenn.) 45.

Supplemental Petition.—The filing a supplemental petition which in effect but reiterates the original does not obviate the effect which the defendant's denial under oath has on the account. Olive *v.* Hester, 63 Tex. 190.

Insufficient Verification.—If the verification of the account is defective, the defect goes to the evidence, and is not ground of demurrer to the complaint. Elyton Land Co. *v.* Morgan, 88 Ala. 434.

3. Cave *v.* Baskett, 3 Humph. (Tenn.) 340; Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 676; Brien *v.* Peterman, 3 Head (Tenn.) 498; Hunter *v.* Anderson, 1 Heisk. (Tenn.) 3.

4. McHugh *v.* Butler, 39 Mich. 145; Locke *v.* Farley, 41 Mich. 405; Gordon *v.* Sibley, 59 Mich. 280; Shandy *v.* Courales, 1 Tex. App. Civ. Cas. § 235.

Allegation of "Due."—The allegation that the account is "due" is material. Shaunnessy *v.* Gierse, 1 Tex. App. Civ. Cas. § 379; McGowan *v.* Lamb, 66 Mich. 615; Duer *v.* Endres, 1 Tex. App. Civ. Cas. § 322. Where the affidavit stated that "the several items of said account respectively mature as there stated," this was held to be defective, and not the equivalent of "due." Shaunnessy *v.* Gierse, 1 Tex. App. Civ. Cas. § 379. But an affidavit that the "annexed account is just, due, and unpaid" substantially

What Defence can be Made.—The statute on probated accounts does not cut off all defences unless the account is denied under oath. Any defence can be made to a probated account, without denying it under oath, that can be made to a note, under a plea of *nil debet*.[1]

IV. ACCOUNTING IN EQUITY—1. Equity Jurisdiction in Cases of Accounts—*a.* WHAT MUST BE ALLEGED.—A general allegation that the accounts are of an intricate nature is insufficient to entitle the plaintiff to maintain a bill for an account; such allegation must be supported by specific statements of facts showing the intricate and complex nature of the accounts.[2]

b. BASIS AND EXTENT OF JURISDICTION.—The basis and extent of the equitable jurisdiction over matters of account appears to have been seldom considered in the American courts, but is often discussed in the English authorities.[3] The best considered authorities put the equitable jurisdiction upon three grounds, to wit: the complicated character of the accounts; the need of a discovery; and the existence of a fiduciary or trust relation.[4]

complies with a statute requiring the affidavit to set out that the account "is justly owing and due." McGowan *v.* Lamb, 66 Mich. 615.

Failure to Object.—A party failing to object to the verification of an account within a reasonable time should not afterwards be heard in opposing it. Robbins *v.* Benson, 11 Oregon 514. And taking issue may be a waiver of the necessity of the oath. Loeb *v.* Munn, 4 Heisk. (Tenn.) 449. See Brown *v.* Stabler, 1 Heisk. (Tenn.) 444.

Resting Case on Defective Affidavit.—If the plaintiff rests his case on an ineffectual affidavit, he cannot, after the defence has rested, go back and prove his demand in the ordinary way as matter of right. McHugh *v.* Butler, 39 Mich. 185. But where defendant, without being misled, allows an irregular affidavit to be introduced without objection, he cannot, after the proofs are closed, object for the first time that it proves nothing. Locke *v.* Farley, 41 Mich. 405.

New Affidavit.—A party cannot by a new and *ex parte* affidavit correct a mistake in not indorsing on the summons and complaint the fact that the account is verified. Gainer *v.* Pollock, 96 Ala. 554.

Counter-Affidavit.—Where a verified account is sued on in a justice's court, the defendant has a right to file a counter-affidavit for the first time on appeal in the county court. Texas, etc., R. Co. *v.* Norton, 1 Tex. App. Civ. Cas. § 403.

1. Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 677. See McCamant *v.* Batsell, 59 Tex. 363; Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 104.

Partnership.—Where one is sued as silent partner on a probated account, the partnership must be proved, whether the account is denied under oath or not. Trundle *v.* Edwards, 4 Sneed (Tenn.) 573.

2. Daniell Ch. Pl. & Pr. vol. 3, 1929; Padwick *v.* Hurst, 23 L. J. Ch. 657; Phillips *v.* Phillips, 9 Hare 471; Foley *v.* Hill, 1 Ph. 398; Fluker *v.* Taylor, 3 Drew 183; Leake *v.* Cordeaux, 4 W. R. 806; McMahon *v.* Burchell, 2 Ph. 127; Bartlett *v.* Parks, 1 Cush. (Mass.) 82.

3. Phillips *v.* Phillips, 9 Hare 471; Dinwiddie *v.* Bailey, 6 Ves. 139; Mackenzie *v.* Johnston, 4 Madd. 374; King *v.* Rossett, 2 Y. & J. 33; Massey *v.* Banner, 4 Madd. 416; Padwick *v.* Hurst, 18 Beav. 575; Navulshaw *v.* Brownrigg, 2 De G., M., & G. 241; Makepeace *v.* Rogers, 11 Jur. N. S. 215; Barry *v.* Stevens, 31 Beav. 258; Foley *v.* Hill, 2 H. L. Cas. 28; Moxon *v.* Bright, L. R. 4 Ch. Cas. 292.

4. Allison *v.* Herring, 9 Sim. 583; Pike *v.* Dickenson, L. R. 7 Ch. 61; Foley *v.* Hill, 2 H. L. Cas. 28; Smith *v.* Leveaux, 2 De G., J., & S. 1; South Eastern R. Co. *v.* Brogden, 3 Mac. &

Under Codes.—But the necessity for a resort to equity because of the complicated character of the accounts and the need of a discovery is in some states very slight since the adoption of Codes of Procedure, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity.[1] But the jurisdiction of the latter court over trusts and those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established.[2]

c. MUTUAL ACCOUNTS.—To sustain a bill for an account there must be mutual demands, and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side and of payments on the other.[3]

G. 23; O'Connor *v.* Spaight, 1 Sch. & Lef. 305; Dinwiddie *v.* Bailey, 6 Ves. 136; Bliss *v.* Smith, 34 Beav. 508; Great Western Ins. Co. *v.* Cunliffe, L. R. 9 Ch. 525; North Eastern R. Co. *v.* Martin, 2 Ph. 758; Ranger *v.* Great, etc., R. Co., 5 H. L. Cas. 91; Mitchell *v.* Great Works Milling, etc., Co., 2 Story (U. S.) 648; Dubourg de St. Colombe *v.* U. S., 7 Pet. (U. S.) 25; Fowle *v.* Lawrason, 5 Pet. (U. S.) 502; Kirkman *v.* Van Lier, 7 Ala. 217; Robinson *v.* Bullock, 58 Ala. 618; Avery *v.* Ware, 58 Ala. 479; Bruce *v.* Burdet, 1 J. J. Marsh. (Ky.) 80; Power *v.* Reeder, 9 Dana (Ky.) 6; Seymour *v.* Long Dock Co., 20 N. J. Eq. 407; Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76; Wilson *v.* Mallet, 4 Sandf. (N. Y.) 112; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1; Post *v.* Kimberly, 9 Johns. (N. Y.) 470; Long *v.* Majestre, 1 Johns. Ch. (N. Y.) 305; Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342; Marvin *v.* Brooks, 94 N. Y. 80; Jones *v.* Bullock, 2 Dev. Eq. (N. Car.) 368; Grubb's Appeal, 90 Pa. St. 228; Passyunk B'ld'g Assoc.'s Appeal, 83 Pa. St. 441; Frisbee's Appeal, 88 Pa. St. 146; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Kerr *v.* Camden Steamboat Co., 1 Cheves Eq. (S. Car.) 189; Nelson *v.* Allen, 1 Yerg. (Tenn.) 360; Hay *v.* Marshall, 3 Humph. (Tenn.) 623; Hickman *v.* Stout, 2 Leigh (Va.) 6.

"The principle upon which courts of equity originally entertained suits for an account, where the party had a legal title, is, that though he might support a suit at law, a court of law either cannot give a remedy, or cannot give so complete a remedy as a court of equity; and by degrees courts of equity assumed a concurrent jurisdiction in cases of account; for it cannot be maintained that this court interferes only when *no* remedy can be had at law." Per the Lord Chancellor in Carlisle *v.* Wilson, 13 Ves. 278.

But that courts of law and equity have concurrent jurisdiction in all matters of accounts, see Chapman *v.* Koops, 3 B. & B. 289; Fowle *v.* Lawrason, 5 Pet. (U. S.) 495; Power *v.* Reeder, 9 Dana (Ky.) 10; Breckenridge *v.* Brooks, 2 A. K. Marsh. (Ky.) 338; King *v.* Balwin, 17 Johns. (N. Y.) 384; Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 361; Post *v.* Kimberly, 9 Johns. (N. Y.) 483; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1; Martin *v.* Spier, 1 Hayw. (N. Car.) 371; Cummins *v.* White, 4 Blackf. (Ind.) 356; Stothart *v.* Burnet, Cooke (Tenn.) 417, But that they will exercise a sound discretion in decreeing or refusing an account, see Hickman *v.* Stout, 2 Leigh (Va.) 6.

Story places the jurisdiction of equity over accounts upon the ground that the chancery machinery is better adapted to the purpose of an account in general. 1 Story Eq. Jur. § 465. See Dyckman *v.* Valiente, 42 N. Y. 549.

1. Marvin *v.* Brooks, 94 N. Y. 80.
2. Marvin *v.* Brooks, 94 N. Y. 80.
3. Kennington *v.* Houghton, 2 Y.

d. COMPLICATED ACCOUNTS.—Judges in the English equity courts have been somewhat slow to maintain jurisdiction in a case where the ground thereof was solely that the account was complicated; and although there are very many cases in which the statement has been made that equity would sometimes take jurisdiction on that account, yet in most of them it is seen that there were also other grounds making it proper for equity to assume cognizance of the cases.[1] Whether or not a court of equity will take jurisdiction upon the sole ground of the account being complicated is a matter largely within the discretion of the court.[2]

If, after giving due effect to all the circumstances, it appears

& C. C. C. 624; Padwick *v.* Hurst, 18 Beav. 575; Fluker *v.* Taylor, 3 Drew 183; North Eastern R. Co. *v.* Martin, 2 Ph. 758; Wells *v.* Cooper (MSS.), cited in 6 Ves. 136; Dinwiddie *v.* Bailey, 6 Ves. 136; Phillips *v.* Phillips, 9 Hare 471; Allison *v.* Herring, 9 Sim. 583; Avery *v.* Ware, 58 Ala. 475; Dickinson *v.* Lewis, 34 Ala. 638; Carter *v.* Bailey, 64 Me. 458; Garner *v.* Reis, 25 Minn. 475; Walker *v.* Cheever, 35 N. H. 339; Durant *v.* Einstein, 5 Robt. (N. Y.) 423; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169; Wilson *v.* Mallett, 4 Sandf. (N. Y.) 112; Salter *v.* Ham, 31 N. Y. 321; McLin *v.* McNamara, 2 Dev. & B. Eq. (N. Car.) 82; Gloninger *v.* Hazard, 42 Pa. St. 389; Passunk B'ld'g Assoc.'s Appeal, 83 Pa. St. 441; Hay *v.* Marshall, 3 Humph. (Tenn.) 623; Smith *v.* Marks, 2 Rand. (Va.) 449; Hickman *v.* Stout, 2 Leigh (Va.) 6. Where all the items of account are on one side the bill cannot be sustained. Pearl *v.* Nashville, 10 Yerg. (Tenn.) 179; Taylor *v.* Tompkins, 2 Heisk. (Tenn.) 89; Pleasants *v.* Glasscock, 1 Smed. & M. Ch. (Miss.) 17.

Not a Mutual Account.—Where a physician had an account running through a period of many years against A. for medical services rendered, whilst the latter had an account against the physician for agricultural products furnished him at various times, *held*, that a bill in equity could not be sustained for an accounting. Haywood *v.* Hutchins, 65 N. Car. 584.

1. Uhlman *v.* New York Ins. Co., 109 N. Y. 433; Taff Vale R. Co. *v.* Nixon, 1 H. L. Cas. 111.

2. Uhlman *v.* New York L. Ins. Co., 109 N. Y. 434; North Eastern R. Co. *v.* Martin, 2 Ph. 758; Phillips *v.* Phillips, 9 Hare 471; Bliss *v.* Smith, 34 Beav. 508. In a case in which a change of jurisdiction is sought on the ground of intricacy or complexity, the accounts must be laid before the court, or their nature, character, and extent so far disclosed that the court may see and judge for itself whether a proper case for the exercise of its jurisdiction exists or not. Ely *v.* Crane, 37 N. J. Eq. 157.

Test.—The test sometimes used to find whether an account is so complicated that equity has jurisdiction is, can a court of law examine it at *nisi prius* with the care necessary to reach an accurate result. Seymour *v.* Long Dock Co., 20 N. J. Eq. 407; South Eastern R. Co. *v.* Brogden, 3 Mac. & G. 8; Foley *v.* Hill, 2 H. L. Cas. 28; O'Connor *v.* Spaight, 1 Sch. & Lef. 305; Taff Vale R. Co. *v.* Nixon, 1 H. L. Cas. 110; Kennington *v.* Houghton, 2 Y. & C. C. C. 627.

Injunction.—The authorities show that there are many cases in which a court of equity will entertain jurisdiction in matters of account in the first instance, where, if the party making the claim had proceeded at law, the court would not, if appealed to for that purpose, have withdrawn the matter by means of an injunction from legal jurisdiction. Crane *v.* Ely, 37 N. J. Eq. 571; Sweeny *v.* Williams, 36 N. J. Eq. 627; South Eastern R. Co. *v.* Brogden, 3 Mac. & G. 8; McIntosh *v.* Great Western R. Co., 3 Sm. & G. 146; Watford, etc., R. Co. *v.* London, etc., R. Co., L. R. 8 Eq. 231; Flockton *v.* Peake, 12 W. R. 465. The common-law procedure act has not taken from courts of equity the right to restrain actions involving complicated accounts where the accounts could be more completely taken in those courts. Croskey *v.* European, etc., Steam Shipping Co., 1 J. & H. 108; Crane *v.* Ely, 37 N. J. Eq. 571.

that there would be a balance of very great inconvenience and possible oppression to the defendant, the plaintiff should be remitted to his action at law to recover his damages, in which action, if the taking of an account becomes necessary, it may be easily taken.[1]

e. FIDUCIARY RELATION.—It may be said generally that whenever there is a fiduciary relation, such as that of trustee, agent, executor, etc., the right to an accounting in equity is undoubted. The right in such cases is based upon the substantive equity of trusts, which jurisdiction equity always had.[2]

1. Smith *v.* Leveaux, 2 De G., J., & S. 1; Kernot *v.* Potter, 3 De G., F., & J. 447; Phillips *v.* Phillips, 9 Hare 471; Fluker *v.* Taylor, 3 Drew 183; Padwick *v.* Hurst, 18 Beav. 575; Flockton *v.* Peake, 10 L. T. N. S. 173; Hemings *v.* Pugh, 4 Giff. 456; Barry *v.* Stevens, 31 Beav. 258; Dabbs *v.* Nugent, 11 Jur. N. S. 943; Edwards-Wood *v.* Baldwin, 4 Giff. 613; Makepeace *v.* Rogers, 13 W. R. 450; Navulshaw *v.* Brownrigg, 2 De G., M., & G. 241; Shephard *v.* Brown, 4 Giff. 208; Croskey *v.* European, etc., Steam Shipping Co., 1 J. & H. 108; Hunter *v.* Belcher, 2 D. G., J., & S. 194; South Eastern R. Co. *v.* Brogden, 3 Mac. & G. 8; Southampton Dock Co. *v.* Southampton Harbor, etc.; Board, L. R. 11 Eq. 254; Burdick *v.* Garrick, L. R. 5 Ch. 233; Moxon *v.* Bright, L. R. 4 Ch. 292; Watford, etc., R. Co. *v.* London, etc., R. Co., L. R. 8 Eq. 231; Bliss *v.* Smith, 34 Beav. 508; Foley *v.* Hill, 1 Ph. 399; North Eastern R. Co. *v.* Martin, 2 Ph. 789; Kennington *v.* Houghton, 2 Y. & C. C. C. 620; O'Connor *v.* Spaight, 1 Sch. & Lef. 305; O'Mahony *v.* Dickson, 2 Sch. & Lef. 400; Frietas *v.* Dos Santos, 1 Y. & J. 574; South Eastern R. Co. *v.* Brogden, 3 Mac. & G. 8; Taff Vale R. Co. *v.* Nixon, 1 H. L. Cas. 110; Mitchell *v.* Great Works Milling, etc., Co., 2 Story (U. S.) 648; Kirkman *v.* Van Lier, 7 Ala. 217; Trapnall *v.* Hill, 31 Ark. 348; State *v.* Churchill, 48 Ark. 426; Farmers' Bank *v.* Polk, 1 Del. Ch. 167; Seymour *v.* Long Dock Co., 20 N. J. Eq. 407; Jewett *v.* Bowman, 29 N. J. Eq. 176; Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76; Printup *v.* Mitchell, 17 Ga. 558; Wilson *v.* Riddle, 48 Ga. 609; Blood *v.* Blood, 110 Mass. 545; Frue *v.* Loring, 120 Mass. 507; Ward *v.* Peck, 114 Mass. 121; Watt *v.* Conger, 1 Smed. & M. (Miss.) 412; Uhlman *v.* New York L. Ins. Co., 109 N. Y. 434; Governor *v.* M'Ewen, 5 Humph. (Tenn.) 241; Coffman *v.* Sangston, 21 Gratt. (Va.) 263; Lafever *v.* Billmyer, 5 W. Va. 33.

Massachusetts.—The statutes of *Massachusetts* give jurisdiction in equity upon accounts where the nature of the account is such that it cannot be conveniently and properly adjusted in an action at law. Under these statutes the plaintiff is entitled to an accounting on a complicated account, although it be a matter of great inconvenience to the defendant. Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56. See Hallett *v.* Cumston, 110 Mass. 32; General Hospital *v.* State Mut. L. Assur. Co., 4 Gray (Mass.) 227; Smith *v.* Mutual L. Ins. Co., 14 Allen (Mass.) 336; New Haven Horse Nail Co. *v.* Linden Springs Co., 142 Mass. 349; Bartlett *v.* Parks, 1 Cush. (Mass.) 82; Locke *v.* Bennett, 7 Cush. (Mass.) 445.

2. Moxon *v.* Bright, L. R. 4 Ch. 282; Southampton Dock Co. *v.* Southampton Harbor, etc., Board, L. R. 11 Eq. 254; Mackenzie *v.* Johnston, 4 Madd. 373; Makepeace *v.* Rogers, 11 Jur. N. S. 215; King *v.* Rossett, 2 Y. & J. 33; Padwick *v.* Stanley, 9 Hare 627; Shephard *v.* Brown, 4 Giff. 208; Hemings *v.* Pugh, 4 Giff. 456; Harrington *v.* Churchward, 6 Jur. N. S. 576; Strelly *v.* Winson, 1 Vern. 297; Smith *v.* Leveaux, 2 De G., J., & S. 1; Navulshaw *v.* Brownrigg, 2 De G., M., & G. 241; Blakeley *v.* Biscoe, Hempst. (U. S.) 114; Crothers *v.* Lee, 29 Ala. 337; Knotts *v.* Tarver, 8 Ala. 743; Halsted *v.* Rabb, 8 Port. (Ala.) 63; Garr *v.* Redman, 6 Cal. 574; Davis *v.* Davis, 1 Del. Ch. 256; Powes *v.* Cray, 7 Ga. 206; Buel *v.* Selz, 5 Ill. App. 116; Gates *v.* Fraser, 9 Ill. App. 624; Clinton County *v.* Schuster, 82 Ill. 137; Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24; Mc Lellan *v.* Osborne, 51 Me. 118; Webb *v.* Fuller, 77 Me. 568; Ferry *v.* Henry, 4 Pick. (Mass.) 75; Hallett *v.* Cumston, 110 Mass. 32; Hodges *v.* Pingree, 10 Gray (Mass.) 14; Darrah *v.* Boyce, 62 Mich.

2. The Bill or Complaint—*a.* GENERALLY.—It is necessary, in order to obtain the equitable remedy of accounting, that a plain case be made in the bill or complaint.[1] But the courts are liberal in their construction of pleadings for an accounting, and the bill or complaint will be upheld if the allegations substantially make out a case.[2]

b. CERTAINTY AND PARTICULARITY.—The petition or bill for an accounting must be definite and certain.[3]

480; King *v.* Barnes, 109 N. Y. 267; Wright *v.* Wright, 59 How. Pr. (N. Y. Supreme Ct.) 176; Dyckman *v.* Valiente, 42 N. Y. 549; Marvin *v.* Brooks, 94 N. Y. 71; Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; State *v.* Quinn, 74 N. Car. 359; Darden *v.* Cowper, 7 Jones (N. Car.), 210; Shirley *v.* Goodnough, 15 Oregon, 642; Long *v.* Cochran, 9 Phila. (Pa.) 267; Bentley *v.* Harris, 10 R. I. 434; Kerr *v.* Camden Steamboat Co., Cheves Eq. (S. Car.) 189; Taylor *v.* Tompkins, 2 Heisk. (Tenn.) 89; Hale *v.* Hale, 4 Humph. (Tenn.) 183; Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449; Thornton *v.* Thornton, 31 Gratt. (Va.) 212; Early *v.* Friend, 16 Gratt. (Va.) 21; Wiswell *v.* Wilkins, 4 Vt. 137; Leach *v.* Bettie, 33 Vt. 195; Rippe *v.* Stogdill, 61 Wis. 38; Colonial, etc., Co. *v.* Hutchinson Mortgage Co., 44 Fed. Rep. 219.

1. Crane *v.* Ely, 37 N. J. Eq. 564; Short *v.* Barry, 58 Barb. (N. Y.) 177; Bouton *v.* Bouton, 42 How. Pr. (N. Y. Supreme Ct.) 11.

2. See the following cases, where the bill was held to be sufficient: Kerr *v.* Blodgett, 16 Abb. Pr. (N. Y. Supreme Ct.) 137; Shaw *v.* Chase, 77 Mich. 436; Grady *v.* Hughes, 80 Mich. 184; Roller *v.* Spilmore, 13 Wis. 29; McLachlan *v.* Staples, 13 Wis. 448; Schwickerath *v.* Lohn, 48 Wis. 599; Rippe *v.* Stogdill, 61 Wis. 38; De Bemer *v.* Drew, 57 Barb. (N. Y.) 438; Davis *v.* Grove, 2 Robt. (N. Y.) 134; Young *v.* Pearson, 1 Cal. 448; Standard Oil Co. *v.* Scofield, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 377; Parker *v.* Turner (Supreme Ct.), 8 N. Y. St. Rep. 500; McRaven *v.* Dameron, 82 Cal. 57; More *v.* Calkins, 85 Cal. 177; Casserly *v.* Witherbee, 28 N. Y. Wkly. Dig. 388; Noyes *v.* Wernberg, 15 N. Y. Wkly. Dig. 72. And see Gutsch Brewing Co. *v.* Fischbeck, 41 Ill. App. 400, where it was held that the bill would not sustain a decree for an accounting.

Proper Form of Complaint.—A complaint which sets forth a partnership, a dissolution, the existence of unsettled accounts, and a balance in favor of plaintiff, and demands an accounting, shows facts enough to constitute a cause of action. Ludington *v.* Taft, 10 Barb. (N. Y.) 447. And for the proper form of complaint in an action for an accounting between two firms, partners in a joint adventure, see Davis *v.* Grove, 2 Robt. (N. Y.) 134, where the subject is considered. For a complicated bill for an account, see Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178.

3. Rogers *v.* Sims, 39 Mo. App. 678; McAndrew *v.* Walsh, 31 N. J. Eq. 331; Trotter *v.* Heckscher, 41 N. J. Eq. 302; Adams *v.* Gaubert, 69 Ill. 585; McLoskey *v.* Gordon, 26 Miss. 260.

Framed on Definite Theory.—The bill must be framed on a definite theory. Upon a bill for an accounting by an agent, relief cannot be had as for a wilful default, the bill not being so drawn. Singer *v.* Steele, 24 Ill. App. 58. See Young *v.* Pearson, 1 Cal. 448.

Judgment Must Accord with Complaint.—The complaint must be so drawn as will justify the judgment; there can be no judgment for a different cause of action than that set forth in the complaint. Arnold *v.* Angell, 62 N. Y. 508; Weeks *v.* Hoyt, 5 Hun (N. Y.) 347; Darling *v.* Brewster, 55 N. Y. 667. But the appellate court will not necessarily reverse a decree for an account, although the bill merely sets forth facts for which *assumpsit* is an adequate remedy. Fidelity Title, etc., Co. *v.* Weitzel, 152 Pa. St. 498.

Specification of Items.—The mere fact that items are not specified does not preclude the allowance of them in the settlement of the account. Tillotson *v.* Tillotson, 34 Conn. 361. But property not charged in the bill as being in the respondent's hands cannot be charged against him. Gillett *v.* Hall, 13 Conn. 435.

Certificate of Counsel.—A bill for an account does not require the certifi-

Ignorance and Fraud.—But where the plaintiff is ignorant of the matters set forth in his complaint, especially if such ignorance is caused by the fraud of the defendant, or by his refusal to permit the plaintiff to examine books in his possession, the bill for an account need not contain such certainty and particularity of statement as would otherwise be necessary.[1]

Necessary Allegations.—A bill for an account must show by specific allegations that there was a fiduciary relation between the parties, or that the account is so complicated that it cannot conveniently be taken in an action at law.[2]

Unnecessary Allegations.—But no allegation beyond those which establish the fiduciary relation or the complicated state of the account is necessary.[3]

Superfluous Averments.—Superfluous averments in the bill do not vitiate.[4]

c. ALLEGATION OF DEMAND.—The allegation that the plaintiff has demanded an accounting from the defendant, and his refusal, is a material one, and must be inserted in the bill.[5]

d. OFFER TO PAY BALANCE.—A distinct offer in the bill to pay the balance which may be found due is not necessary.[6]

cate of counsel. Bachman *v.* Einhorn, 5 W. N. C. (Pa.) 250.

1. Towle *v.* Pierce, 12 Met. (Mass.) 329; 44 Am. Dec. 679; Crosby *v.* Watts, 41 N. Y. Super. Ct. 208.

2. Badger *v.* McNamara, 123 Mass. 117; Walker *v.* Brooks, 125 Mass. 241; Trapnall *v.* Hill, 31 Ark. 347.

Must aver Indebtedness.—The bill must aver an indebtedness to the plaintiff at the time of filing it. Volmer *v.* McCauley, 7 Phila. (Pa.) 382; Metz *v.* Farnham, 8 Phila. (Pa.) 267.

Against Devisees.—A bill for an account, passing the executors, and seeking to obtain payment out of the property in the hands of the devisees in remainder, should show affirmatively that the money never came to the executors' hands, and that it still remains a charge on the estate. Clason *v.* Lawrence, 3 Edw. Ch. (N. Y.) 48. But in an action by an administrator appointed to administer upon the assets left unadministered on the death of the executor, against an executor of such former executor, to recover the assets, it is not necessary that the complaint allege that the assets ever came into defendant's hands. Walton *v.* Walton, 2 Abb. Pr. N. S. (N. Y. Ct. App.) 428.

3. Green *v.* Brooks, 81 Cal. 328; West *v.* Brewster, 1 Duer (N. Y.) 647; Christy *v.* Libby, 2 Daly (N. Y.) 418.

Fraud.—The right of the beneficiary of a trust to enforce an accounting from the trustee does not rest upon fraud, and no such allegation is necessary. Green *v.* Brooks, 81 Cal. 328.

4. Kerr *v.* Blodgett, 16 Abb. Pr. (N. Y. Supreme Ct.) 137; State *v.* Chadwick, 10 Oregon 423. See Walker *v.* Spencer, 45 N. Y. Super. Ct. 71, where it was held that the complaint was not to be regarded as setting up several causes of action merely because it alleged different transactions. In Brown *v.* Balde, 3 Lans. (N. Y.) 283, it was held that the allegations made the action one on a bond instead of for an accounting, although there were sufficient averments to sustain it as a bill for an accounting. See further Kerr *v.* Webb, 9 Rich. Eq. (S. Car.) 369; Muir *v.* Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477.

5. Magauran *v.* Tiffany, 62 How. Pr. (N. Y. Supreme Ct.) 251; Perry *v.* Foster, 62 How. Pr. (N. Y. Supreme Ct.) 228.

Bill by Two.—Where the bill is on behalf of two, an averment of demand by one only, and without stating authority from the other, is sufficient. Ellas *v.* Lockwood, Clarke Ch. (N. Y.) 311.

6. Craig *v.* Chandler, 6 Colo. 543; Barton *v.* May, 3 Sandf. Ch. (N. Y.) 450. *Contra.*—Casserly *v.* Witherbee,

c. PRAYER.—The prayer is an essential part of the complaint. Accounting should not be ordered unless prayed for.[1]

3. The Answer.—Almost all the rights of the defendant are set up before the referee or master, and an answer in an accounting case does not have the same scope as in other cases. As the taking an account will be decreed if there have been dealings between the parties calling for equitable interposition, all those questions which usually form the subject-matter of an answer are left to the master or referee.[2]

Cross-Bill.—A defendant is entitled to an account of what the plaintiff has received, without filing a cross-bill for that purpose.[3]

Denial.—A denial that there have been mutual accounts, or that the property for which an account is sought was ever received, is sufficient, without any further detailed statement.[4]

28 N. Y. Wkly. Dig. 388; but this was a redemption case.

Proper Form.—In an action of redemption the proper form of an offer to pay is, that on the payment of what, if anything, shall be found due, the mortgagee may be decreed to deliver possession. Quin v. Brittain, Hoffm. Ch. (N. Y.) 353. An allegation of "due demand" is an implied allegation of an offer to account and pay. Hill *v.* Haskin, 51 Cal. 175.

1. Dominguez *v.* Dominguez, 7 Cal. 427. See Averill, etc., Co. *v.* Verner, 22 Ohio St. 372.

Prayer for Discovery.—A bill against a corporation for an accounting, and to recover money alleged to have been obtained through fraud, unaccompanied by a prayer for discovery, is demurrable. Beggs *v.* Edison Electric Light, etc., Co., 96 Ala. 295. But if in a bill for a discovery, with a prayer for an account, the case is not the proper subject of an action for an account, the fact that the plaintiff is entitled to a discovery will not necessarily entitle him to an account. Magic Ruffle Co. *v.* Elm City Co., 14 Blatchf. (U. S.) 113.

Governs Decree.—The accounting is wholly governed by the prayer. The decree will only be for such an accounting as is prayed for, and in that aspect only. Scott *v.* Gamble, 9 N. J. Eq. 218; Welch *v.* Arnett (N. J. Eq. 1890), 20 Atl. Rep. 48.

For Dissolution of Partnership.—Where an accounting of the general accounts of a partnership is sought, the bill must pray for a dissolution. Daniell Ch. Pl. & Pr., vol. 1, 334.

General Relief.—If the facts stated constitute a case in which the defendant should render an account, the court may compel an accounting under a prayer for general relief. Wood *v.* Brown, 34 N. Y. 337; Dyckman *v.* Valiente, 42 N. Y. 549; Haworth *v.* Taylor, 108 Ill. 275.

Duplicity.—The prayer is not looked to in determining whether there is more than one cause of action; where a complaint demands an accounting of the partnership business both before and after the death of a partner, it is but one cause of action. Skidmore *v.* Collier, 8 Hun (N. Y.) 50. See also Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; Darling *v.* Brewster, 55 N. Y. 667; Day *v.* Stone, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 137.

2. See article REFERENCES.

3. Scott *v.* Lalor, 18 N. J. Eq. 31. Cross items need not be pleaded to be availed of except when the whole account is set out in the answer. Goldthwait *v.* Day, 149 Mass. 185. But see Bailey *v.* Bergen, 4 Thomp. & C. (N. Y.) 642, where it is held that defendant's right to an accounting must be specially pleaded in order to avail as a ground of affirmative relief.

4. Perry *v.* Foster, 62 How. Pr. (N. Y. Supreme Ct.) 228. See Noyes *v.* Wernberg, 15 N. Y. Wkly. Dig. 72; Livingston *v.* Livingston, 3 Johns. Ch. (N. Y.) 51.

Demurrer.—A denial need not be interposed as a defense in the case of stale demands. A demurrer may be resorted to when the accounting is sought of such claims as are stale. Bell *v.* Hudson, 73 Cal. 285.

Setting out the Account.—As to whether a defendant who denies by answer the complainant's right to an account is nevertheless required to give the account called for, the decisions are conflicting.[1] The weight of authority is, probably, that where the account does not appear, by the allegations and charges of the bill, to be useful in establishing the complainant's right to it, but appears merely as that which must ultimately be rendered in fulfilment of an obligation the enforcement of which is sought, the defendant need not set out the account in his answer, in case it is necessary to resort to an answer rather than to a plea or demurrer in resisting the complainant's alleged right to the account; but if the alleged right may be resisted by plea or demurrer, and the defendant, instead of availing himself of either of those pleadings, chooses to answer, he must answer fully, setting out the account.[2]

4. The Plea of Stated Account—*a.* IN EQUITY.—A plea of a stated account is a good bar to a bill for an account; for there is no rule more strictly adhered to in courts of equity than that, when a de-

1. For an elaborate review of them see French *v.* Rainey, 2 Tenn. Ch. 640. The matter is discussed in the following cases: Law *v.* Hunter, 1 Russ. 100; Walker *v.* Woodward, 1 Russ. 107; Elmer *v.* Creasy, L. R. 9 Ch. 69; De la Rue *v.* Dickenson, 3 Kay & J. 388; Jerrard *v.* Saunders, 2 Ves. Jr. 457; Stephens *v.* Stephens, 2 Sel. Cas. 51; Sweet *v.* Young, Ambl. 353; Donegal *v.* Stewart, 3 Ves. 446; Mazeredo *v.* Maitland, 3 Madd. 72; Lancaster *v.* Evors, 1 Ph. 349; Gethin *v.* Gale, Ambl. 353; Shaw *v.* Cling, 11 Ves. 283; Clegg *v.* Edmonson, 22 Beav. 125; Hudson *v.* Trenton Locomotive, etc., Co., 16 N. J. Eq. 475; Shepherd *v.* Roberts, 3 Bro. C. C. 239; Swinborne *v.* Nelson, 16 Beav. 416; Great Luxembourg R. Co. *v.* Magnay, 23 Beav. 646; Hall *v.* Noyes, 3 Bro. C. C. 483; Adams *v.* Fisher, 3 Myl. & C. 526; Howe *v.* McKernan, 30 Beav. 547; Phelips *v.* Caney, 4 Ves. 107; Leonard *v.* Leonard, 2 B & B. 323; Reade *v.* Woodroofe, 24 Beav. 421; Rowe *v.* Teed, 15 Ves. 376; Randal *v.* Head, Hardr. 188; John *v.* Dacie, 13 Price, 632; Jacobs *v.* Goodman, 2 Cox 282; —— *v.* Harrison, 4 Madd. 252; Booth *v.* Smeath, 2 Strob. Eq. (S. Car.) 31.

2. Pace *v.* Bartles, 45 N. J. Eq. 371, a well-considered case in which the authorities are all reviewed. See Meeker *v.* Marsh, 1 N. J. Eq. 198; Pullman Palace Car Co. *v.* Central Transp. Co., 34 Fed. Rep. 357; Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205. To a bill in equity for an account of sales of a book alleged to have been published by the defendant on the joint account of the plaintiff and himself, an answer which denies that any such book was published during the time alleged, and asserts that the book published by the defendant was a different one, need not render an account of sales. Armstrong *v.* Crocker, 10 Gray (Mass.) 269. Making admissions in the answer, sufficient for the purposes of the suit up to decree, is enough, without giving further accounts. Lockett *v.* Lockett, L. R. 4 Ch. 336.

Motion.—If the answer does not set out the account, the plaintiff is entitled on motion to have produced for inspection documents in the possession of defendant. Robbins *v.* Davis, 1 Blatchf. (U. S.) 238.

Manner of Setting out Account.—Where defendants are required to set out accounts, they may for the purpose of rendering their schedules less burdensome, instead of going too much into particularity, refer to the original accounts in their possession; and care must be taken to avoid any inconsistency between the body of the answer and the schedule. Daniell Ch. Pl. & Pr., vol. 1, 725, 729; White *v.* Barker, 5 DeG. & S. 746; Major *v.* Arnott, 2 Jur. N. S. 387; Drake *v.* Symes, 1 Johns. 647; Telford *v.* Ruskin, 11 Sim. 401; Bally *v.* Kendrick, 13 Price 291; Lockett *v.* Lockett, L. R. 4 Ch. 336.

fendant sets forth a stated account, he shall not be obliged to go upon a general one.[1]

What May be Pleaded as a Stated Account.—Besides the technical account stated other matters may be pleaded as such. A general release of all demands, not under seal, may be pleaded as a stated account.[2] The delivery up of vouchers is an affirmation that the account between the parties was a stated one; and where such a transaction has taken place, it should be averred in the plea.[3] An award may amount to an account stated,[4] and so may an accounting and final settlement under a power.[5]

Requisites of Plea.—In order to support a plea of a stated account it must be shown to have been final.[6] The plea must show that it was in writing, and likewise that the balance was in writing, or at least must set forth what the balance is.[7] It is not necessary to aver that the account was settled between the parties upon a minute investigation of items; a general agreement will be sufficient.[8] The stated account must be alleged to be just and true, to the best of the defendant's knowledge and belief.[9]

Must be Supported by Answer.—An answer is necessary to support the plea where the bill anticipates the plea of an account stated, and alleges facts to avoid it; and the answer as well as the plea must deny those allegations of the bill.[10]

Amending Bill.—Where a complainant files a bill for a general account, and the defendant sets forth a stated one, the complainant must amend his bill.[11] By the amendment he must surcharge

1. Daniell Ch. Pl. & Pr., vol. 1, 666.
2. Daniell Ch. Pl. & Pr., vol. 1, 667.
3. Daniell Ch. Pl. & Pr., vol. 1, 667.
4. Ives *v.* Ashelby, 26 Ill. App. 244; Coultas *v.* Green, 43 Ill. 277. Where the parties to a bill for the settlement of partnership affairs submit the accounting to arbitration, the award to be entered as the finding of the court, the complainant cannot dismiss where the court has overruled a motion to set aside the award. Ives *v.* Ashelby, 26 Ill. App. 244.
5. Craig *v.* McKinney, 72 Ill. 305.
6. Daniell Ch. Pl. & Pr., vol. 1, 666.
7. Daniell Ch. Pl. & Pr., vol. 1, 666. But it need not be alleged that it was signed by the parties, as acquiescence in it for a length of time will render it a stated account. Wood *v.* Gault, 2 Md. Ch. Dec. 433.
8. Daniell Ch. Pl. & Pr., vol. 1, 666. The word "settle" has a definite legal meaning, and implies the mutual adjustment of accounts between parties, and an agreement upon the balance. Baxter *v.* State, 9 Wis. 38. See Armstrong *v.* Chemical Nat. Bank, 37 Fed. Rep. 466; Greene *v.* Harris, 9 R. I. 401.
9. Driggs *v.* Garretson, 25 N. J. Eq. 178; Harrison *v.* Bradley, 5 Ired. Eq. (N. Car.) 136; Daniell Ch. Pl. & Pr., vol. 1, 667.
10. Harrison *v.* Farrington, 38 N. J. Eq. 359. See Schwarz *v.* Wendell, Harr. (Mich.) 395. The plea of an account stated cannot be sustained unless it be supported by answer denying the receipt of any part of the money for which the defendant is called upon to account, subsequently to the time when the account stated was adjusted. Danels *v.* Taggart, 1 Gill & J. (Md.) 311; Rouskulp *v.* Kershner, 49 Md. 524.

Answer in Place of Plea.—Instead of a plea, the stated accounts may be given in an answer. Seamans *v.* Burt, 11 R. I. 320.

11. Brown *v.* Van Dyke, 8 N. J. Eq. 795; Weed *v.* Smull, 7 Paige (N. Y.) 573; Leeycraft *v.* Dempsey, 15 Wend. (N. Y.) 83; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 209; Cruise *v.* Walker, 6 Phila. (Pa.) 294. But the

and falsify the stated account.[1]

b. UNDER THE CODES—**Must be Pleaded.**—Under the Codes a stated account must be specially pleaded to be available as a defence.[2]

Reply must Surcharge and Falsify.—In analogy to the equity practice, the reply must surcharge and falsify the plea. It is not enough to allege that the account was not a full account.[3] But where the code of procedure makes no provision for a reply, and the only pleadings allowed are the complaint and answer, the plea of stated account must be taken as denied.[4]

5. Practice.—It is the correct practice in suits for an accounting to dispose of all matters in bar of an accounting, before the account is stated or a reference ordered.[5]

Costs.—The taxation of costs is discretionary.[6]

6. The Decree.—The ordinary decree in an accounting case is that an account shall be taken.[7]

bill need only be amended when an account has been given by the defendant. Vandyke *v.* Brown, 8 N. J. Eq. 657.

Setting Down for Argument. — Not amending the bill and setting down for argument a plea of stated accounts is equivalent to demurring to it. Allen *v.* Woonsocket Co., 11 R. I. 288.

1. Costin *v.* Baxter, 6 Ired. Eq. (N. Car.) 197; Holcomb *v.* Holcomb, 11 N. J. Eq. 477. The amendment must charge either fraud or particular errors. Daniell Ch. Pl. & Pr., vol. 1, 668.

2. Mower County *v.* Smith, 22 Minn. 97; Derby *v.* Yale, 13 Hun (N. Y.) 273; Liscomb *v.* Agate, 67 Hun (N. Y.) 388. But where the defendant pleads an account stated, he may either rely thereon, or he may, on the trial, fall back upon the accounts, and show that there is in fact a balance due him. Goings *v.* Patten, 1 Daly (N. Y.) 168.

3. Barker *v.* Hoff, 52 How. Pr. (N. Y. Supreme Ct.) 382; Suttle *v.* Doggett, 87 N. Car. 203; Grant *v.* Bell, 87 N. Car. 34; Weeks *v.* Hoyt, 5 Hun (N. Y.) 347. See Welsh *v.* German American Bank, 42 N. Y. Super. Ct. 462; Mount *v.* Ellingwood, 2 Thomp. & C. (N. Y.) 527. When a note is given for balance and receipted for in full by mistake, the creditor may sue on the original account, and to a defence of account stated, where the reply is a general denial, all the facts can be shown. Clark *v.* Marbourg, 33 Kan. 471.

Waiver.—But the surcharging and falsifying may be waived. Unless the evidence of surcharging and falsification is objected to because it is unauthorized by the pleading, the failure to plead it is waived. Liscomb *v.* Agate, 67 Hun (N. Y.) 388.

4. Price *v.* Eccles, 73 N. Car. 162.

5. Auld *v.* Butcher, 2 Kan. 135. But an account is generally ordered to be taken before trying the validity of a release, especially if the complainant replies that he was under age when he signed it. Carter *v.* Alston, 2 Hayw. (N. Car.) 237. See Dampf's Appeal, 106 Pa. St. 72. A reference will not be ordered where the evidence shows that nothing is due. Nail *v.* Martin, 4 Ired. Eq. (N. Car.) 159. On the hearing of a bill for an account, the only evidence, as a general rule, material or competent is such as goes to prove or disprove the complainant's right to an account. Standish *v.* Babcock, 48 N. J. Eq. 386; Hudson *v.* Trenton Locomotive, etc., Co., 16 N. J. Eq. 475. See article REFERENCES.

6. McGillaray *v.* Moser, 43 Kan. 219; Armstrong *v.* McAlpin, 18 Ohio St. 184. See Lubert *v.* Chauviteau, 3 Cal. 458; 58 Am. Dec. 415; Wall *v.* Covington, 76 N. Car. 150. If it appears that defendant has unreasonably neglected to render an account, the court may impose the costs on him, though nothing is due plaintiff. Knapp *v.* Edwards, 57 Wis. 191. See article COSTS.

7. Hudson *v.* Trenton Locomotive, etc., Co., 16 N, J. Eq. 475.

Necessity for.—Where the liability to

Frame and Scope.—The decree must direct to what matters the account shall extend, and in decreeing a general account, special directions will be rendered proper and necessary by the particular circumstances of the case.[1] The decree usually directs that all the matters of account shall be adjusted down to the time of stating the accounts, although no facts are stated in respect to them in the pleadings.[2]

Appeal.—An interlocutory decree directing an accounting is not appealable.[3]

Dismissal.—After a decree for an account the complainant cannot dismiss his bill unless upon consent of defendant.[4]

7. Appellate Proceedings. (See also APPEALS.)—Objections to the

account is denied, there must be an interlocutory decree finding such liability, before there can be a reference to a master. Collyer *v.* Collyer, 38 Pa. St. 257. There is no necessity for an interlocutory decree to account where the parties have agreed on a final settlement, unless ground is laid for surcharging and falsifying the account stated. Calvit *v.* Markham, 3 How. (Miss.) 343. If on the hearing the several items of account between the parties have been ascertained, the court can render judgment for the aggregate. Blodgett *v.* Hitt, 29 Wis. 171. See Ruckman *v.* Decker, 28 N. J. Eq. 5. Where an interlocutory order for an account is not reheard, it ought to be taken as a declaration that the plaintiff is entitled to the account prayed for. Bailey *v.* Wilson, 1 Dev. & B. Eq. (N. Car.) 182.

Court May Take Account.—The court may itself take or state the account without a reference to a master. Emery *v.* Mason, 75 Cal. 222.

1. Hudson *v.* Trenton Locomotive, etc., Co., 16 N. J. Eq. 476. See Osment *v.* McElrath, 68 Cal. 466; 58 Am. Rep. 17, where the findings were held sufficient. The decree for an account should be according to the finding of the jury. Todd *v.* Clark, 1 Desaus. Eq. (S. Car.) 112. But a mere formal error does not vitiate a decree. Turner *v.* Morris, 27 Miss. 737.

Principles of the Case.—The court ought to settle the principles of the case, and put them in the form of instructions to the master. Hunt *v.* Gorden, 52 Miss. 194.

Agreements.—The court must settle the construction and effect of agreements between the parties, by which their mutual dealings were regulated, and by which, consequently, the account must be controlled. Hudson *v.* Trenton Locomotive, etc., Co., 16 N. J. Eq. 475.

Sales.—The court may specify as to how a sale in an accounting suit is to be conducted. More *v.* Calkins, 85 Cal. 177. But the decree appointing a receiver to sell need not expressly require him to act under oath, or to make return of his doings. Tomlinson *v.* Ward, 2 Conn. 400.

Numbering Directions.—In *England*, where, by any decree or order, any accounts are directed to be taken, such direction is to be numbered, so that each distinct account may be designated by a number. Daniell Ch. Pl. & Pr., vol. 2, 1005.

2. Crosbie *v.* Leary, 6 Bosw. (N. Y.) 312; Neel's Appeal, 3 Penny (Pa.) 66; Hagar *v.* Whitmore, 82 Me. 248; Moore *v.* Swanton Tanning Co., 60 Vt. 459; Boyd *v.* Foot, 5 Bosw. (N. Y.) 110. See McCaskill *v.* McBryde, 2 Ired, Eq. (N. Car.) 52.

Reservation.—Reservation in a judgment of leave to apply for an account may be made. Madison Ave. Baptist Church *v.* Baptist Church, 43 N. Y. Super. Ct. 157. See Youngs *v.* Youngs, 53 N. Y. 613.

3. Duff *v.* Duff, 71 Cal. 513. See Jenks *v.* Langdon, 21 Ohio St. 362. The court will never suspend proceedings under the decree, on the mere ground that if they are prosecuted the parties will, if the decree is reversed, be put to unnecessary expense. The taking of the account will not be suspended. Daniell Ch. Pl. & Pr., vol. 2, 1471.

4. Cozzens *v.* Sisson, 5 R. I. 489; Daniell Ch. Pl. & Pr., vol. 1, 794. See also as to decrees in accounting cases, article DECREES.

account will not be noticed in the appellate court unless exceptions were filed in the court below.[1] And where an intricate account is brought up with a reference to a master, and the burden of stating it is thus sought to be imposed on the appellate court, the court will reverse in order that a reference may be had.[2]

8. Parties.—The rule which requires that all parties interested in the object of a suit should be parties to the bill applies to all cases in which an account is sought against a defendant. One person cannot exhibit a bill against an accounting party without bringing before the court all persons who are interested in having the account taken, or in the result of it, otherwise the defendant might be harassed by as many suits as there are parties interested in the account.[3]

Partners.—Thus, in a suit for a partnership account, or for a share of a partnership adventure, it is in general necessary that all persons having shares in the same adventure should be parties.[4]

1. Williamson *v.* Downs, 34 Miss. 402.

2. Steere *v.* Hoagland, 39 Ill. 264; Bressler *v.* McCune, 56 Ill. 475; Groch *v.* Stenger, 65 Ill. 481; River *v.* Touslee, 62 Ill. 266; Sallee *v.* Morgan, 67 Ill. 376; Moss *v.* McCall, 75 Ill. 190; Patten *v.* Patten, 75 Ill. 446; Mosier *v.* Norton, 83 Ill. 519; Quayle *v.* Guild, 83 Ill. 553; Daly *v.* St. Patrick's Catholic Church, 97 Ill. 19; Cooper *v.* McNeil, 9 Ill. App. 97; Gibbs *v.* Meserve, 12 Ill. App. 613; Dubourg de St. Colombe *v.* U. S., 7 Pet. (U. S.) 625. Where the cause has been sent back by the court of appeals for a further account, so much of the account as was reported prior to the decree needs not to be supported by proof. Henshaw *v.* Freer, Bailey Eq. (S. Car) 311. See article APPEALS.

3. Daniell Ch. Pl. & Pr., vol. 1, 216; Story Eq. Pl. § 218; Moffat *v.* Farquharson, 2 Bro. C. C. 338; Evans *v.* Stokes, 1 Keen 24; Stafford *v.* London, 2 Eq. Abr. 166; Cowslad *v.* Cely, Pre. Ch. 83; Scurry *v.* Morse, 9 Mod. 89; Darthez *v.* Clemens, 6 Beav. 165. The practice used to formerly obtain in chancery of referring the case to a master to inquire if all the persons interested were made parties. Daniell Ch. Pl. & Pr., vol. 1, 218; Sandilands *v.* Innes, 3 Sim. 264; Waite *v.* Templer, 1 S. & S. 319. As a general rule, when by a fair construction of the bill, or at any stage of the proceedings, it becomes certain that the judgment or decree must necessarily be directly against such of the respondents named as reside without the jurisdiction, and that no judgment or decree can be rendered against the respondent before the court without embracing and being binding on them or the estate in which they have an interest, the hearing cannot ordinarily proceed without them. Lawrence *v.* Rokes, 53 Me. 110.

4. Ireton *v.* Lewis, Rep. temp. Finch 96; Moffat *v.* Farquharson, 2 Bro. C. C. 338; Good *v.* Blewit, 13 Ves. 397; Hills *v.* Nash, 1 Ph. 594; Cullen *v.* Queensbury, 1 Bro. C. C. 101; Dozter *v.* Edwards, 3 Litt. (Ky.) 72; Wells *v.* Strange, 5 Ga. 22; Mudgett *v.* Gager, 52 Me. 541; Parsons *v.* Howard, 2 Woods (U. S.) 1; Wilson *v.* Lassen, 5 Cal. 115; Colman *v.* Clements, 23 Cal. 247; Young *v.* Allen, 52 Cal. 466. All those owning interests in a mining partnership must be parties to a bill filed for an account of the business. Settembre *v.* Putnam, 30 Cal. 490. In a suit for an accounting between partners, a firm with whom they dealt are not necessary parties. Fisher *v.* Sweet, 67 Cal. 230. And a guarantor of one partner is not a proper party to a suit for an account of the partnership property. Bissell *v.* Ames, 17 Conn. 126.

Retiring Partner.—A retiring partner should be a party to an accounting suit. Wilson *v.* Lassen, 5 Cal. 115. But a partner who has sold his interest to another partner is not a necessary party. Kilbourn *v.* Sunderland, 130 U. S. 505. But where the interest

Corporations.—When a stockholder brings an action on behalf of the corporation against the directors for an accounting of moneys belonging to it, the corporation is a necessary party defendant.[1]

Assignees.—In any suit by a creditor against an assignee for the benefit of creditors, to compel him to account, all the creditors and the assignor must be parties.[2]

Trusts.—All the *cestuis que trustent* entitled to the income or any part of an estate in the hands of a trustee are necessary parties to a bill against such trustee for an accounting.[3]

of the partner has been sold at an execution sale, such partner is a necessary party to an accounting suit between the other partner and the purchaser, even although his whereabouts is unknown. Wright *v.* Ward, 65 Cal. 525.

Insolvents.—In bill to settle partnership accounts, insolvent partners must be parties; and if bankrupt, their assignees. Fuller *v.* Benjamin, 23 Me. 255; Mallow *v.* Hinde, 12 Wheat. (U. S.) 194.

Representatives of Deceased Partners.—Representatives of a deceased partner should be made parties to a bill to dissolve a partnership. Burchard *v.* Boyce, 21 Ga. 6. And the heirs must be made parties when a sale of real estate is sought in an accounting case. Pugh *v.* Currie, 5 Ala. 446; Lang *v.* Waring, 25 Ala. 625; 40 Am. Dec. 533; Andrews *v.* Brown, 21 Ala. 437; 56 Am. Dec. 252; Whitney *v.* Cotten, 53 Miss. 689. See De Manderfield *v.* Field (N. Mex., 1893), 32 Pac. Rep. 146; Fells *v.* McRea, 5 Eng. Law & Eq. 233; Haig *v.* Gray, 1 De G. & S. 741; Van Aken *v.* Clark, 82 Iowa 256.

1. Beach *v.* Cooper, 72 Cal. 99; Moyle *v.* Landers, 83 Cal. 579. And trustees of a dissolved corporation are necessary parties to any action affecting the corporate property. Clark *v.* San Francisco, 53 Cal. 306. When a member of an unincorporated association sues the president or other chief officer for an accounting, all the members must be made parties, or the plaintiff must sue for the benefit of all. Warth *v.* Radde, 18 Abb. Pr. (N. Y. Supreme Ct.) 396. And when a judgment creditor of a corporation files a bill for an account from the estate of a deceased stockholder, all the other stockholders, or their personal representatives, must be made parties. New England Commercial Bank *v.* Stockholders, 6 R. I. 154.

2. McPherson *v.* Parker, 30 Cal. 456; 89 Am. Dec. 129. And in a bill by the assignor against the assignee, all the creditors are necessary parties. Carpenter *v.* Robinson, 1 Holmes (U. S.) 67; James *v.* Atlantic Delaine Co., 3 Cliff. (U. S.) 614. But where the creditors have a right to appear before the referee as though they were parties, a motion that they be brought in as plaintiffs will not be granted. Douglas *v.* Smith (Supreme Ct.), 21 N. Y. Supp. 813.

3. Speakman *v.* Tatem, 45 N. J. Eq. 388; Stevens *v.* Melcher (Supreme Ct.), 6 N. Y. Supp. 811; Eldredge *v.* Putnam, 46 Wis. 205; Hubbard *v.* Burrell, 41 Wis. 365; Strohn *v.* Hartford F. Ins. Co., 33 Wis. 648; McCabe *v.* Bellows, 1 Allen (Mass.) 269; Wilcox *v.* Pratt, 125 N. Y. 688; Norris *v.* Hassler, 22 Fed. Rep. 401; Hindmarsh *v.* Southgate, 3 Russ. 324; Holland *v.* Prior, 1 Myl. & K. 237; Anderson *v.* Caunter, 2 Myl. & K. 763; Palk *v.* Clinton, 12 Ves. 48; Hobart *v.* Abbot, 2 P. Wms. 643; Norrish *v.* Marshall, 5 Madd. 475; Lockwood *v.* Abdy, 14 Sim. 437; Murphy *v.* Jackson, 5 Jones Eq. (N. Car.) 11; Ogilvie *v.* Knox Ins. Co., 2 Black (U. S.) 539; Brantly *v.* Kee, 5 Jones Eq. (N. Car.) 332; Fleming *v.* Gilmer, 35 Ala. 62; Gridley *v.* Wynant, 23 How. (U.S.) 500; New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507; Ashley *v.* Sumner, 4 Jones Eq. (N. Car.) 121; Bell *v.* Donohue, 8 Sawy. (U. S.) 485; Howth *v.* Owens, 29 Fed. Rep. 722; Conolly *v.* Wells, 33 Fed. Rep. 205; Parsons *v.* Neville, 3 Bro. C. C. 365; Cockburn *v.* Thompson, 16 Ves. 328; Pritchard *v.* Hicks, 1 Paige (N.Y.) 270; Sheppard *v.* Starke, 3 Munf. (Va.) 29; Brown *v.* Ricketts, 3 Johns. Ch. (N.

Unnecessary Persons.—There is no objection to joining persons as parties who are not necessary. No objection can be taken to this by a necessary party.[1]

Waiving Relief.—The plaintiff may waive relief which requires the presence of other necessary parties, and take only that which may be granted without them.[2]

Y.) 553; Davoue *v.* Fanning, 4 Johns. Ch. (N. Y.) 199; West *v.* Randall, 2 Mason (U. S.) 181; Huson *v.* McKenzie, 1 Dev. Eq. (N. Car.) 467; Arendell *v.* Blackwell, 1 Dev. Eq. (N. Car.) 358; Bethell *v.* Wilson, 1 Dev. & B. Eq. (N. Car.) 610; Kettle *v.* Crary, 1 Paige (N. Y.) 417 note; Ross *v.* Crary, 1 Paige (N. Y.) 416; Hallett *v.* Hallett, 2 Paige (N. Y.) 19; Egberts *v.* Wood; 3 Paige (N. Y.) 517; 24 Am. Dec. 236, Sherrit *v.* Birch, 3 Bro. C. C. 229; Davies *v.* Davies, 11 Eng. Law & Eq. 199; Lenaghan *v.* Smith, 2 Ph. 301; Smith *v.* Snow, 3 Madd. 10; Hares *v.* Stringer, 15 Beav. 206; Grace *v.* Terrington, 1 Coll. 3; Barbour *v.* Whitlock, 4 T. B. Mon. (Ky.) 180; Reid *v.* Vanderheyden, 5 Cow. (N. Y.) 719; Hawkins *v.* Hawkins, 1 Hare 543; Caldecott *v.* Caldecott, Cr. & Ph. 183; Shuttleworth *v.* Howarth, Cr. & Ph. 230; Noland *v.* Turner, 5 J. J. Marsh. (Ky.) 179; West *v.* Randall, 2 Mason (U. S.) 181; Kellar *v.* Beelor, 5 T. B. Mon. (Ky.) 573; Oldham *v.* Collins, 4 J. J. Marsh. (Ky.) 50. Where a creditor files a bill against a trustee, any creditor may come in under the decree while the fund is in the control of the court. Brooks *v.* Gibbons, 4 Paige (N. Y.) 374.

1. Story Eq. Pl. § 221; Fletcher *v.* Ashburner, 1 Bro. C. C. 497; West *v.* Randall, 2 Mason (U. S.) 197; Saville *v.* Tankred, 1 Ves. 101; Parl. Cases, by Tomlins, 174; Bailey *v.* Inglee, 2 Paige (N. Y.) 278; Butler *v.* Prendergast, 4 Bro. P. C. 174; Lockwood *v.* Abdy, 14 Sim. 437. The parties cannot object if the court investigates and adjusts the accounts of third parties, if they are so interwoven with the subject-matter of the suit as to make it necessary, and no injury can be claimed to have been caused thereby. Butler *v.* Cornwall Co., 22 Conn. 359. In an action against one for an accounting, another may be joined as a party for the purpose of explaining a transaction between himself and the plaintiff, although no decree is asked against him. Buie *v.* Mechanics, etc., Assoc., 74 N. Car. 117. See Rowland *v.* Gardner, 69 N. Car. 53.

2. Settembre *v.* Putnam, 30 Cal. 491; Harvey *v.* Cooke, 4 Russ. 34; Carter *v.* New Orleans, 19 Fed. Rep. 659. But the plaintiff must undertake to give effect in the cause to the utmost rights which the absent party could have claimed if he had been before the court; and it must be plain that the decree will not bind and cannot be enforced against the absent party, and that all questions are left open as to him. Lawrence *v.* Rokes, 53 Me. 110; Story Eq. Pl. § 220. And the court may require that parties not served have actual knowledge of the pendency of the bill. Lawrence *v.* Rokes, 53 Me. 110; Fuller *v.* Benjamin, 23 Me. 258.

Method of Waiver.—A mere allegation in the bill that the plaintiff does not claim that there is due to him anything from the defendant not served is not enough; he must by distinct averments show that the decree cannot affect the absent defendant. Mudgett *v.* Gager, 52 Me. 541. See Towle *v.* Pierce, 12 Met. (Mass.) 329; 44 Am. Dec. 679; Vose *v.* Philbrock, 3 Story (U. S.) 335.

Some Accounted with.—The most usual exception to the rule requiring all persons interested in the accounts to be parties is that which allows the plaintiff to waive his rights against those who have been paid and accounted with, and proceed against the trustee alone. Daniell Ch. Pl. & Pr., vol. 1, 218; D'Wolf *v.* D'Wolf, 4 R. I. 450; Branch *v.* Booker, 3 Munf. (Va.) 43; Moore *v.* Beauchamp, 5 Dana Ky.) 71; Weymouth *v.* Boyes, 1 Ves. Jr. 416; Hills *v.* Nash, 1 Ph. 594; Brown *v.* DeTastet, Jac. 284; Bray *v.* Fromont, 6 Madd. 5; Perry *v.* Knott, 5 Beav. 293; Smith *v.* Snow, 3 Madd. 10; Hares *v.* Stringer, 15 Beav. 206; Lenaghan *v.* Smith, 2 Ph. 301; Hunt *v.* Peacock, 6 Hare 361; Milligan *v.* Milledge, 3 Cranch (U. S.) 220; West *v.* Randall, 2 Mason (U. S.) 196; Weymouth *v.* Boyes, 1 Ves. Jr. 416;

9. Proceedings to impeach an Account—The Bill or Complaint.—The bill or complaint filed to open an account must distinctly allege the ground upon which it is sought to set the account aside. The error, mistake, or fraud must be alleged with particularity.[1]

Towle *v.* Pierce, 12 Met. (Mass.) 329; 44 Am. Dec. 679; Vose *v.* Philbrock, 3 Story (U. S.) 335; Lawrence *v.* Rokes, 53 Me. 110; Mudgett *v.* Gager, 52 Me. 541; Palmer *v.* Stevens, 100 Mass. 461.

Liable to Account Severally.—In a case where there are several persons, each of whom is liable to account for his own receipts, a plaintiff is allowed to file a bill against one or more of them for an account of his or their own receipts and payments, without making the others parties to the suit. Daniell Ch. Pl. & Pr., vol. 1, 271; Cowslad *v.* Cely, Pre. Ch. 83; Devaynes *v.* Robinson, 24 Beav. 86; Kellaway *v.* Johnson, 5 Beav. 319; Perry *v.* Knott, 5 Beav. 293; Shipton *v.* Rawlins, 4 Hare 622; Hall *v.* Austin, 2 Coll. 570.

1. Brodrib *v.* Brodrib, 56 Cal. 566; Branger *v.* Chevalier, 9 Cal. 353; Cross *v.* Sacramento Sav. Bank, 66 Cal. 462; Hopkins *v.* Beard, 6 Cal. 664; Terry *v.* Sickles, 13 Cal. 427; Dominguez *v.* Dominguez, 7 Cal. 424; Kronenberger *v.* Binz, 56 Mo. 121; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 209; Leycraft *v.* Dempsey, 15 Wend. (N. Y.) 83; Threlkeld *v.* Dobbins, 45 Ga. 144; Colburn *v.* Lansing, 46 Barb. (N. Y.) 37; Langdon *v.* Roane, 6 Ala. 518; 41 Am. Dec. 60; Badger *v.* Badger, 2 Cliff. (U. S.) 137; Horan *v.* Long, 11 Tex. 229; Stearns *v.* Page, 7 How. (U. S.) 819; Chubbuck *v.* Vernam, 42 N. Y. 432; Porter *v.* Wormser, 94 N. Y. 431; Brown *v.* Welsh, 27 N. J. Eq. 429; Mebane *v.* Mebane, 1 Ired. Eq. (N. Car.) 403; Harrison *v.* Bradley, 5 Ired. Eq. (N. Car.) 136; Daniell Ch. Pl. & Pr., vol. 1, 372. But see Shugart *v.* Thompson, 10 Leigh (Va.) 452, where it was held that the bill should be construed liberally.

Fraud.—While the party may not surcharge and falsify at large, but only for items pointed out in the bill, yet if there is a suspicion of fraud cast upon the whole account, the liberty to surcharge and falsify is unrestricted, notwithstanding the bill contains no direct averment of fraud. Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Bullock *v.* Boyd, Hoffm. Ch. (N. Y.) 294; Daniell Ch. Pl. & Pr., vol. 1, 668.

Reply.—Where the defendant pleads specially denying each error and also all fraud, the plaintiff must take issue and prove the error or fraud, or the court will not disturb the account. Blackledge *v.* Simpson, 1 Hayw. (N. Car.) 259. See Houston *v.* Dalton, 70 N. Car. 662; Compton *v.* Culberson, 2 Dev. Eq. (N. Car.) 93.

Annexing Account.—If the defendant pleads the account in bar he must annex a copy to the answer in support of his plea. Weed *v.* Smull, 7 Paige (N. Y.) 573; Meeker *v.* Marsh, 1 N. J. Eq. 198; Seymour *v.* Long Dock Co., 20 N. J. Eq. 396. And the account should be set forth with particularity. 1 Mill. 418.

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Consolidation of Actions, see CONSOLIDATION.
Election of Remedies, see ELECTION.
Venue of Actions, see VENUE.
Appearances, see that title.

I. What is an Action.—1. Generally; Definition.—The term "action" is a comprehensive one and is applicable to almost any proceeding in a court of justice by which an individual pursues that remedy which the law affords him.[1]

Legislative Meaning.—Like its counterpart, "cause of action," the term "action" is often used in statutes with no very precise defini-

1. Weston *v.* Charleston, 2 Pet. (U. S.) 449.

"Action" Defined.—In Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, Marshall, C. J., said: "In law language a suit is the prosecution of some demand in a court of justice. . . . To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute a suit is to continue that demand."

In McBride's Appeal, 72 Pa. St. 480, a suit or action is thus defined: "A suit or action, according to its legal definition, is the lawful demand of one's right in a court of justice." And this is substantially the definition given by Blackstone. 3 Black. Com. 116.

In Hunter's Will, 6 Ohio 499, 501, this definition is given: "I should define an action to be an abstract legal right in one person to prosecute another in a court of justice; and a suit, the actual prosecution of such right in a court of justice." Per Wright, J.

Mr. Justice Miller, in U. S. *v.* 10,000 Cigars, 1 Woolw. (U. S.) 125, said: "The phrase 'civil actions' includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties or such parties and the government. It is used here in contradistinction to prosecutions for crime;" and see the following cases citing this with approval: Green *v.* U. S., 9 Wall. (U. S.) 655; Rison *v.* Crebbs, 1 Dill. (U. S.) 184; Fenstermacher *v.* State, 19 Oregon 504.

"Suit," "Cause," and "Action."—In Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, Orton, J., at p. 476, says: "The legal signification of the word 'suit' comprehends the prosecution of any claim, demand, or request, and is much broader than the term 'action,' and may embrace it, but does not define it." But other cases have held that, in any legal sense, action, suit, and cause are convertible terms. *Ex p.* Milligan, 4 Wall. (U. S.) 2; Hunter's Will, 6 Ohio 499.

Suit in Equity.—The term action includes suits in equity as well as proceedings at law. Central Pac. R. Co. *v.* Dyer, 1 Sawy. (U. S.) 641.

tion, and the duty then devolves on the courts, in the construction thereof, of finding the legislative meaning.[1]

As Used in Private Contracts.—The term is often used in contracts between private persons; in which case, unless restrained by the context, it receives the same construction as the courts give to "action" generally.[2]

1. **Actions by the Crown.**—In Bradlaugh *v.* Clarke, L. R. 8 App. Cas. 354, the meaning of the term "action" is most elaborately considered. The case involved the construction of a penal statute, allowing a penalty of £500, "to be recovered by *action* in one of her Majesty's Superior Courts at Westminster," upon any member of the House of Commons voting as such in the House or sitting during any debate after the Speaker has been chosen without having made and subscribed the oath thereby appointed. The question was whether this statute could be sued on by a common informer, or whether the Crown alone could sue. The argument was wholly over the construction of the word "action" as used in the statute. It was held that the Crown alone could sue, and that an action did not lie by a common informer. As Lord Selborne, L. C., went into the subject very minutely, we quote at length from his opinion: "I am also satisfied after full consideration that the word 'action' is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the Crown, and, therefore, not furnishing any sufficient ground for implying a right of action in a common informer. That it is used as a '*nomen generalissimum*' in this particular statute seems probable, from the fact that it stands there alone, without having superadded to it a number of other technical terms which are usually found associated with it in earlier statutes. Lord Coke (Coke Litt. 284b, 285a) adopts Bracton's definition of an 'action': '*Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur.*' In the third Institute he says: 'The king may have an action for such wrong as is done to himself, and whereof none other can have any action but the king, without being apprised by indictment, presentment, or other matter of record, as a *quare impedit*, *quare incumbravit*, a writ of attaint, of debt, detinue of ward, escheat, *scire facias pur repealer patent*.' So also Fitzherbert: 'The king shall have an action of trespass.' In Comyn's Digest, 'Action' (B), 'the term is applied to various rights of suit by the Crown, writ of right, writ of escheat, and other civil remedies, including debt and trespass; and in 'Action (D)' it is extended even to *placita coronea*, or criminal proceedings; as it is also in Bacon's Abridgment ('actions in general'). In the same abridgment it is said: 'The king, though the head and chief of his kingdom, may redress any injuries he may receive from his subjects by such usual common-law actions as are consistent with the royal prerogative and dignity.' And in Chitty, 'Prerogative,' 245: 'The general rule is that the king may waive his prerogative remedies, and adopt such as are assigned to his subjects; he may maintain the usual common-law actions, as trespass, *quare clausam fregit*, or for taking his goods.' These statements of the law are in accordance with the language of the statute 31 Eliz. c. 5, 'Concerning Informers,' which speaks of 'Actions, suits, bills, indictments, and informations' with express reference to 'any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs or successors only.' Considering the nature of the subject with which that statute deals, I am not surprised at the reference which the appellant made to it in his argument at your Lordships' bar. The conclusion to which I have been brought is that there is no difficulty in applying any part of the language of the clause in the Act of 1866, which creates the penalty sued for in the present action, to a suit by the Crown; and, therefore, that no part of that language affords any sufficient ground for implying an intention on the part of the legislature to give a common informer, as well as the Crown, a right of action for that penalty."

2. Harris *v.* Phoenix Ins. Co., 35 Conn. 312. In this case a policy of

2. Special Proceedings.—*a.* GENERALLY.—The term "special proceedings" is used in the codes of practice of many of the states, in contradistinction to "action." It may be said generally that any proceeding in a court which was not, under the common law and equity practice, either an action at law or a suit in chancery, is a special proceeding.[1]

b. PARTICULAR PROCEEDINGS.—**Probate Proceedings.**—A proceeding in a court of probate, or any probate proceeding in a court of general jurisdiction, is a special proceeding.[2]

insurance contained a provision that no suit or action for the recovery of any claim on the policy should be sustainable in any court of law or chancery unless commenced within twelve months after the loss occurred. Where the amount due for a loss was attached by a creditor of the insured within twelve months, on a process of foreign attachment, and a suit of *scire facias* was brought against the company by the creditor after the expiration of twelve months, it was held that the original attachment saved the claim from the limitations of the policy, and that the suit of *scire facias* was sustainable. "But by a 'suit' within the meaning of this provision of the policy is most clearly meant any proceeding in a court for the purpose of obtaining such remedy as the law allows a party under the circumstances," per Hinman, J.

Federal Removal Acts.—As to what constitutes a civil suit or action which may be removed from the state to the United States courts, see REMOVAL OF CAUSES.

1. Any proceeding which, under the old practice, might be commenced by petition or motion upon notice is a special proceeding. Tate *v.* Powe, 64 N. Car. 644.

The codes define a special proceeding as being any proceeding which is not an action. Their definition of an action is meant to include all such proceedings as have heretofore been denominated either an action at law or a suit in equity. See Harrison *v.* King, 9 Ohio St. 388, and the codes of the several states.

2. Hunt *v.* Sneed, 64 N. Car. 176; Springl e *v.* Hutchinson, 66 N. Car. 450; Bell *v.* King, 70 N. Car. 330; Herring *v.* Outlaw, 70 N. Car. 334; McCausland's Estate, 52 Cal. 568; *Ex p.* Smith, 53 Cal. 204.

Probating of a Will.—A proceeding for the probate of a will is a special proceeding. Sisters *v.* Glass, 45 Iowa 154. In Hunter's Will, 6 Ohio, 499 (a case anterior to the code) it was held that an application to make probate of a will is neither an action nor a suit.

Granting Letters of Administration.—The granting letters of administration by a county court is not an action. Waples *v.* Marsh, 19 Iowa 381.

Proceedings against Executors and Administrators.—A petition to compel an administrator to sell land to pay debts is a special proceeding. Pelletier *v.* Saunders, 67 N. Car. 261; Jerkins *v.* Carter, 70 N. Car. 500.

A proceeding by citation or attachment against an administrator or executor for neglect to file his settlement accounts as required by law is not an action. Philips *v.* State, 5 Ohio St. 122; 64 Am. Dec. 635.

A proceeding to remove an executor is a special proceeding. Barnes *v.* Brown, 79 N. Car. 401; Murrill *v.* Sandlin, 86 N. Car. 54; Simpson *v.* Jones, 82 N. Car. 323.

A creditor's bill against an administrator or executor is a special proceeding. Jerkins *v.* Carter, 70 N. Car. 500; Patterson *v.* Miller, 72 N. Car. 516; Haywood *v.* Haywood, 79 N. Car. 42; Shields *v.* Payne, 80 N. Car. 291.

Petition by an Executor or Administrator to Sell Land.—A petition by an executor or administrator to sell lands to pay debts is a special proceeding. Hyman *v.* Jarnigan, 65 N. Car. 96; Badger *v.* Jones, 66 N. Car. 305; Sinclair *v.* McBryde, 88 N. Car. 438. And any proceeding instituted by any one to sell the real estate of a decedent to pay debts is not a civil action. Seward *v.* Clark, 67 Ind. 289.

Claim Pending in Court.—A claim pending in court for trial against the estate of a decedent is a civil action. Lester *v.* Lester, 70 Ind. 201.

Attorney Filing Note in Probate Proceedings.—Where a note provided for

Mandamus.—Mandamus is a special proceeding.[1]

Attachment.—Proceedings in attachment are not actions.[2]

Attorneys.—Proceedings by a person for admission to the bar, or proceedings taken against an attorney for his disbarment, are special proceedings.[3]

Certiorari, Prohibition, and Quo Warranto.—The extraordinary remedies of Certiorari and Prohibition are special proceedings; but Quo Warranto is a civil action.[4]

Partition.—A proceeding for partition is a special proceeding.[5]

Street and Highway Proceedings.—Proceedings taken to open or widen or to change the grade of streets, and all proceedings in reference thereto, including appeals in such proceedings, are special proceedings and not actions.[6]

an attorney's fee, in case an action was brought thereon, it was held that the filing the note in the probate proceedings as a claim against the estate was such an action as to entitle the attorney to the fee. Davidson *v.* Vorse, 52 Iowa 384.

1. People *v.* Richmond County, 28 N. Y. 112; People *v.* Schoonmaker, 19 Barb. (N. Y.) 657; People *v.* Albright, 23 How. Pr. (N. Y. Supreme Ct.) 306; People *v.* Croton Aqueduct Board, 5 Abb. Pr. (N. Y. Supreme Ct.) 372. *Contra*, it is a civil action. Howerton *v.* Tate, 66 N. Car. 231. See also Kendall *v.* U. S., 12 Pet. (U. S.) 615; People *v.* Ransom, 2 N. Y. 490; Commercial Bank *v.* Canal Com'rs, 10 Wend. (N. Y.) 26; Tyler *v.* Houghton, 25 Cal. 26; Humiston *v.* Smith, 21 Cal. 129.

2. Harrison *v.* King, 9 Ohio St. 388.

3. A proceeding upon charges preferred by a private prosecutor to disbar an attorney is a special proceeding where in a change of venue on account of prejudice on the part of the judge may be granted upon the same conditions and upon compliance with the same rules as in ordinary actions. State *v.* Clark, 46 Iowa 155.

An application for admission as an attorney is a special proceeding. Matter of Cooper, 22 N. Y. 67.

4. **Certiorari.**—Thompson *v.* Reed, 29 Iowa 117. Certiorari is a special proceeding when issued to review proceedings on habeas corpus. People *v.* Jacobs, 5 Hun (N. Y.) 428.

Prohibition.—The writ of Prohibition is a special proceeding. People *v.* Court of Common Pleas, 43 Barb. (N. Y.) 278.

Quo Warranto.—An information in the nature of a quo warranto is a civil action. Reynolds *v.* State, 61 Ind. 392.

5. Capps *v.* Capps, 85 N. Car. 408; Bragg *v.* Lyon, 93 N. Car. 151.

Correction of Error in Partition.—But an action to correct an error in the partition of land is a civil action. Cheatham *v.* Crews, 81 N. Car. 343. See Wahab *v.* Smith, 82 N. Car. 229.

Amending Petition for Statutory Partition.—The amending a petition for statutory partition, asking equitable relief, makes it a civil action. Stableton *v.* Ellison, 21 Ohio St. 527.

6. **Proceedings to Assess Damages.**—Proceedings to assess damages on laying out plank roads are special proceedings. Matter of Fort Plain, etc., Plank Road Co., 3 Code Rep. (N. Y.) 148; Matter of New York (Supreme Ct.), 27 St. Rep. 188.

Application for Reference.—An application by the commissioners of estimate to extend a street in the city of New York, for a reference to ascertain their charges and expenses, is a special proceeding. Matter of New York (Supreme Ct.), 27 N. Y. St. Rep. 188.

Appellate Proceedings.—Proceedings on a reference in cases of appeal from an order of commissioner of highways are special proceedings. People *v.* Flake 14 How. Pr. (N. Y. Supreme Ct.) 527; People *v.* Albright, 23 How. Pr. (N. Y. Supreme Ct.) 306.

Change of Toll-gate.—A proceeding to change the location of a toll-gate is a special proceeding. McAllister *v.* Albion Plank Road Co., 11 Barb. (N. Y.) 611.

Massachusetts.—A claim against a city for damages occasioned to land by changing the grade of a street cannot

Drainage Proceedings.—Likewise all statutory proceedings taken to drain wet lands are special proceedings.[1]

Habeas Corpus.—Application for a writ of habeas corpus is not a civil action.[2]

Divorce and Alimony Proceedings.—Divorce and alimony proceedings are special proceedings and not actions.[3]

Condemnation of Land.—Proceedings to condemn land are not actions but special statutory proceedings.[4]

Bastardy Proceedings.—A bastardy proceeding is a civil action.[5]

Proceedings to Recover Dower.—A petition for dower is a special proceeding.[6]

Lunatics, Trustees, and Guardians.—An application for leave to commence an action against the estate of a lunatic, and removals of guardians and trustees, are all special proceedings.[7]

Vacating, Setting Aside, and Impeaching Judgments.—Any proceeding to set aside a judgment or to vacate it is a special proceeding.[8]

be submitted to arbitration under Pub. Sts. c. 188, because such claim is not a "controversy which may be the subject of a personal action at law or of a suit in equity." Osborn *v.* Fall River, 140 Mass. 508. And damages for flowing land can be recovered only in the mode provided by statute. Such damage is not the subject of a suit at law or in equity, but of a particular statutory mode of redress. Henderson *v.* Adams, 5 Cush. (Mass.) 610.

1. Durden *v.* Simmons, 84 N. Car. 555; Matter of Swan, 33 Hun (N. Y.) 200.

Indiana.—Proceedings for the construction of drains and ditches are not civil actions within the meaning of the provisions of the constitution regarding trials by jury. Anderson *v.* Caldwell, 91 Ind. 451; 46 Am. Rep. 613. But they are so far a civil action that the provisions of §§ 412 to 417, R. S. 1881, in relation to a change of judge, must be held applicable. Bass *v.* Elliott, 105 Ind. 517.

2. McGlennan *v.* Margowski, 90 Ind. 150. *Contra*, *Ex p.* Milligan, 4 Wall (U. S.) 2. Holmes *v.* Jennison, 14 Pet. (U. S.) 340. But perhaps these two last cases only hold a *habeas corpus* case to be an action in the broadest sense of the word.

3. Evans *v.* Evans (Ind., 1886), 3 West Rep. 330; Reeves *v.* Reeves, 82 N. Car. 348.

4. Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476; Farney *v.* Ralls, 30 Iowa 559; Whitney *v.* Atlantic R. Co., 53 Iowa 651; Matter of Waverley Water Works Co., 16 Hun (N. Y.) 57. See Albany, etc., R. Co. *v.* Dayton, 10 Abb. Pr. N. S. (N. Y. Supreme Ct.) 182; Rochester, etc., R. Co. *v.* Beckwith, 10 How. Pr. (N. Y. Supreme Ct.) 168; New York Cent. R. Co. *v.* Marvin, 11 N. Y. 276; Matter of New York, etc., R. Co., 35 Hun (N. Y.) 231; Matter of New York, etc., R. Co., 33 Hun (N. Y.) 231; Matter of New York, etc., R. Co., 35 Hun (N. Y.) 275.

5. Ingram *v.* State, 24 Neb. 33. *Contra*, it is a special proceeding. State *v.* McIntosh, 64 N. Car. 607.

6. Felton *v.* Elliott, 66 N. Car. 195. *Contra*, it is a civil action and appealable. Corry *v.* Lamb, 43 Ohio St. 390.

7. Williams *v.* Cameron, 26 Barb. (N. Y.) 172; Matter of Livingston, 34 N. Y. 555; Matter of King, 42 Hun (N. Y.) 607.

Order Removing Committee of Lunatic and Appointing Another.—An order removing the committee of a lunatic and appointing another person in his stead is not a special proceeding. Matter of Griffin, 5 Abb. Pr. N. S. (N. Y. Supreme Ct.) 96.

8. **Motion to Set Aside Judgment.**—A motion by a creditor to set aside a judgment entered upon confession is a special proceeding. Belknap *v.* Waters, 11 N. Y. 477.

Ohio.—A proceeding under § 536 of the Ohio Code, by petition in the court of common pleas, to vacate a judgment rendered by that court at a former term and to reinstate the case on the docket for trial, is not appealable to the district court. Such a proceeding is not, of itself, a civil action, but is a special proceeding in an ac-

But where a petition impeaching a decree for fraud seeks relief which could not be obtained by a retrial of the cause in which the judgment was rendered, it will be regarded as a civil action and not a special proceeding.[1]

Proceedings to Make New Parties to Judgments.—Some of the states have a provision allowing a joint contractor to be made a party to a judgment. This proceeding is a civil action.[2]

Miscellaneous Cases.—There will be found in the note hereto a number of miscellaneous cases in which it was held that the proceedings were either an action or a special proceeding.[3]

tion after judgment. Taylor *v.* Fitch, 12 Ohio St. 169.

1. Coates *v.* Chillicothe Branch State Bank, 23 Ohio St. 415, where it was held that an appeal may be taken in such action as in other cases.

2. Yoho *v.* McGovern, 42 Ohio St. 11.

3. **Refunding Tax.**—An application for the refunding of a tax illegally assessed is a special proceeding. Harris *v.* Niagara County, 33 Hun (N. Y.) 279.

Proceedings to Charge Stockholders.—Proceedings to charge stockholders of a bank are special. Empire City Bank Case, 8 Abb. Pr. (N. Y. Ct. App.) 192. See Matter of Buffalo (Buffalo Super. Ct.), 17 N. Y. St. Rep. 371; Wagener *v.* Reiley, 4 How. Pr. (N. Y. Ct. App.) 195; Talbot *v.* Talbot, 23 N. Y. 17; Matter of Delaware, etc., Canal Co., 69 N. Y. 209.

Supplementary Proceedings.—Supplementary proceedings are not special proceedings. Dresser *v.* Van Pelt, 15 How. Pr. (N. Y. Super. Ct.) 19; Mallory *v.* Gulick, 15 Abb. Pr. (N. Y. Supreme Ct.) 307, note.

Compelling Heirs to Perform Ancestor's Contract.—Application to court to compel infant heirs to specifically perform contract of ancestor is a special proceeding. Hyatt *v.* Seeley, 11 N. Y. 52.

Proceedings to Punish Referee.—A proceeding to punish a referee for contempt in refusing to carry out judgment of foreclosure is not a special proceeding. People *v.* Bergen, 9 Hun (N. Y.) 202.

Prosecuting Error.—A right to institute a proceeding in error is rather a right of appeal than a right of action. Schooner Marinda *v.* Dowlin, 4 Ohio St. 500.

Proceedings for Contempt.—Proceedings for contempt are special proceedings. Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Holstein *v.* Rice, 15 Abb. Pr. (N. Y. Supreme Ct.) 307, note; Gray *v.* Cook, 15 Abb. Pr. (N. Y. Super. Ct.) 308, note; Hart *v.* Johnson (Supreme Ct.), 7 N. Y. St. Rep. 133.

Order Declaring Banking Association Insolvent.—An order declaring a banking association insolvent is a special proceeding. U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199.

Proceedings on Transcript of a Justice's Judgment.—A transcript of a justice's court judgment was filed in the county clerk's office. After the expiration of five years a motion was made by plaintiff in the county court for leave to issue execution. On the hearing of the motion defendant did not appear, but another person appeared to oppose and presented affidavits to the effect that he was the owner of the judgment, under an assignment executed by plaintiff's general agent. The matter was referred to a referee, who reported that plaintiff made an agreement in writing to sell the judgment, and that there was no fraud inducing it. The court, on hearing counsel for plaintiff and the contestant, the defendant not appearing, confirmed the report and denied plaintiff's motion. *Held*, a special proceeding. Ithaca Agricultural Works *v.* Eggleston, 107 N. Y. 272.

Auditing Commissioner's Accounts.—An order auditing commissioner's accounts is a special proceeding. Matter of Ryers, 72 N. Y. 1.

Summary Proceedings to Recover Land.—Summary proceedings to recover the possession of land are special proceedings. People *v.* Boardman, 4 Keyes (N. Y.) 59. See Freeman *v.* Ogden, 40 N. Y. 105; Carpenter *v.* Green, 4 Hun (N. Y.) 416.

Arbitration and Judgment.—Arbitration and judgment on the award is a

II. WHAT IS A CAUSE OF ACTION—Definition.—A cause of action is generally held to be a union of the right of the plaintiff and its infringement by the defendant.[1]

special proceeding and not an action. Moore *v.* Boyer, 42 Ohio St. 312.

Interpleader.—Where the defendant is allowed to bring into court the subject of the suit and compel an interpleader, after the defendant is discharged and the new party pleads, this action is a civil action, and must be proceeded in as a civil action. Maginnis *v.* Schwab, 24 Ohio St. 336.

Vacating Assessment.—A petition to vacate an assessment is not a special proceeding. Matter of Jetter, 78 N. Y. 601.

Damages for the Erection of Mill.—A proceeding to get damages for the erection of a mill is a special proceeding. Summer *v.* Miller, 64 N. Car. 688.

Forcible Entry and Detainer.—Forcible entry and detainer is a civil action. Bowers *v.* Cherokee, 45 Cal. 495.

Penalties.—An action to recover a penalty is a civil action. Mitchell *v.* State, 12 Neb. 538.

1. Veeder *v.* Baker, 83 N. Y. 156; Atchison, etc., R. Co. *v.* Rice, 36 Kan. 593.

Combination of Right and Delict.—"The N. Y. Code (§ 275) provides that if the defendant has answered, the court may grant the plaintiffs any relief consistent with the case made by the complaint and embraced within the issue. In case no answer has been put in, the relief granted cannot exceed that demanded in the complaint. In the former case the demand of relief in the complaint becomes immaterial. The case made by the complaint and the limits of the issue alone determine the extent of the power of the court. These expressions of the statute include the statement of the *right of the plaintiffs and its infringement by the defendants. These constitute the case.*" Per Johnson, J., in Marquat *v.* Marquat, 12 N. Y. 341.

In Hayes *v.* Clinkscales, 9 S. Car. 441, McIver, J., at p. 453, after quoting the following from Pomeroy on Remedies: "The cause of action, therefore, must always consist of two factors—(1) the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property, or contract; and (2) the delict or wrongful act or omission of the defendant, by which the primary right and duty have been violated"—uses this language: "And the words 'right of action' in the statute should be held to mean the primary right, which constitutes one of the foundations of the cause of action, and not the remedial right which flows from such primary right held by the plaintiff and the breach of the primary duty resting upon the defendant."

In Rodgers *v.* Mutual Endowment Assoc., 17 S. Car. 406, McGowan, J., at pp. 410, 411, says: "What is the cause of action? We must keep in view the difference between the subject of action and the cause of action. The subject of action is what was formerly understood as the subject matter of the action, and, as Mr. Pomeroy says, 'finds its primary and far more important application in equitable rather than legal proceedings. The cause of action is the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other; and these appear by the facts of each separate case.'"

Cooley, J., in the case of Post *v.* Campan, 42 Mich. 96, says: "The elements of a cause of action are, first, a breach of duty owing by one person to another; and second, a damage resulting to the other from the breach. Damage where no duty is violated is *damnum absque injuria;* a neglect of duty, where no loss occurs, is equally incapable of giving a right of action."

"The expression 'cause of action' means the whole cause of action; that is, all the facts which together constitute the plaintiff's right to maintain the action." Per Blackburn, J., in Allhusen *v.* Malgarejo, L. R. 3 Q. B. 343. "The words 'cause of action' in s. 18 are a comprehensive term which includes every circumstance which goes to make up a contract and breach." Per Lush, J., in Allhusen *v.* Malgarejo, L. R. 3 Q. B. 344. And in Sichel *v.* Borch, 2 H. & C. 954, this language is used by the Barons: "It has been laid down in an analogous matter that the term 'cause of action' means the

Delict alone as Cause of Action.—Some authorities hold that the cause of action is the act or delict on the part of the defendant which gives the plaintiff his cause of complaint; they reject, as unnecessary to the definition, the right of the plaintiff.[1]

whole cause of action. Here the cause of action is the contract and the breach of it. It does not follow that because the breach of contract took place in this country the cause of action arose within the jurisdiction of the Superior Courts. We must take into consideration the contract of which there has been a breach. The contract, strictly speaking, was neither in Norway nor in England. No doubt, so far as one of the parties is concerned it was in England, but so far as the other party is concerned it was in Norway; therefore it was in neither one country nor the other. For these reasons it appears to me that the statute does not apply to this case." Per Pollock, C. B., at pp. 957–8. "The 'cause of action' means the whole cause of action; and includes the drawing and indorsement of the name of the drawer on the bill, both of which took place in Norway. Therefore the whole cause of action did not arise within the jurisdiction." Per Martin, B., 958. And see Fife *v.* Round, 6 W. R. 283; Slade *v.* Noel, 4 F. & F. 424; and Nettleford *v.* Funcke, Day's C. L. P. Acts (3d ed.) 18.

1. **Delict alone as the Cause of Action.**—"It [the cause of action] is that which in popular meaning—for many purposes, in legal meaning—is the cause of action, viz., the act on the part of the defendant which gives the plaintiff his cause of complaint." Per Brett, J., in Jackson *v.* Spittall, L. R. 5 C. P. 552. "A cause of action is a wrong committed or threatened. It may consist of the wrongful conversion of property or of the non-performance of an agreement. In one case the cause of action would sound in tort, the other in contract; and, while the relief sought might relate to the same subject-matter, yet proof of facts sufficient to sustain an action for the tort would be insufficient to sustain an action for the non-performance of the agreement, for the reason that the *probata* would not correspond with the *allegata*." Per Curiam in Miller *v.* Hallock, 9 Colo. 551. "It being well settled that, in a case of this kind, the suit must be brought where the cause of action arose, it becomes essential, in order to determine whether this suit has been brought before the proper court, to determine what is the cause of action. An action is 'the lawful demand of one's right.' The cause of this lawful demand, or the reason why the plaintiff can make such demand, is some wrong act committed by the defendant, and some damage sustained by the plaintiff in consequence thereof. The commission or omission of an act by the defendant, and damage to the plaintiff in consequence thereof, must unite to give him a good cause of action. No one of these facts by itself is a cause of action against the defendant. The wrongful diversion, then, of the water of the stream in Connecticut by the defendant, and the consequent damage which the plaintiffs' mill in Massachusetts has sustained, constitute the cause of action. A part of that which is essential to the plaintiffs' right to recover took place in Connecticut. Without the commission of the act of diversion in Connecticut there would have been no good cause of action. With it there is a sufficient cause of action. The act of diversion, which arose in Connecticut, and the other facts existing give to the plaintiffs a cause of action. That which is essential, therefore, to the plaintiffs' right of recovery against any one, or their cause of action, arose where the suit has been brought." Per Ingersoll, J., in Foot *v.* Edwards, 3 Blatchf. (U. S.) 310. See following cases allowing the venue to be laid in either place, where the material facts of a cause of action take place in different places: Scott *v.* Brest, 2 T. R. 238; Bulwer's Case, 7 Coke 1; Thompson *v.* Crocker, 9 Pick. (Mass.) 59; Barden *v.* Crocker, 10 Pick. (Mass.) 383; Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M. (U. S.) 538; Comyn's Digest, Action, N. 11; Watts *v.* Kinney, 23 Wend. (N. Y.) 485; Livingston *v.* Jefferson, 1 Brock. (U. S.) 203.

"It is a fundamental principle of law, applicable alike to breaches of contract of this description and to torts, that in order to found a right of action there must be a wrongful act done and a loss resulting from that wrongful act. The wrongful act must be the act of the

Remedy Alone.—The mere giving of a legal remedy does not of itself create a cause of action out of the matter upon which the remedy is accorded.[1]

In the Construction of Statutes in which the term is used the question becomes of practical importance in the administration of justice.[2]

defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act. The wrong done and the injury sustained must bear to each other the relation of cause and effect, and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of." Per Depue, J., in Warwick *v.* Hutchinson, 45 N. J. L. 65.

For a further discussion of what is a cause of action, especially in its relation to cause and effect, consult the following cases: Stevenson *v.* Newnham, 13 C. B. 285; Burton *v.* Pinkerton, L. R. 2 Exch. 340; Glover *v.* London, etc., R. Co., L. R. 3 Q. B. 25; Byard *v.* Holmes, 34 N. J. L. 296; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17; 10 Am. Rep. 265, *aff'd* 35 N. J. L. 574; Kuhn *v.* Jewett, 32 N. J. Eq. 647.

1. In Wurlitzer *v.* Suppe, 38 Kan. 31, it was held that, if an attachment is allowed before an account falls due, this does not make it a cause of action, and therefore such account cannot be joined and sued on in the same action with notes due, under a provision of the Code allowing all causes of action on contract to be joined. Simpson, C., said, 34, 35: "The law does not create causes of action—these are created by the acts and contracts of persons; it only gives a right of action under certain conditions and limitations on the cause. . . . To constitute a cause of action in cases of this character there must be a duty to be performed, a right to be enforced, and a failure, omission, or refusal to perform, or an infringement of the right. On an account not due these elements are wanting. There is no failure, omission, or refusal to pay. The right to enforce payment is not infringed, because that right does not accrue until the time for payment has expired. It seems to follow that the statute allowing an attachment to issue under certain circumstances on a claim before it is due does not make it a cause of action as designated in the article of the Code upon the subject of the joinder of actions."

2. **Statutes Conferring Jurisdiction.**—The English Common Law Procedure Act (1852) allowed a foreign defendant to be sued on a "cause of action" which arose within the jurisdiction. In Jackson *v.* Spittall, L. R. 5 C. P. 542, it was held that the term "cause of action" as used in the act did not mean the whole cause of action, i.e., the contract and breach, but the act on the part of the defendant which gives the plaintiff his cause of complaint. In that case the plaintiff sued the defendant, a British subject resident in the Isle of Man, upon an alleged breach of a contract not to indorse a bill of exchange delivered to him as security. The contract was made in the Isle of Man. The breach by indorsing over took place in Manchester, Eng. The question involved was whether the defendant could be sued in England, summons being served on him in the Isle of Man, under the Procedure Act. It was held he could be. But in Sichel *v.* Borch, 2 H. & C. 954, the reverse of the above ruling obtained. It was the case of a merchant, residing in Norway and not being a British subject, who drew, indorsed, and sent in a letter by post to a merchant in London a bill of exchange payable in London, which was indorsed to the plaintiff and dishonored. It was held that no cause of action had arisen within the jurisdiction of the superior courts, and that the plaintiff could not proceed against the defendant under the 19th section of the Common Law Procedure Act. In Allhusen *v.* Malgarejo, L. R. 3 Q. B. 340, the defendant, a foreigner residing abroad, entered into a contract with the plaintiffs abroad to sell them a quantity of manganese, to be delivered at Newcastle-upon-Tyne. The defendant delivered part, but failed to deliver the rest. It was held that as the whole cause of action did not arise in England, the defendant could not be sued therein under the Procedure Acts. To the same effect see Fife *v.* Round, 6 W. R. 283; Slade *v.* Noel, 4 F. & F. 424; Nettleford *v.* Funcke, Day's C. L.

III. When is an Action Commenced?—1. Generally.—It often becomes material in practice to know when an action is commenced. Points of precedeure, the application of the statute of limitations, and various other legal principles may all depend in their application upon the question, when was the action commenced? For certain purposes an action may be held to be commenced, while for other purposes the courts may deny to the action the attribute of a "commenced" suit. But generally speaking, not noting the exceptions to and the qualifications of the doctrines, the legislation of the states and the adjudications follow three main classifications, to wit: the action is commenced when the complaint is filed, when the process is issued, or when the process is served on the defendant.

2. In the Various States—Alabama.—In *Alabama* all civil actions in courts of record, except such cases as are otherwise provided for by the Code, are commenced by the service of a summons.[1]

P. Acts (3d ed.) 18. In Veeder *v.* Baker, 83 N. Y. 156, it was held that an action, under an act making an officer personally liable who signed a false report of a corporation's condition, should be brought where the cause had arisen, which was the place where the false report had been signed. So in Rodgers *v.* Mutual Endowment Association, 17 S. Car. 406, an agreement was made in the state between a citizen thereof and a foreign Mutual Co., whereby application was made for membership, and the amount there paid was to be refunded if the application was rejected. The rules of the company required proof of death-claims to be made at the home office, when an assessment was to be made and the claims were to be paid there. *Held*, that the claim of the beneficiaries under such citizen's certificate was not a cause of action arising within the state, within the meaning of the statute.

Habeas Corpus.—In *Ex p.* Milligan, 4 Wall. (U. S.) 2, the question involved in the case was whether a certificate of division of opinion, required by the Act of 1802, making it the duty of the U. S. circuit court to certify to the U. S. supreme court the point in a *cause* upon which the judges were divided, could be granted in a habeas corpus case after the petition had been filed, but before the writ had been issued and a return made. It was held that when the petition has been filed and the writ prayed for, it is a suit, or cause, within the meaning of the act. "But it is argued that the proceeding does not ripen into a cause until there are two parties to it. This we deny. It was the cause of Milligan when the petition was presented to the circuit court. It would have been the cause of both parties if the court had issued the writ and brought those who held Milligan in custody before it." Per Davis, J.

But see Fruitt *v.* Anderson, 12 Ill. App. 430, where Baker, P. J., says: "The term 'cause of action' involves not only a right of action, but also that there is some person in existence who is qualified to institute process. The right must also be capable of being legally enforced, and so there must be also a person to be sued." Therefore it was held that the plaintiff, who was the guardian of a lunatic and furnished him necessaries, could not sue until a proper person existed to be sued therefor, and that until then he had no cause of action.

1. Civil Code Ala. § 2651; Cruise *v.* Riddle, 21 Ala. 791; East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 151; *Ex p.* Locke, 46 Ala. 77; Huss *v.* Central R., etc., Co., 66 Ala. 475; Alabama G. S. R. Co. *v.* Hawk, 72 Ala. 117; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112; 24 Am. St. Rep. 863; Alabama G. S. R. Co. *v.* Smith, 81 Ala. 229; Ware *v.* Swann, 79 Ala. 330; Sublett *v.* Hodges, 88 Ala. 491; Alabama G. S. R. Co. *v.* Thomas, 89 Ala. 294; Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68; American Union Co. *v.* Daughtrey, 89 Ala. 191; South, etc., R. Co. *v.* Bees, 82 Ala. 340; Anniston, etc., R.

Arizona.—By a provision in the Code of Civil Procedure *Arizona* has enacted that all civil suits in courts of record shall be commenced by complaint filed in the office of the clerk of such court.[1]

Arkansas.—In *Arkansas* a civil action is commenced by filing in the office of the clerk of the proper court a complaint, and causing a summons to be issued thereon.[2]

Co. *v.* Ledbetter, 92 Ala. 326; Winston *v.* Mitchell, 93 Ala. 554; Alabama G. S. R. Co. *v.* Arnold, 80 Ala. 600; Tompkins *v.* Holt (Ala., 1891), 8 So. Rep. 794; Barker *v.* Anniston, etc., R. Co., 92 Ala. 314.

Issuing of the Writ.—The suing out of the writ is the commencement of the action. Cox *v.* Cooper, 3 Ala. 256. But a summons is not "sued out," within Code, § 2631, providing that "the suing out of the summons is the commencement of a suit, whether it be executed or not, if the suit be continued by an alias, or recommenced at the next term," till it passes from the clerk to a proper officer, with a *bona-fide* intention to have it served. West *v.* Engle (Ala., 1893), 14 So. Rep. 333.

Notice in Summary Proceedings.—The issuance of a notice in summary proceedings at the suit of the State Bank and branches is the commencement of a suit, if followed up by service on the defendant and motion for judgment. Griffin *v.* State Bank, 6 Ala. 908; Stanley *v.* Bank of Mobile, 23 Ala. 652.

Statutory Claim.—The commencement of a statutory claim suit is not the issue of the execution, nor its levy, but the making of the affidavit and the giving of the bond by the claimant. McAdams *v.* Beard, 34 Ala. 478.

Ejectment.—Where a person against whose tenants ejectment has been commenced is made a defendant on her own application, the action must be considered as having been commenced against her at the time it was brought against the other defendants, in computing the time necessary to bar the action. Turner *v.* White, 97 Ala. 545

Summary Proceeding against Stockholder.—A summary proceeding by a corporation against a delinquent stockholder is a suit commencing when the notice is placed in the hands of the sheriff to be served. Alabama, etc., R. Co. *v.* Harris, 25 Ala. 232.

Contest before Probate Court.—In a contest before the probate court respecting the validity of a will, the proponent is the party plaintiff, and the contestants are the defendants; and the other heirs-at-law, or distributees, though notified of the proceeding, are not parties to it unless they come forward and make themselves parties. Blakey *v.* Blakey, 33 Ala. 611. See Allen *v.* Prater, 35 Ala. 169; Clemens *v.* Patterson, 38 Ala. 721.

1. Code Civil Proc. § 1.

2. Digest of the Statutes (1884), § 4967; State Bank *v.* Bates, 10 Ark. 120; Ruddell *v.* Walker, 7 Ark. 458; Bailey *v.* Palmer, 5 Ark. 208; McClellan *v.* State Bank, 12 Ark. 141; St. Louis, etc., R. Co. *v.* Shelton, 57 Ark. 459.

Necessity of Process.—The filing of a complaint is not alone the commencement of an action. Process on it must also be issued, and until then the running of the statute of limitations is not arrested. Hallum *v.* Dickinson, 47 Ark. 120; State Bank *v.* Cason, 10 Ark. 479; State Bank *v.* Brown, 12 Ark. 94; McClarren *v.* Thurman, 8 Ark. 313.

Proving Date of Writ—*Secondary Evidence.*—Upon proof of the loss or destruction of a writ, the date of its issue and its contents may be proved by secondary evidence. Hallum *v.* Dickinson, 47 Ark. 120.

Filing an Open Account.—Under § 1, ch. 133, Gould's Digest, which provides that suits at law may be commenced by filing in the clerk's office "a note or writing obligatory or due bill or other evidence of debt," on which a summons or *capias* may issue, a plaintiff cannot commence an action by filing an open account. Nor can the plaintiff commence an action by filing a sealed agreement which on its face shows no cause of action, and upon which a right of action could only be shown by auxiliary evidence. Gaines *v.* Craig, 24 Ark. 477.

Assigning Chose after Filing Complaint.—As the issuance of the writ of summons, and not the filing of the

California.—Civil actions are commenced in *California* by filing a complaint.[1]

cause of action with the justice, constitutes the institution of the suit, therefore the suit may be in the name of the assignee if the note be assigned after filing and before issuance of the writ. Ruddell *v.* Walker, 7 Ark. 457.

1. Code Civil Proc. § 405; Dupuy *v.* Shear, 29 Cal. 238; Reynolds *v.* Page, 35 Cal. 296; Adams *v.* Patterson, 35 Cal. 122; Brown *v.* Mann, 71 Cal. 192.

Limited to Limitation Act.—A suit is commenced within the Limitation Act of 1850 by simply filing the complaint. To prevent the bar of the statute, no other proceeding is necessary. But for all other purposes an action can be commenced only by filing the complaint and issuing a summons, unless a defendant voluntarily appear and plead without summons. Sharp *v.* Maguire, 19 Cal. 577; Pimental *v.* San Francisco, 21 Cal. 351; Allen *v.* Marshall, 34 Cal. 165.

Mechanics' Lien.—The provision in the general Limitation Act of 1850, that the filing of the complaint shall be deemed a commencement of a suit, applies to that act only, and not to the Mechanics' Lien Act. Under this latter act, to commence a suit within six months from the expiration of a credit given, a complaint must be filed and a summons issued. Flandreau *v.* White, 18 Cal. 640. See Green *v.* Jackson Water Co., 10 Cal. 375, where an amended complaint was filed and summons issued thereon. *Held*, barred.

Plea of Action Pending.—Where a defendant pleaded another suit pending between the same parties and for the same cause of action, and it appeared that no summons had ever been issued upon the complaint, and that there had been no appearance on the part of the defendant, *held*, that there was no suit pending, and consequently no misjoinder of causes of action. Weaver *v.* Conger, 10 Cal. 234; Primm *v.* Gray, 10 Cal. 522.

Question of Fact.—It seems that the commencement of an action is a question of fact and not of law. Adams *v.* Patterson, 35 Cal. 122. *Compare* Caulfield *v.* Sanders, 17 Cal. 571.

Amendment of Complaint.—The filing of a new complaint after a demurrer has been sustained is not the commencement of a new action. Jones *v.* Frost, 28 Cal. 246; Barber *v.* Reynolds, 33 Cal. 497; Allen *v.* Marshall, 34 Cal. 165; Farris *v.* Merritt, 63 Cal. 118; Easton *v.* O'Reilly, 63 Cal. 305; Link *v.* Jarvis (Cal., 1892), 33 Pac. Rep. 206; Barber *v.* Reynolds, 33 Cal. 497; Lorenzana *v.* Camarillo, 45 Cal. 125. Most of the above cases support the doctrine that an amended complaint relates back to the commencement of the action, if a new cause of action is not pleaded and new parties are not brought in; and in such case the statute ceases to run when the original complaint is filed.

Introducing New Cause of Action.—But when a complaint is amended so as to state a new cause of action, the action is not commenced as to said new cause until the amended complaint is filed. Anderson *v.* Mayers, 50 Cal. 525. See Atkinson *v.* Amador Canal Co., 53 Cal. 102, where the action was trespass, and an amended complaint was filed for the purpose of including a parcel of land inadvertently omitted from the original complaint. *Held*, that the filing of the original complaint did not stop the statute of limitations from running against the trespass upon the omitted parcel. See also Jeffers *v.* Cook, 58 Cal. 147; Meeks *v.* Southern Pac. R. Co., 61 Cal. 149.

Illustrations of no New Cause of Action.—Where the words in the petition were, "He is a thief," *held* that an amendment, "that thieving son of a ——, he stole from me and I can prove it," did not state a new cause of action. Smullen *v.* Phillips, 92 Cal. 408. Where a complaint praying for the return of articles pledged was amended by striking out the prayer for their return, *held*, to be no change in the cause of action. Vanderslice *v.* Matthews, 79 Cal. 273.

Original Defendant cannot take Advantage because New Party made.—While an amendment introducing a new cause of action is a commencement of the action at the time the amendment is filed, still it does not change the nature of the action against the original defendant (the amendment having made new defendants), nor extend the statute in his favor till the filing of

Colorado.—*Colorado* has a statutory provision to the effect that civil actions in the district courts and county courts shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons therein.[1]

Connecticut.—In *Connecticut* the service of the writ, not the date of its issue, is the commencement of the suit.[2]

Delaware.—*Delaware* has a statutory provision to the effect that every writ used for the commencement of an action shall bear date on the day it was issued, and shall be returnable on the first day of the term next thereafter.[3]

District of Columbia.—By federal legislation it is enacted that in the *District of Columbia* civil actions shall be commenced by the filing of a complaint and the issuing of a summons. The action is deemed to be commenced from the time of the issuing of the summons.[4]

Florida.—In *Florida* an action is deemed to be commenced when the summons or other original process is delivered to the proper officer to be served.[5]

Georgia.—The Code of *Georgia* provides that when the petition is

such amendment. Lewis *v.* Adams, 70 Cal. 403; 59 Am. Rep. 423.

Divorce.—Where a new cause of action is inserted in the complaint for divorce, the action is commenced as to this new cause of action when the amendment is filed. Valensin *v.* Valensin, 73 Cal. 106.

Merger.—When an order is made for the service of summons by publication, and a summons is issued, and a supplemental complaint is afterwards filed, and a summons issued thereon, the original action becomes merged in the action as supplemental. McMinn *v.* Whelan, 27 Cal. 300.

1. Civil Code, § 29.

2. Holderidge *v.* Wells, 4 Conn. 151, note; Spalding *v.* Butts, 6 Conn. 30; Clark *v.* Helms, 1 Root (Conn.) 487; Jencks *v.* Phelps, 4 Conn. 152; Perkins *v.* Perkins, 7 Conn. 563; 18 Am. Dec. 120; Gates *v.* Bushnell, 9 Conn. 535.

The Practice Act of *Connecticut* seems to contain no provision as to when an action is commenced, and hence the above cases are probably law now.

Foreign Attachment.—An action of foreign attachment is not begun, as regards the defendant, until the process is served upon him. After service on the garnishee only, the defendant may pay the debt and escape the penalty of costs. Ashburn *v.* Poulter, 35 Conn. 553. See Studwell *v.* Cooke, 38 Conn. 551.

Real estate was attached on Feb. 28, and personal service of the writ was made on the defendant on March 4. *Held*, that the action was not brought within the meaning of the statute of limitations until March 4. Sanford *v.* Dick, 17 Conn. 215.

3. Laws of Delaware (Rev. Code 1893), tit. 16, § 1. The action is probably commenced when writ is issued.

4. Rev. Code (Dist. of Columbia) 1857, ch. 81, § 1.

Filing of Declaration.—For the purposes of the statutes of limitations at least, an action is commenced when the declaration is filed. "Where the original declaration states a cause of action, but does it imperfectly, and thereafter an amendment is filed, a plea of the statute of limitations will relate to the time of the filing of the original declaration." Lewis *v.* Washington R. Co., 6 Mackey (D. C.) 556. See Moses *v.* Taylor, 6 Mackey (D. C.) 255.

New Cause of Action.—The amendment of a declaration so as to state for the first time a cause of action is equivalent to bringing a new suit as of the date of the amendment. Johnston *v.* District of Columbia, 1 Mackey (D. C.) 427.

5. Rev. Sts. ch. 26, art. 1, § 1282.

filed in the office of the clerk of the court the action is commenced; also, that upon such petition the clerk shall indorse the date of its filing in his office, which shall be considered the time of the commencement of the suit.[1]

1. Code (1882), § 3333. See § 3333, Code (1873); Bagley *v.* Stephens, 80 Ga. 736; Weslow *v.* Peavy, 51 Ga. 210; Dobbins *v.* Jenkins, 51 Ga. 203; George *v.* Gardner, 49 Ga. 449; Branch *v.* Mechanics' Bank, 50 Ga. 416; Littleton *v.* Spell, 77 Ga. 227.

Service Perfected.—The filing of a declaration in the clerk's office, when service has been perfected as required by law, will be considered as the commencement of the suit; *aliter*, where there has been no service. Ferguson *v.* New Manchester Mfg. Co., 51 Ga. 609; Coleman *v.* Warrill, 57 Ga. 124. "It would scarcely be contended that a plaintiff, whose right of action lacks but a few days of being barred by the statute of limitations, could, by simply filing his petition in the clerk's office, with the clerk's entry thereon, and then dismissing it without service, gain six months' longer time to recommence an action for the same cause." Per Trippe, J., in Branch *v.* Mechanics' Bank, 50 Ga. 416.

Attachment.—Where a declaration claiming damages for seduction of plaintiff's daughter had been filed in the clerk's office, but had not been served on defendant, the filing of the declaration was such a commencement of the suit under the Code as to authorize an attachment to issue *pendente lite*. Graves *v.* Strozier, 37 Ga. 32.

Ejectment.—When in an action of ejectment a third person goes into possession after the commencement of the suit, and such third person is made a party defendant, the date of the commencement of the original suit is to be taken as the date of the commencement of the suit against such new party. Roe *v.* Doe, 47 Ga. 540.

Changing Suit from Individual Capacity to Representative.—The first suit was instituted by the plaintiff in her individual capacity, and pending the action the declaration was amended so as to show that she sued in fact as the executor of her husband. *Held*, that after the amendment, as before, the suit was the same suit and not another; and that the time when the declaration had been filed was the time the suit was commenced. Tift *v.* Towns, 63 Ga. 237.

Removal to U. S. Courts.—When the petition is filed, application may be made for a removal to the *U. S.* court, at a term of the court prior to that in which said suit is returnable. Floyd County *v.* Hurd, 49 Ga. 466.

Certiorari.—A writ of *certiorari* is not "brought" within the meaning of § 2920 of the Code until filed in the clerk's office. Barrett *v.* Devine, 60 Ga. 632.

Court with no Jurisdiction.—A suit in a court having no jurisdiction is no suit at all; it is simply a nullity. Per McCay, J., in Gray *v.* Hodge, 50 Ga. 263.

Amendments of Pleadings.—Where the cause of action is one single contract and one single breach thereof, all amendments to the declaration relate back to the commencement of the suit. Verdery *v.* Barrett, 89 Ga. 349. But where an action of ejectment is brought in the "John Doe" form, a demise may be introduced, by amendment, at any time; and every demise of this character is a separate and distinct cause of action. The cause of action thus introduced does not relate back to the filing of the declaration, but dates from the time the amendment is filed and allowed. Jones *v.* Johnson, 81 Ga. 293.

Some Illustrations. — A declaration was filed. The clerk failed to annex a process to it. The suit nevertheless went on for several years. Finally, it was dismissed by the court on the motion of the defendant, the ground of the motion being the want of process. Pending the suit the limitation period for the suit ran out. Within six months from the dismissal of the suit the suit was renewed. *Held*, that the time of the termination of the first suit was when it was dismissed, and not when the clerk's right to annex a process to the petition expired; and that the new suit was commenced in season. Wynn *v.* Booker, 22 Ga. 359. Where an action was brought by A for the use of B, against C, and it appeared on the face of the declaration that the suit was brought for the use of B, and C acknowledged service and waived a copy of the declaration before the writ was filed: *held*, that the ac-

Idaho.—The *Idaho* Code prescribes that a civil action is commenced by filing a complaint.[1]

Illinois.—In *Illinois* the issuing of the summons is the commencement of a suit.[2] And if any cause exists in a given case why that date should not apply, the party relying upon the statute of limitations as a bar should make such cause apparent.[3]

knowledgment of service and waiver of copy so charged C with notice of the equitable rights of B that he could not afterwards, before the writ was actually filed, buy up a debt against A, and plead it as an offset, unless he could make it appear that when he did so acknowledge service he did not know that the suit was for the use of B. "We are not prepared to say that the acknowledgment of service and waiving copy was the commencement of suit. It may be that plaintiff would never file it." McCay, J., in Whitaker *v.* Pope, 48 Ga. 15.

1. Code Civil Proc. § 4068.

2. Feazle *v.* Simpson, 2 Ill. 30; Collins *v.* Montemy, 3 Ill. App. 182.

3. Chicago, etc., R. Co. *v.* Wilcox, 12 Ill. App. 42. See Chicago, etc., R. Co. *v.* Henneberry, 42 Ill. App. 126; People *v.* Stewart, 29 Ill. App. 441; Pennsylvania Co. *v.* Sloan, 125 Ill. 72; 8 Am. St. Rep. 337; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416; 9 Am. St. Rep. 630; Haines *v.* Chandler, 26 Ill. App. 400; Fairbanks *v.* Farwell, 141 Ill. 354.

Suit in Chancery.—The filing of the bill is the commencement of a suit in chancery, and service had therein on process issued or by publication of notice made prior thereto is a nullity. Hodgen *v.* Guttery, 58 Ill. 431.

What is Suing Out of a Summons.—The suing out of a summons is the commencement of a suit, but a writ is not considered as legally sued out until it is delivered to the sheriff with authority to make service, or is transmitted to him for the purpose of being served. The mere making out, signing, and sealing of a summons by the clerk, and delivery to the plaintiff or his attorney, is not the commencement of a suit so as to save the bar of a limitation. Hekla Ins. Co. *v.* Schroeder, 9 Ill. App. 472, where the process was issued the day before the limitation expired; but as the record was silent as to when the sheriff received it, it was held that the action was barred. *Compare* Ben Franklin Ins. Co. *v.* Schroeder, 9 Ill. App. 477. And see the case of Schroeder *v.* Merchants' Ins. Co., 104 Ill. 71, where the plaintiff filed his præcipe for a summons against the defendant, and it was issued by the clerk and placed in the hands of the plaintiff's attorney, who retained the same until its return day, when he handed it back to the clerk, ordering a new writ, which was issued and served returnable to the next term of the court. This last process was issued after the expiration of the year, the contract limitation. *Held*, that the suit was commenced when the præcipe was filed and the first summons was issued by the clerk.

Amendment as to Parties.—Amending the process and making a new party, with new process against him, is a commencement as to such defendant from the time he is made a party. U. S. Ins. Co. *v.* Ludwig, 108 Ill. 514. But substituting the party having the legal right to sue, instead of one improperly named as plaintiff, is in no sense the commencing of a new suit; but so far as the defendant is concerned the suit will be regarded as commenced at the time of the original issuing and service of the summons. U. S. Ins. Co. *v.* Ludwig, 108 Ill. 514, where on a life policy of insurance containing a contract clause of limitations an action was improperly brought in the name of an assignee within the time limited, instead of in the name of an administrator, and judgment of recovery was had, which was reversed for want of a proper party plaintiff. Thereupon, by leave of court, an amendment was made substituting the administrator in place of his assignee, and a new count was filed upon the same cause of action, but this was after the expiration of the contract period of limitation. *Held*, that the amendment related back to the commencement of the suit, and that the limitation could not be invoked to defeat the action. *Compare* Teutonia L. Ins. Co. *v.* Mueller, 77 Ill. 22; Chicago, etc., R. Co. *v.* Jenkins, 105 Ill. 588.

Indiana.—An action in *Indiana* is commenced from the time of issuing the summons.[1]

Indian Territory.—A suit in the United States court for the *Indian Territory* is commenced by filing a written complaint.[2]

Iowa.—In *Iowa* the delivery of the original notice to the sheriff of the proper county with intent that it shall be served immedi-

Filing Affidavit for Attachment.—The filing of an affidavit for an attachment is the commencement of the suit. Pullian *v.* Nelson, 28 Ill. 112.

Writ of Error.—Where a writ of error is sued out within five years, the failure to have the process served before the expiration of the five years does not bring the case within the operation of the statute. Burnap *v.* Wight, 14 Ill. 303.

Alias Summons.—Where a summons from the circuit court is made returnable to the fourth day of the term, it is not merely voidable, but absolutely void, and should be quashed; but where the court, upon quashing the writ, continued the cause with an order for an alias summons, and such summons was issued, *held*, that the alias summons might be considered as the commencement of a new suit; that the words "as you have been before commanded," in the writ, might be regarded as surplusage; and that the writ might be amended in the circuit court by striking out those words. Rattan *v.* Stone, 4 Ill. 540.

Redocketing Cause.—Where a party failed to take the proper steps to have a cause redocketed, and for that reason the motion to redocket was overruled, and afterwards, upon proper notice, the cause was redocketed, a notice to take depositions, served in the interim and before the cause was properly on the docket, was held of no avail; and it is not error to suppress depositions taken in pursuance of such notice. Joy *v.* Aultman, etc., Mfg. Co., 11 Ill. App. 413.

1. Rev. Sts. (1888) § 314; Chicago, etc., R. Co. *v.* Bills, 118 Ind. 221; Penrose *v.* McKenzie, 116 Ind. 35; Ross *v.* State, 131 Ind. 548.

Issue of Process.—The commencement of a suit or the institution of proceedings on motion includes the issuing of process or notice to bring the defendant into court. Temple *v.* Irvin, 34 Ind. 412. The general rule is that an action is not commenced until the impetration of the writ. And where the record does not show the issuing of any writ, nor an objection in the court below to the time of bringing the action, the supreme court will presume that the action was commenced when appearance was made and answer filed. Charlestown School Tp. *v.* Hay, 74 Ind. 127.

When is Summons Issued.—The issuing of summons is the commencement of an action, but a summons is not issued until it comes to the hands of the sheriff. Fordice *v.* Hardesty, 36 Ind. 23. *Compare* Wood *v.* Bissell, 108 Ind. 229.

Summons Issued before Complaint Filed.—Under the Code, a summons issued upon a præcipe, before the filing of the complaint in the cause, will be set aside on appearance and motion. Hust *v.* Conn, 12 Ind. 257. But where the complaint does not show that the summons was prematurely issued, a demurrer based upon that defect is bad. Hust *v.* Conn, 12 Ind. 257.

An Illustration.—A proceeding was commenced by process of foreign attachment issued under the statute of 1843. The affidavit was filed and the writ issued in April, 1853; but it did not appear that the writ was ever served or returned, nor that it was ever placed in the sheriff's hands. The record stated that the writ issued, and contained a copy of it. Nothing further was done until December, 1853, when the defendant appeared and answered. *Held*, that the statement that the writ issued did not imply that it was placed in the hands of the sheriff for service; that the inference was that it remained in the clerk's office, as he copied it into the record; also that the action was not commenced before the delivery of the writ to the sheriff for service; that the mere making out of a writ without actual or constructive delivery to the officer for service was the same as if no writ had issued. Hancock *v.* Ritchie, 11 Ind. 48.

2. Rev. Sts. U. S., chapter on *Indian Territory*.

ately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action.[1]

1. Rev. Code (1888), § 2532; Bracken *v.* McAlvey, 83 Iowa 421; Fernekes *v.* Case, 75 Iowa 152; Hampe *v.* Shaffer, 76 Iowa 563; Case *v.* Blood, 71 Iowa 632; McDonald *v.* Jackson, 55 Iowa 37; District Tp. *v.* District Tp., 62 Iowa 30; Archer *v.* Chicago, etc., R. Co., 65 Iowa 611; Clark *v.* Stevens, 55 Iowa 361; Ewell *v.* Chicago, etc., R. Co., 29 Fed. Rep. 57; Collins *v.* Bane, 34 Iowa 385; Reed *v.* Chubb, 9 Iowa 178; Hagan *v.* Burch, 8 Iowa 309; Elliott *v.* Stevens, 10 Iowa 418; Snyder *v.* Ives, 42 Iowa 157; Phinney *v.* Donahue, 67 Iowa 192; Wolfenden *v.* Barry, 65 Iowa 653; Parkyn *v.* Travis, 50 Iowa 436. In this last case it was held that an action is commenced when the notice is served on the defendant, and not when it is placed in the hands of the officer for service. Proska *v.* McCormick, 56 Iowa 318, holds that it is only for the purpose of the statute of limitations that the delivery of an original notice to the sheriff for service constitutes the commencement of an action; for all other purposes the commencement of the action dates from the actual service of the notice.

Necessity of Delivery to the Sheriff.—An action is to be deemed commenced from the delivery of the original notice to the sheriff, and not from the filing of the petition. Collins *v.* Bane, 34 Iowa 385; Hampe *v.* Shaffer, 76 Iowa 563; Bracken *v.* McAlvey, 83 Iowa 421.

Presumption of Delivery.—Where the original notice is not served until a month after the petition is filed, the court will presume that the notice was delivered to the sheriff at the time of filing the petition, with the intent that it be served immediately, and after that time the operation of the statute of limitations will be suspended. Snyder *v.* Ives, 42 Iowa 157.

Filing Claim with Administrator.—Where the claim is against an estate, the filing of the claim and such action by the administrator as to indicate approval thereof are a sufficient commencement of an action to prevent the claim being barred. Wilson *v.* McElroy, 83 Iowa 593.

Defective Notice.—A notice of an action, with the appearance day left blank, is not an original notice within the meaning of § 2532 of the Code; and the delivery of such a notice by a justice of the peace to a constable for service, with the understanding that the latter should insert the appearance day at or before the time of service, was held not to be the commencement of an action within the meaning of said section; and where the action was not otherwise begun on the cause of action until more than ten years after it accrued, the action was barred. Phinney *v.* Donahue, 67 Iowa 192. And where the original notice named as the appearance day a day already past, the suit was held not begun; nor was the case aided by the service, after the limitation period had elapsed, of a second notice, correctly reciting the appearance day; and the appearance of the defendant on the day named in the last notice was not a waiver of his right to insist upon the statute of limitations. Jones Lumber Co. *v.* Boggs, 63 Iowa 589. The first notice stated that the term of court at which the defendants were required to appear would commence on 30 August, when it began on 31 August. This notice was held fatally defective, and its delivery to the sheriff did not arrest the operation of the statute of limitations. Fernekes *v.* Case, 75 Iowa 152.

Injunction.—Where an injunction was issued to restrain the removal of the records and office to a new county seat, it was held that the action was commenced by the service of the writ of injunction, although the notice was not served until more than the period of limitations had elapsed. Sweatt *v.* Faville, 23 Iowa 321.

Intent must be Continuous.—Although the delivery of an original notice to the sheriff, with intent that it shall be served immediately, is a commencement of the action for the purposes of the statutes of limitations, yet such intent must be continuous until the service is effected. Where a notice was placed in the sheriff's hands, and he neglected to serve the same, but afterwards returned it to the plaintiff's attorney, who lost it, and nearly two years later another notice was

Kansas.—The Code of *Kansas* provides that an action shall be deemed commenced, within the meaning of the statute of limitations, as to each defendant, at the date of the summons which is served on him or on a codefendant who is a joint contractor or otherwise united in interest with him.[1]

drawn and served, it was held that the action was not begun with the delivery of the first notice to the sheriff. Wolfenden *v.* Barry, 65 Iowa 653.

Amendments of Pleadings.—An amendment of a petition, which sets up no new cause of action, but simply states the original in another form, may be filed after the lapse of the statutory period of limitation. Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601; Case *v.* Blood, 71 Iowa 632; Barke *v.* Early, 72 Iowa 273. And an amendment may be filed after the statutory limitation, setting up additional damages arising out of the original cause of action. Cooper *v.* Mills County, 69 Iowa 350. And see Myers *v.* Kirt, 68 Iowa 124, an action to recover damages on account of unlawful sales of liquor to a woman's husband, and for a lien against the saloon property. The petition did not state facts sufficient to warrant a lien, but was allowed to be amended after the statutory period had barred the cause of action.

Amendment as to Parties.—Where one co-executor withdrew from the case, and the other filed an amended petition, claiming in her own right, filed and allowed without objection, this was held not to commence a new action, for the purposes of the statute of limitations. Wade *v.* Clark, 52 Iowa 158, 35 Am. Rep. 262.

Attachment.—The petition, affidavit for the writ, and attachment bond were filed 29 November, 1857, and the writ was issued on the same day. The original notice was dated 30 November, and was received by the sheriff on the same day. The defendant moved to quash the writ of attachment because it was issued before the commencement of the action. *Held*, that when a petition is filed an action is so far commenced that a writ of attachment may issue before the original notice is placed in the hands of the sheriff for service. Hagan *v.* Burch, 8 Iowa 309. See also Reed *v.* Chubb, 9 Iowa 178; Elliott *v.* Stevens, 10 Iowa 418.

An Illustration.—Where the notice was placed in the sheriff's hands for service April 1, but was not served until April 3, and the cause of action accrued April 2, it was held that the cause of action had accrued before suit commenced. Parkyn *v.* Travis, 50 Iowa 436.

1. Code Civil Proc. § 20. § 57 provides that an action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. See Culp *v.* Steere, 47 Kan. 746; Wilkinson *v.* Elliott, 43 Kan. 590; Smith *v.* Bourbon County, 43 Kan. 619; Pracht *v.* McNee, 40 Kan. 1; German F. Ins. Co. *v.* Bullene, 51 Kan. 764; Parsons Water Co. *v.* Hill, 46 Kan. 145; Ordway *v.* Cowles, 45 Kan. 447; Smith *v.* Payton, 13 Kan. 362; Carney *v.* Taylor, 4 Kan. 178; Searle *v.* Adams, 3 Kan. 515, 89 Am. Dec. 598; Thompson *v.* Wheeler, 29 Kan. 481.

Issue of Process.—The action is commenced when the petition and præcipe are filed and when summons is issued. Per Valentine, J., in Dunlap *v.* McFarland, 25 Kan. 490.

Attachment.—Where an action is commenced by the filing of a petition, a præcipe, and an affidavit for an order of attachment, and a summons and order of attachment are issued on the same day, and the order of attachment is served by levying upon certain real estate, and the defendant is not found, and afterward the summons and order of attachment are returned, and the plaintiff then proceeds to obtain service of the summons by publication, and the first publication of the summons is made three days after the action is commenced,—it was held that for the purposes of the attachment the action was deemed to have been commenced at the time of the filing of the petition, the præcipe, and the affidavit for the order of attachment, and that the order of attachment was not invalid because issued before the action was commenced. Dunlap *v.* McFarland, 25 Kan. 490.

Kentucky.—In *Kentucky* an action is deemed commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action.[1]

Louisiana.—Under the practice code of *Louisiana* an action is begun by petition addressed to a competent judge.[2]

Maine.—In *Maine* all civil actions, except *scire facias* and other special writs, are commenced by original writ.[3]

United in Interest.—In an action to enforce a mechanic's lien, the owner of the lot had conveyed the same away before suit; summons was served on him thereafter. *Held*, that he was not so united in interest with the purchaser that the action could be deemed commenced as to such purchaser at the date of the summons served on the original owner. Rice *v.* Simpson, 30 Kan. 28.

Silence of the Record.—Where the record as brought to the appellate court fails to show when the action was commenced below, it is impossible to hold that a plea of the statute of limitations was improperly overruled. Marbourg *v.* McCormick, 23 Kan. 38.

1. General Statutes (1888), ch. 71, art. 4, § 1; Heckman *v.* Louisville, etc., R. Co., 85 Ky. 631; Louisville *v.* Smith, 87 Ky. 501; Newton *v.* Carson (Ky., 1887), 5 S. W. Rep. 475.

Issuing Process.—Issuing the writ, not the filing the declaration, is the commencement of the action. Thompson *v.* Bell, 6 T. B. Mon. (Ky.) 558; Butts *v.* Turner, 5 Bush (Ky.) 435; Kellar *v.* Stanley, 86 Ky. 240.

Date of First Process.—The date of the first summons or process issued in good faith is the date of commencement. Trabue *v.* Sayre, 1 Bush (Ky.) 129.

Amendment as to Parties.—In case of an amendment substituting new parties in place of the defendant, wrongfully made such, the action is only commenced when the new parties are brought in. Leatherman *v.* Times Co., 88 Ky. 291; 21 Am. St. Rep. 342.

2. Art. 170, La. Code Prac.; Lalane *v.* Payne, 42 La. Ann. 152; Boyd *v.* Heine, 41 La. Ann. 393.

The Statute of Limitations.—A citation served on a married woman under a petition in which she is sued as a single woman, cannot subsequently, after the defendant is sued as a married woman and duly cited, be invoked as a citation sufficient to interrupt prescription. Bertrand *v.* Knox, 39 La. Ann. 431. Where a co-owner of indivision of immovable property brings an action in his own name for the entire damage done to the estate by a trespasser, the citation in such suit will avail to interrupt prescription as to the other co-owner who afterwards intervenes and joins in the action. Becnel *v.* Wagnespack, 40 La. Ann. 109.

3. Rev. Sts. (1883), ch. 81, § 1; Johnson *v.* Farwell, 7 Me. 372.

Writ Brought in Wrong County.—Donnell *v.* Gatchell, 38 Me. 217, holding that the limitation was not suspended for six months from attaching to a cause of action, where the writ was abated by reason of being brought in the wrong county.

Plea in Abatement.—Biddeford Sav. Bank *v.* Mosher, 79 Me. 242, holding that a plea in abatement to a trustee writ, founded upon the fact that the alleged trustee was not a resident of the county, is bad if it does not allege the non-residence at the time of the commencement of the action.

Unavoidable Accident; Statute Construed.—Marble *v.* Hinds, 67 Me. 203, a case construing § 87, c. 81, Rev. Sts., as to failure of service, the result of unavoidable accident.

Inevitable Accident Causing Failure of Service.—If the plaintiff would avoid the bar of the statute of limitations by having seasonably sued out process, which failed of service through inevitable accident in the transportation by mail, it is incumbent on him to show that he previously ascertained the course of the mail, and that a letter enclosing the precept, and properly directed, was put into the post-office sufficiently early to have reached the officer, by the ordinary route, in season for legal service. A suit against the sheriff for default of his deputy, which is limited to four years, is barred thereafter, though the writ fail of service by inevitable accident.

Maryland.—In *Maryland* the practice of bringing actions is a simplified common-law practice. The plaintiff delivers a written memorandum to the clerk of the court, who then issues summons. The plaintiff only files his declaration after the summons is returned served. The action is probably commenced when summons is issued.[1]

Massachusetts.—An action is deemed to have been commenced in *Massachusetts* on the day of the date of the writ.[2]

Michigan.—In *Michigan* it is probable that an action is commenced when the declaration is filed.[3]

Jewett *v.* Greene, 8 Me. 447; Brown *v.* Houdleth, 10 Me. 399.

1. See Tyler's Maryland Pleading, *passim*.

Amendment of Pleading.—The declaration may be amended, and the amendment relates back to the commencement of the action. Wolf *v.* Bauereis, 72 Md. 481.

2. Where a writ was filled up and dated before the expiration of the time limited by the statute for bringing the action, it was held that the action was not barred by the statute, although the writ was not served until such time had expired. Gardner *v.* Webber, 17 Pick. (Mass.) 407; Bunker *v.* Shed, 8 Met. (Mass.) 150. See Ford *v.* Phillips, 1 Pick. (Mass.) 202; Emery *v.* Seavey, 148 Mass. 566; Cram *v.* Holt, 135 Mass. 46; Federhen *v.* Smith, 3 Allen (Mass.) 119; Swift *v.* Crocker, 21 Pick. (Mass.) 241; Butler *v.* Kimball, 5 Met. (Mass.) 94; Graves *v.* Cushman, 131 Mass. 359; Thorndike *v.* Wells, 146 Mass. 619; Phœnix Ins. Co. *v.* Frissell, 142 Mass. 513; Lowe *v.* Harwood, 139 Mass. 133.

Parol Evidence.—The *teste* of a writ is *prima facie* evidence of the time when it was sued out, but it is not conclusive; and the actual time when it was sued out and delivered to the officer may be proved by parol evidence. Parkman *v.* Crosby, 16 Pick. (Mass) 297.

Replevin.—The date of a writ of replevin is not conclusive evidence of the time when the action was commenced; and if the cause of action had not accrued on the day of the date, but did accrue before the day of the service thereof, and there is no evidence of the time when the writ was given to the officer, the action may properly be considered as having been commenced after the cause of action accrued. Federhen *v.* Smith, 3 Allen (Mass.) 119. See Field *v.* Jacobs, 12 Met. (Mass.) 118, where it was held that the action of replevin was commenced when the writ was filled up, although not served nor given to an officer for service, nor a replevin bond filed, until after the expiration of twenty-four hours, the time limited by the statute to replevy impounded cattle.

Provisional Writ.—Where a writ is filled up provisionally, and delivered to an officer with instructions not to serve it until after a certain time or the happening of a certain event, the action will not be commenced until *service* of the writ. Seaver *v.* Lincoln, 21 Pick. (Mass.) 267. See Grimes *v.* Briggs, 110 Mass. 446. Where a writ of replevin was delivered to an officer, and he was directed before serving it to demand the goods from the party, and the same not being delivered he proceeded to replevy them, the writ and service were held good. Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 195.

3. Johnson *v.* Mead, 73 Mich. 326; Sheridan *v.* Cameron, 65 Mich. 680; Randall *v.* Gartner, 96 Mich. 284; People *v.* Clement, 72 Mich. 116; Bresnahan *v.* Nugent, 92 Mich. 76; Detroit Free Press *v.* Bagg, 78 Mich. 650; Bogue *v.* Prentis, 47 Mich. 124; Johnson *v.* Mead, 58 Mich. 67; Spier *v.* McGueen, 1 Mich. 252; Pattridge *v.* Lott, 15 Mich. 251; Foote *v.* Pfeiffer, 70 Mich. 581; McOmlier *v.* Chapman, 42 Mich. 117.

Filing Declaration.—Where the declaration was sent to the county clerk without an entry fee, and he declined to file it, it was held that serving a copy on the defendant before the fee was paid and declaration filed was void, although the plaintiff immediately paid the entry fee and had the declaration filed as soon as the omission came to

Minnesota.—The Statutes of *Minnesota* provide that an action is commenced as to each defendant when the summons is served on him.[1]

Mississippi.—In *Mississippi* an action is commenced from the time of the filing of the declaration, if a summons be issued thereon for the defendant.[2]

Missouri.—The *Missouri* Code provides that the filing a petition in a court of record, or a statement or account before a court not of record, and the suing out of process therein, shall be taken and deemed the commencement of a suit.[3]

his attention, which was just after he had served a copy. Ellis *v.* Fletcher, 40 Mich. 321. See also Wetherbee *v.* Kusterer, 41 Mich. 359.

Issue of Summons.—A suit is not begun, for the purposes of the statutes of limitations, by merely filling out a summons and leaving it in a justice's office until the return day, or by retaining it in the plaintiff's custody; it must be issued with the intent that, if practicable, it shall be served. Howell *v.* Shepard, 48 Mich. 472. And a justice's summons is not issued if merely delivered to the plaintiff and kept in his hands. Howell *v.* Shepard, 48 Mich. 472. The date of a writ is *prima facie* evidence of the time of its actual issue, and defendant has the burden of proving that it was not then issued. Howell *v.* Shepard, 48 Mich. 472.

Attachment.—An attachment proceeding is begun when the writ issues, not when the declaration is filed. Galloway *v.* Holmes, 1 Dougl. (Mich.) 330.

Presumption.—Plaintiff commenced two suits against defendant on the same day, for the same cause of action—one by declaration, the other by attachment. The court presumed, nothing appearing on the record to the contrary, that the suit by declaration was filed first, and held that a plea of that suit in abatement of the attachment suit was bad, because the plea did not state that it was still pending. Wales *v.* Jones, 1 Mich. 254. See also Pew *v.* Yoare, 12 Mich. 16.

Amendment.—An amendment to a declaration counting on the conversion of "953 bushels of wheat of the value of $1040," which strikes out that item, and inserts in its place, "31 acres of growing wheat of the value of $800," introduces a new cause of action, and cannot be allowed at a time when such new cause of action is barred. Nugent *v.* Adsit, 93 Mich. 462.

1. Rev. Sts. § 4698; Bruns *v.* Schreiber, 48 Minn. 366; Hooper *v.* Farwell, 3 Minn. 106; Auerbach *v.* Maynard, 26 Minn. 421; Lough *v.* Pitman, 25 Minn. 120.

2. Rev. Code (1880), § 1522; Brown *v.* Goolsby, 34 Miss. 437; Benson *v.* Stewart, 30 Miss. 49.

Issuing of Process.—The commencement of the action, within the meaning of the statute, is the suing out of a writ and placing it in the hands of the officer for service, and not the filing of the declaration. Lamkin *v.* Mye, 43 Miss. 241.

Chancery Suits.—The filing of the bill, and not the issuance of the process, is so far a commencement of a suit in the chancery court as to stop the running of the statute of limitations. Bacon *v.* Gardner, 23 Miss. 60.

Distinction between Commencement of an Action and Lis Pendens.—There is a substantial difference between the commencement of an action and its being a suit pending between the parties; the first having reference only to the act of the plaintiff, but the second having reference also to the position of the defendant. Allen *v.* Mandaville, 26 Miss. 397.

3. Wagner's Rev. Sts. Mo. § 2013; Baker *v.* Missouri Pac. R. Co., 34 Mo. App. 98; Sutton *v.* Dameron, 100 Mo. 141; Smith *v.* Boese, 39 Mo. App. 15; Smith *v.* Barrett, 41 Mo. App. 460; Lilly *v.* Toblein, 103 Mo. 477; 23 Am. St. Rep. 887; South Missouri Lumber Co. *v.* Wright, 114 Mo. 326.

Filing of the Declaration.—"In this country, the filing of the declaration, and not the return of the writ, must be considered the commencement of the suit." Per Wash, J., in Dougherty *v.* Downey, 1 Mo. 674. But see Fenwick *v.* Gill, 38 Mo. 510, where, at p.

Montana.—When the state of *Montana* was a territory, its Code provided that an action is commenced by filing a complaint. This is probably the law now, since the state's admission into the Union.[1]

Nebraska.—*Nebraska* provides by statute that an action shall be deemed commenced, within the meaning of the statute of limitations, as to the defendant, at the date of the summons which is served on him.[2]

Nevada.—Civil actions in the district courts of *Nevada* are commenced by the filing of a complaint with the clerk of the court, and the issuance of a summons thereon.[3]

New Hampshire.—The supreme court of *New Hampshire* holds that the time when an action is commenced is the time when the writ is in fact filled up with the declaration in order to have it served upon the opposite party.[4]

525, Holmes, J., says: "The summons was served on the defendant on the 31st day of October, 1858. Strictly speaking this was the commencement of the suit."

Attachment.—Where suit is commenced by attaching the defendant's property, the plaintiff may take depositions before summons served or publication completed, because it is a *pending* suit. Lewin *v.* Dille, 17 Mo. 64.

Mechanic's Lien.—Where, in a suit on a mechanic's lien, the petition is filed ninety days after the filing of the lien, the action is commenced within the meaning of the statute (Wagn. Sts. 911, § 16), and the lienor is not barred although the writ is issued subsequent to that period. Gosline *v.* Thompson, 61 Mo. 471. And see Spurlock *v.* Sproule, 72 Mo. 503, 507, which applies the doctrine generally, that an action is commenced when the petition is filed.

Amendment.—An amended petition correcting the original description in a suit on a mechanic's lien is merely a continuance of the original action; and where that was brought within ninety days after filing the lien, the plaintiff is not barred by the lien limitation law. Mann *v.* Schroer, 50 Mo. 306. And where an amendment sets up no new matter or claim, it relates to the commencement of the suit; but where it introduces a new claim, the running of the statute continues to the time of filing the amendment. Buel *v.* St. Louis Transfer Co., 45 Mo. 562. See also Smith *v.* Missouri Pac. R. Co., 50 Fed. Rep. 760.

Understanding of Counsel.—Where a bill was filed in time, but a summons did not issue until afterward, owing to an understanding that the defendant would appear without a summons, the suit was held not barred. Wright *v.* Pratt, 17 Mo. 43.

Depositing a Special Tax Bill.—The depositing a special tax bill with the justice before the five years' limitation had run out, but not delivering process to the constable until it had expired, is not such commencement of suit as to save the action from the bar of the statute. Turner *v.* Burns, 42 Mo. App. 94.

What is the Issuing of an Execution.—The mere writ, lying in the clerk's office, in no officer's hands who could enforce it, ought not to be held the "issuing" of an execution, within the meaning of the statute. An order or writ not sent out is not "issued." Burton *v.* Deleplain, 25 Mo. App. 376.

1. Code Civ. Proc. Montana Ter. § 66.

2. Code Civ. Proc. § 19; Johnson *v.* Jones, 2 Neb. 126; Burlingim *v.* Cooper, 36 Neb. 73.

Amendment as to Parties.—In an action to foreclose a mechanic's lien, an amendment making the owner of the legal title party commences the suit as to him only from the time he was made a party. Green *v.* Sanford, 34 Neb. 363.

3. Code Civ. Proc. § 22. See also § 23, providing that at any time within one year after the filing of a complaint the plaintiff may cause to be issued a summons thereon. Rose *v.* Richmond Min. Co., 17 Nev. 25.

4. Society, etc., *v.* Whitcomb, 2 N. H. 227. See Gagnon *v.* Connor, 64 N.

New Jersey.—In *New Jersey* a suit is commenced as soon as the writ is sealed and issued out of the office, in good faith, for the purpose of being served or proceeded on, and that purpose is not afterward abandoned.[1]

New Mexico.—The Compiled Laws of *New Mexico* prescribe that all suits at law in the district courts shall be commenced by filing a declaration in the office of the clerk of the court.[2]

New York.—The *New York* Code of Civil Procedure provides that a civil action is commenced by the service of a summons; also that an action is commenced against a defendant, within the

H. 276; Buswell *v.* Babbitt, 65 N. H. 168.

Parol Evidence.—The date and not the service of the writ is *prima facie* evidence of the true time when it was sued out. But this *prima facie* evidence may be rebutted and the true time shown by parol testimony. Society, etc. *v.* Whitcomb, 2 N. H. 227.

Limitations; Suits in Equity, etc.—"An action at law is in general regarded as commenced, so as to avoid the statute of limitations, when the writ is completed with the purpose of making immediate service. But when there is no intention to have it served, or where it cannot be served until some further act is done, the action is not deemed to be commenced until such act is performed. The same rule is applicable to suits in equity. A bill in equity must be filed in the clerk's office and an order of notice obtained before it can be served upon the defendant. The date of the filing is therefore the earliest time which can be taken as the commencement of the suit." Per Carpenter, J., in Clark *v.* Slayton, 63 N. H. 402.

Provisional Writ.—When the writ is placed in the hands of the officer, but not to be served until after demand, the suit is not commenced till demand. Robinson *v.* Burleigh, 5 N. H. 225; Leach *v.* Noyes, 45 N. H. 364; Graves *v.* Ticknor, 6 N. H. 537; Hardy *v.* Corliss, 21 N. H. 356; Mason *v.* Cheney, 47 N. H. 24; Brewster *v.* Brewster, 52 N. H. 60.

Set-off.—In general, an action is commenced, so as to exclude a subsequent set-off, when the writ is made out and placed in the hands of the officer for service. Hardy *v.* Corliss, 21 N. H. 356.

Writ under Control of Party.—A writ, until served, is under the control of the party, and may be changed by him. Plumer *v.* Fogg, 18 N. H. 559.

1. White *v.* Hunt, 6 N. J. L. 415; Bank of Elizabeth *v.* Barber, 8 N. J. L. 309; Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539. Thus, where an attorney sued out a summons and showed it to a defendant requesting him to sign his appearance to it, and the defendant promised to do so in case he could not arrange with plaintiff, and defendant afterward appeared to that summons, the suit was considered as having been actually commenced at the time the summons was first shown to the defendant, so that a note acquired by the defendant subsequent to that time could not be set off. Whitaker *v.* Turnbull, 18 N. J. L. 172. And likewise when a summons was prepared and sealed by an attorney, in the usual manner, as agent of the clerk of the court, and suffered to remain upon his table without being given to the sheriff, while awaiting an answer to a proposal for an arbitration, and was afterwards served prior to the term to which it was returnable, it was held that the making and sealing the writ by the attorney, in good faith, and for the purpose of having it served, was the commencement of the suit, although the statute of limitations barred the claim before the summons had been placed in the sheriff's hands for service. Updike *v.* Ten Broeck, 32 N. J. L. 105.

Scire Facias.—The writ of *scire facias*, referred to in section fifty-one of the Attachment Act, must necessarily be regarded in the nature of a summons, and as the commencement of an action. Delaware, etc., R. Co. *v.* Ditton, 36 N. J. L. 361.

2. Compiled Laws (1884), § 1907. And see same section, establishing pleadings and practice according to the forms and rules of the common law, and differentiating law pleading and practice from equity.

meaning of any provision of the act which limits the time for commencing an action, when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him.[1]

1. Code Civ. Proc. § 416 and § 398. See also Evans *v.* Cleveland, 72 N. Y. 486; Palmer *v.* Ensign, 19 Alb. L. J. 399; Clare *v.* Lockhard, 122 N.Y. 263; Shaw *v.* Cock, 78 N. Y. 194; Jackson *v.* Haviland, 13 Johns. (N. Y.) 229; Akin *v.* Albany Northern R. Co., 14 How. Pr. (N. Y. Supreme Ct.) 337; Treadwell *v.* Lawlor, 15 How. Pr. (N. Y. Supreme Ct.) 8; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y. Supreme Ct.) 329; Matter of Griswold, 13 Barb. (N. Y.) 412; More *v.* Thayer, 10 Barb. (N. Y.) 258; Hill *v.* Thacter, 3 How. Pr. (N. Y. Supreme Ct.) 407; Riley *v.* Riley, 64 Hun (N. Y.) 496; Matter of Bonnett's Will, 1 Conn. (N. Y.) 294; Matter of Bradley's Will, 70 Hun (N. Y.) 104; Matter of Duffy, 133 N. Y. 512; Reilly *v.* Hart, 55 Hun (N. Y.) 465; Knapp *v.* New York El. Co. (Super. Ct.), 24 N. Y. Supp. 324; Quick *v.* Leigh, 12 N. Y. Supp. 616, 59 Hun (N. Y.) 616; Bruen *v.* Bokee, 4 Den. (N. Y.) 56, 47 Am. Dec. 239; Long *v.* Stafford. 103 N. Y. 274; Merritt *v.* Scott, 3 Hun (N. Y.) 657; Vandenburgh *v.* Biggs, 3 How. Pr. (N. Y. Supreme Ct.) 316; White *v.* Ward, 35 Barb. (N. Y.) 637; Berlin *v.* Hall, 48 Barb. (N. Y.) 442; Gibson *v.* Van Derzee, 47 How. Pr. (N. Y. Supreme Ct.) 231; Maples *v.* Mackey, 22 Hun (N. Y.) 228; Davison *v.* Budlong, 40 Hun (N. Y.) 245; Sanford *v.* Sanford, 2 Hun (N. Y.) 94; Schermerhorn *v.* Schermerhorn, 5 Wend. (N. Y.) 513; Burdick *v.* Green, 18 Johns. (N. Y.) 14.

Under the Code of New York—*Service of Summons.*—As a general rule, an action under the Code is not commenced until the actual service of the summons. The only exceptions are those created by §§ 399 and 435 of the Code. The first exception is confined to cases in which the statute of limitations is set up as a defense; the second to actions against non-resident or absconding debtors and foreign corporations. Wiggin *v.* Orser, 5 Duer (N. Y.) 118. The action is commenced as to a defendant when the summons and complaint are originally served on his codefendant. Broadway Bank *v.* Luff, 51 How. Pr. (N. Y. Supreme Ct.) 479.

Not-imprisonment Act.—An action is sufficiently commenced under the non-imprisonment act, for the purpose of issuing a warrant, by lodging a summons with the sheriff with intent that it should be served. Gregory *v.* Weiner, 1 Code Rep. N. S. (N. Y.) 210.

Attachment.—A summons issued or served is not necessary to commence an action wherein an attachment is asked. Wallace *v.* Castle, 68 N. Y. 370.

Action by Stockholder.—An action by one stockholder suing for all saves the rights of any others made parties thereafter. Brinckerhoff *v.* Bostwick, 99 N. Y. 185.

Referring to an Arbitrator.—The entry of an order to refer to arbitration a claim presented to an executor is the commencement of the action for the purpose of determining whether the action has been brought within the time limited by the statute. Hultslander *v.* Thompson, 5 Hun (N. Y.) 348; Bucklin *v.* Chapin, 1 Lans. (N. Y.) 443; Reynolds *v.* Collins, 3 Hill (N. Y.) 37; Comstock *v.* Olmstead, 6 How. Pr. (N. Y. Supreme Ct.) 77.

Presentation to a Comptroller.—The presentation to the comptroller of a city of a claim to recover assessments, although a necessary preliminary to the bringing of a suit against the city, is not the commencement of an action to collect the claim within the meaning of the statute of limitations. Brehm *v.* New York, 104 N. Y. 186.

Amending Complaint.—Amending the complaint and introducing a new cause of action is a new commencement. Sands *v.* Burt, 1 Alb. L. J. 124; Newman *v.* Marvin, 12 Hun (N. Y.) 236; Jackson *v.* Griffin, Col. & C. (N. Y.) 227; Campbell *v.* Bowne, 5 Paige (N. Y.) 34. *Contra*, Ward *v.* Kalbfleisch, 21 How. Pr. (N. Y. Supreme Ct.) 283; Wilson *v.* Smith (Super. Ct.), 39 N. Y. St. Rep. 156.

Parol Evidence.—The true time of filling up a process and of placing it in an officer's hands for service, and of its service, may be shown by extrinsic proof, irrespective of the indorsements thereon. The return, though, of a justice to the county court, showing the time of the issue and return of

North Carolina.—In *North Carolina* an action is commenced as to each defendant when the summons is issued against him.[1]

the service of summons, is *prima facie* evidence of the time of the commencement of the action, in the trial upon appeal in that court. Porter *v.* Kimball, 3 Lans. (N. Y.) 330.

Before the Code—*Issuing the Writ.*—The issuing of the writ was the commencement of the suit, in all cases where the time was material, so as to save the statute of limitations; and it was not necessary to show that the writ had been returned, nor that it was actually delivered to the sheriff. If the writ was made out and sent to the sheriff, by mail or otherwise, with a *bona-fide* intention of having it served, it was sufficient. Burdick *v.* Green, 18 Johns. (N. Y.) 13. The issuing of a capias to any county was a commencement of an action within the meaning of the statute of limitations. Jackson *v.* Brooks, 14 Wend. (N. Y.) 649; Beekman *v.* Satterlee, 5 Cow. (N. Y.) 519; Baskins *v.* Wilson, 6 Cow. (N. Y.) 471; Davis *v.* West, 5 Wend. (N. Y.) 63. In Ross *v.* Luther, 4 Cow. 158, 15 Am. Dec. 341, it was held that the issuing of the writ was the commencement of the action; that the mere filling it up is not sufficient; it must be either delivered to the sheriff, or sent to him by mail or otherwise, with a *bona-fide*, absolute, unequivocal intention to have it served; that, if delivered to an agent or messenger who has power to determine when or whether it shall be given to the sheriff, the writ is not deemed issued, nor the suit commenced, until its actual delivery to the sheriff. A *capias* sued out and returned *non est inventus*, continued down by regular continuances on a continuance roll to the term when the process issued upon which the defendant was arrested, saves the attaching of the statute of limitations; and it seems that no length of time between the first and last process destroys the effect of such a proceeding; in this case 17 years elapsed between the issuing of the two writs. Ontario Bank *v.* Rathbun, 19 Wend. (N. Y.) 291.

But the plaintiff must show that the process on which the arrest was made is a continuation of the process originally issued, as that it is an *alias* or *pluries*. The continuation of the suit must be proved and will not be presumed. Soulden *v.* Van Rensselaer, 3 Wend. (N. Y.) 471. See also Davis *v.* West, 5 Wend. (N. Y.) 63.

Proceeding by Declaration.—Where a defendant is proceeded against by declaration under the statute, instead of *capias*, the suit is not considered as commenced until the defendant is personally served with the declaration; the filing of it, entry of the rule to plead, and efforts to serve it will not suffice to save the statute. Edmonstone *v.* Thomson, 15 Wend. (N. Y.) 554.

Defendant Kept in Ignorance of Capias.—Where the defendant is kept in ignorance of the *capias* by order of the plaintiff until the limitation period has elapsed, this is not sufficient to take the case out of the statute of limitations. Madison County Bank *v.* Keller, 2 Hill (N. Y.) 117.

Summons Issued by Justice.—Where a summons in a justice's court is returned as having been served by copy, and the justice issues another summons, the suit is legally continued, and in respect to the defence of the statute of limitations is deemed to have been commenced when the first summons was delivered to the constable to be served. Cornell *v.* Moulton, 3 Den. (N. Y.) 12.

1. Code N. C. § 161; Hester *v.* Mullen, 107 N. Car. 724, a slander case; Wyrick *v.* Wyrick, 106 N. Car. 84; Whetstine *v.* Wilson, 104 N. Car. 385; Fulbright *v.* Tritt, 2 Dev. & B. (N. Car.) 491; Governor *v.* Welch, 3 Ired. (N. Car.) 249; Hanna *v.* Ingram, 8 Jones (N. Car.) 55; State *v.* Wood, 3 Ired. (N. Car.) 23; Badham *v.* Jones, 64 N. Car. 655; Wheeler *v.* Cobb, 75 N. Car. 21; Etheridge *v.* Woodley, 83 N. Car. 11.

Ejectment.—The commencement of an action of ejectment is the service of the declaration. Thompson *v.* Red, 2 Jones (N. Car.) 412.

Pending Suit.—"It seems to be settled that a suit is not pending until the return term, or at least until service of process." *Per* Reade in Simmons *v.* Simmons, Phil. Eq. (N. Car.) 65.

Alias Summons to be Issued.—Where an original summons issued in August, 1871, which was not served, and was not in three years followed by appropriate successive processes in order to

North Dakota.—*Dakota* Territory provided by statute that a civil action should be commenced by the service of a summons. This is probably the law of North Dakota now.[1]

Ohio.—*Ohio* has a code provision almost identical with that of *New York* in reference to the commencement of an action. An action is commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon; and an action is deemed commenced, within the meaning of the statute of limitations, as to each defendant, at the date of the summons which is served on him or on a codefendant who is a joint contractor or otherwise united in interest with him.[2]

constitute a continuous single action, the suit could not be made to relate to the issuance of the original process (and so avoid the bar of the statute of limitations) by taking out a second summons neither in form an *alias* nor purporting to be such. Etheridge *v.* Woodley, 83 N. Car. 11.

Amendment of Pleading.—The amendment of a pleading by a change of name is not affected by the statute of limitations. Bray *v.* Creekmore, 109 N. Car. 49.

1. Compiled Laws of Dakota (1887), § 4892.

2. Rev. St. § 5035 and § 4987; Barrick *v.* Gifford, 47 Ohio St. 180; 21 Am. St. Rep. 798; Dewitt *v.* Greenfield, 5 Ohio 225; Seibert *v.* Switzer, 35 Ohio St. 661; Moore *v.* Chittenden, 39 Ohio St. 563; Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140; Markley *v.* Michael, 6 Cinc. L. Bull. (Ohio) 832; Schock *v.* Frazer, 10 Am. L. Rec. (Ohio) 305.

Date of Summons.—An action is deemed commenced at the date of the summons which is served on the defendant, and, although a demurrer to the petition is sustained, and leave is given to amend, the action remains commenced; and the averment as to the discovery of the fraud within four years before the action was brought may be supplied in a subsequent amendment to the petition. Zieverink *v.* Kemper (Ohio, 1893), 34 N. E. Rep. 250. When a writ is issued and returned not served, and an *alias* is issued and served, the suit is commenced at the date of the first writ. Swisher *v.* Swisher, Wright (Ohio) 755.

Setting Aside Service.—The service of a summons on the return day is not void but voidable; and if such service is set aside, the plaintiff may under section 23 of the Code, within the time therein limited, bring a new action, notwithstanding the time allowed for commencing the action may have expired between the time of instituting proceedings and the time of setting aside the service. Meisse *v.* McCoy, 17 Ohio St. 225.

Contesting a Will.—Where a proceeding for the contest of a will is commenced within the statutory period of limitation, although only part of the persons interested in the contest are made parties thereto, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation has expired. Bradford *v.* Andrews, 20 Ohio St. 208; 5 Am. Rep. 645.

Petitions in Error.—The provision of section 20 of the Code of Civil Procedure, that an action shall be deemed commenced as to each defendant at the date of the summons which is served on him or on a codefendant who is a joint contractor, is applicable, by analogy, to petitions in error. Buckingham *v.* Commercial Bank, 21 Ohio St. 131; Robinson *v.* Orr, 16 Ohio St. 285; Bowen *v.* Bowen, 36 Ohio St. 312.

Enforcing Lien of Assessment.—Where an action was commenced for the purpose of enforcing the lien of an assessment, given by the Act of March 29, 1869, and by mistake the owner of the premises was not made a party or served with process, nor was there any endeavor to make him a party until after the expiration of the two years, there was no commencement of a proper action within the meaning of the exception contained in the Act. Bonte *v.* Taylor, 24 Ohio St. 628.

Attempt to Commence.—A petition was filed July 4, and a summons was issued but not served because the defendant could not be found. On Sep-

Oklahoma.—The Territory of *Oklahoma* has by its Code of Civil Procedure provided that an action is commenced, within the meaning of the statute of limitations, at the date of the summons which is served on the defendant.[1]

Oregon.—In *Oregon* an action is deemed commenced, within the meaning of the statute of limitations, when the complaint is filed and the summons is served on the defendant; but for all purposes other than that of the statute of limitations actions are commenced by filing a complaint with the clerk of the court.[2]

Pennsylvania.—A suit is commenced in *Pennsylvania* by issuing the writ, although it is not served.[3]

tember 7 summons was again issued, and was served on the same day. *Held*, that the first attempt to commence the action was not equivalent to a commencement thereof under R. S. § 4988. Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140.

Third Parties Cannot Acquire Interest.—Jurisdiction of a cause attaches upon the filing a petition and the issuing of the summons. The 78th section of the Code, to wit, "When the summons has been served, or publication made, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof," refers solely to questions of title in the specific property in controversy. Spinning *v.* Ohio L. Ins. Co., 2 Disney (Ohio) 336.

1. Code Civil Proced. § 20. See § 57, which provides that a civil action may be commenced in a court of record by filing in the office of the proper court a petition and causing a summons to be issued thereon.

2. Hill's Ann. Laws, § 14 and § 51.

Foreclosure of Mechanic's Lien.—Material men must commence proceedings to foreclose their liens within a year from the date of filing their lien notices. They must *commence* by filing a complaint. Coggan *v.* Reeves, 3 Oregon 275.

3. Dexter *v.* Billings, 110 Pa. St. 135; Bell's Appeal, 115 Pa. St. 88; 2 Am. St. Rep. 532; Everett *v.* London Ins. Co., 142 Pa. St. 332; 24 Am. St. Rep. 499; Miskey *v.* Miskey (Pa., 1888), 11 Atl. Rep. 881; Fuller *v.* Dempster (Pa., 1887), 11 Atl. Rep. 670.

Issuing the Writ.—A policy of insurance required that suit should be brought within twelve months of loss. Plaintiff issued summons within a year, but, failing to obtain service, was obliged, after the year had expired, to issue an *alias* and then a *pluries* writ. *Held*, that the action was begun in time by the issuing of the writ, although it was not served. "An action was commenced within twelve months next after the loss occurred, and although the writ was not served, an *alias* and *pluries* writ were issued, so that a proper service was finally obtained. We have always held that *alias* and *pluries* writs are a continuation of the original process and not the inception of a fresh suit." Per Curiam in American Cent. Ins. Co. *v.* Haws, 20 W. N. C. (Pa.) 370. See also Lynn *v.* McMillin, 3 P. & W. (Pa.) 170, holding that if special bail be entered in time in the original suit, in which the writ was returned *non est inventus*, it will be a compliance with the conditions of the bail bond given upon an *alias* or *pluries capias*. See also McClurg *v.* Fryer, 15 Pa. St. 293, where a summons in case on a guaranty in writing, issued above four years after the right of action on the guaranty arose, was returned *nihil*, and an *alias* summons issued above five years from the issuing of the first, and it was held that the original and the *alias* were so connected as to prevent the running of the statute of limitations from the time of the issuing of the original summons.

But that the doctrine laid down above is somewhat qualified, see Jones *v.* Orum, 5 Rawle (Pa.) 253, where Sergeant, J., says: "After this order of the court below, the plaintiffs entered a rule of reference under the arbitration act, and caused notices to be served on the defendants, and it is insisted now, on the authority of Flanegan *v.* Negley 3 S. & R. (Pa.) 498 and similar cases, that, a suit having been once entered on the docket, the

Rhode Island.—Issuing a writ is the commencement of a suit at law in *Rhode Island*, if such issuing be with absolute and honest intention of having service made.[1]

South Carolina.—In *South Carolina* an action is commenced as to each defendant when the summons is served on him.[2]

rule of reference was regular, though upwards of ten years had elapsed after the writ was taken out, and returned without being duly served, and not a single step had been taken by the plaintiffs during that period to continue the action. If this were so, it would certainly present an extraordinary state of things in the management of suits. A writ might be taken out, and never served, and the plaintiff lie by nearly double the period imposed by the statute of limitations, and then the plaintiff treat the action as pending, and date its existence from the first writ. This would introduce all the mischiefs the statute of limitations was intended to guard against, and expose a party to the necessity of contesting the validity of a claim after more than six years had elapsed, and when his vouchers were lost and witnesses dead. Even where the replication of a writ taken out, and continuances since, is allowed to avoid the plea of the statute of limitations, no case has gone to the extent of time, which had passed in this case." *Compare* Schlosser *v.* Lesher, 1 Dall. (Pa.) 415, where two and a half years held not too long; Hertzog *v.* Ellis, 3 Binn. (Pa.) 209; Mouston *v.* Rees, 6 Binn. (Pa.) 32; Brown *v.* Sheaffer, 6 Binn. (Pa.) 177; Paule *v.* Purcell, 2 Browne (Pa.) 20; Thomas *v.* Hopkins, 2 Browne (Pa.) 145; Clemson *v.* Beaumont, 2 Browne (Pa.) 215; Maus *v.* Sitesinger, 2 S. & R. (Pa.) 421; Phillips *v.* Oliver, 5 S. & R. (Pa.) 419; Sharpe *v.* Kilgore, 3 S. & R. (Pa.) 387; Flanegan *v.* Negley, 3 S. & R. (Pa.) 498; Vitry *v.* Danci, 3 Rawle (Pa.) 1; Brown *v.* Kelso, 2 P. & W. (Pa.) 427; Salmon *v.* Davis, 4 Binn. (Pa.) 375; 5 Am. Dec. 410.

Writ against Two.—If a writ issue against two, and be served upon one only, and an *alias* writ subsequently issue, which is served upon both, this is for all purposes a new action and not a continuance of the first, so as to avoid the operation of the statute of limitations. Magaw *v.* Clark, 6 Watts (Pa.) 528.

Scire Facias.—If a *scire facias* be sued out within the five years, which is returned *tarde venit*, and an *alias scire facias* issue after the expiration of that period and after a term has intervened, the process may be connected, and the commencement of the proceeding must be referred to the issuing of the original *scire facias*. Pennock *v.* Hart, 8 S. & R. (Pa.) 369; Lewis *v.* Smith, 2 S. & R. (Pa.) 142.

1. Cross *v.* Barber, 16 R. I. 266; Hail *v.* Spencer, 1 R. I. 17.

Issuing the Writ.—"Is it the receipt of the writ by the sheriff that is required in order to constitute the commencement of an action? If so, its commencement may still depend on contingencies wholly independent of the plaintiff, as the sheriff's occasional absence, his sickness, or his want of official qualifications. But, at any rate, why should the receipt of it by the sheriff be required? As long as the defendant is untouched by the precept, of what consequence is it to him whether it be in the hands of the plaintiff or the sheriff? How can his liability be affected by this or that event? The truth is that in contemplation of law the writ is issued on the application of the creditor, by the sovereign power of the state, through the instrumentality of its officers. It is the state's precept or command, and is issued and the action commenced whenever it is in the hands of the plaintiff, or his attorney, ready to fulfil its purpose. . . . It should, however, be followed up by such acts as show that it is a real and not a pretended commencement of a suit." *Per Curiam* in Hail *v.* Spencer, 1 R. I. 19.

Contingent Writ.—When a writ is issued to be served on a contingency, the suit is not commenced until such contingency has become fact. Cross *v.* Barber, 16 R. I. 266.

2. Code Civil Proced. § 122; Sligh *v.* Sligh, 1 Brev.(S. Car.) 176; Bryce *v.* Massey, 35 S. Car. 127; Suber *v.* Chandler, 36 S. Car. 344; Ariail *v.* Ariail, 29 S. Car. 84; Montague *v.* Stelts, 37 S. Car. 200.

South Dakota.—While *South Dakota* was a territory there was a code provision that a civil action should be commenced by the service of a summons. This is probably law now.[1]

Tennessee.—In *Tennessee* the suing out of a summons is the commencement of an action, within the meaning of the statute of limitations, whether it be executed or not, if the action is duly prosecuted and continued by the issuance of *alias* process from term to term, or recommended within one year after the failure to execute.[2]

Texas.—*Texas* provides by statute that all civil suits in the district and county courts shall be commenced by petition filed in the office of the clerk of such court.[3]

Service of Summons.—"An action cannot be commenced except by the service of a summons, or by delivering it to the sheriff or other officers of the county with the intent that it shall be actually served; and the only evidence of service is either by certificate of the sheriff, if served by him or by another person, the affidavit of such person, or the written admission of the defendant." *Per* McIver, A. J., in State *v.* Cohen, 13 S. Car. 201.

Attachment.—Summons was dated same day attachment was granted and levied, but the indorsement of the sheriff's entry on the summons was dated the day after, on which day it was served. *Held*, that in the absence of other testimony it was error to dissolve the attachment, as irregularity by the clerk who granted the order cannot be presumed, and the summons may have been issued on the day of its date by delivery to some other person than the sheriff for service. McIver, A. J., *dissenting*, that, under § 122 of the Code, actions can be commenced only by service of summons, or by delivery to the sheriff or other officer for service. Cureton *v.* Dargan, 12 S. Car. 122. If the declaration in attachment is filed within a year and a day after the return of the writ, the lien of the attachment is preserved, provided satisfactory cause can be shown for not filing within two months of the return, as required by the act; and it seems that cause may be shown as well after as before the filing of the declaration. McBride *v.* Floyd, 2 Bailey (S. Car.) 209.

Indorsement by Sheriff.—The original indorsement on the writ by the sheriff, and not the entry in the sheriff's book, is the best evidence to prove when an action was commenced. Reid *v.* Colcock, 1 Nott & M. (S. Car.) 592; 9 Am. Dec. 729.

Warrant Issued by Justice.—A warrant issued under the hand of a justice of the peace, on which the defendant was taken, was held an effectual commencement of a prosecution, though the warrant was not sealed. State *v.* Vaugh., Harp. (S. Car.) 313.

Malicious Prosecution.—An information before a magistrate does not constitute such a commencement of a prosecution as to enable the person informed against to maintain an action for malicious prosecution. Heywood *v.* Cuthbert, 4 McCord (S. Car.) 354.

1. Compiled Laws of Dakota (1887), § 4892.

2. Milliken & Vertrees' Code, § 3448. And see Code (1884), § 3448. See also Milliken & Vertrees' Code, § 3518, which provides that all civil actions at law in courts of record, or before justices of the peace, except otherwise provided, shall be commenced by summons. Hughes *v.* Brown, 88 Tenn. 578.

§ 3448 not Applicable to Suits before Justices.—Section 3448, *supra*, does not apply to suits brought before justices of the peace. Maynard *v.* May, 2 Coldw. (Tenn.) 44.

Suits in Equity.—A suit in equity is commenced at date of filing bill and giving cost bond in the sense that the running of the statute of limitations is thereby arrested. Collins *v.* Ins. Co., 91 Tenn. 432.

Day Indorsed on Writ.—See Peck's Reports, 275, where it was held that the real commencement of an action, for the purpose of computing time under act of limitations, is the day indorsed on the writ.

3. Sayles' Texas Civil Statutes, Art. 1181; Davidson *v.* Southern Pac.

Utah.—In *Utah* a civil action is commenced by filing a complaint.[1]

Vermont.—In *Vermont* the time of the commencement of a suit,

R. Co., 44 Fed. Rep. 476; Foster *v.* Smith, 66 Tex. 680; Texas, etc., R. Co. *v.* Davidson, 68 Tex. 370; Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286; Dillingham *v.* Bryant (Tex. App., 1889), 14 S. W. Rep. 1017; Browning *v.* Pumphrey, 81 Tex. 163; Cotton *v.* Lyter, 81 Tex. 10; Bates *v.* Smith, 80 Tex. 242; Ricker *v.* Shoemaker, 81 Tex. 22; Cotter *v.* Parks, 80 Tex. 539; Gulf, etc., R. Co. *v.* Thompson (Tex. App., 1890), 16 S. W. Rep. 174; Becker *v.* Gulf, etc., R. Co., 80 Tex. 475; American Salt Co. *v.* Heidenheimer, 80 Tex. 344; Telfener *v.* Dillard, 70 Tex. 139; Texas Elevator Co. *v.* Mitchell, 78 Tex. 64; Kauffman *v.* Wooters, 79 Tex. 205; Tribby *v.* Wokee, 74 Tex. 142; Rowland *v.* Murphy, 66 Tex. 534; Rucker *v.* Dailey, 66 Tex. 284; Life Assoc. *v.* Goode, 71 Tex. 90; Mayer *v.* Walker, 82 Tex. 222; Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631; East Line, etc., R. Co. *v.* Culberson, 72 Tex. 375; 13 Am. St. Rep. 805.

When a Paper is Filed.—A paper is to be deemed to have been filed only when delivered into the custody of the clerk, to be kept by him among the papers of the cause. Causing a clerk to indorse a paper as filed, and immediately withdrawing it from his custody, is not filing the paper. Beal *v.* Alexander, 6 Tex. 531; Holman *v.* Chevaillier, 14 Tex. 339; Snider *v.* Methvin, 60 Tex. 487.

A petition was marked "filed on the 23d day of May, 1876," on a cause of action barred by limitation on 18 May, 1876. On 15 May, 1876, the plaintiff deposited his petition with the late clerk of the court, there being no clerk, though the late clerk remained in charge of the office. On the evening of the same day the plaintiff deposited his petition with the clerk elect, who did not qualify as clerk until May 23, on which day he indorsed the petition as filed. *Held*, that there was such a commencement of suit as to prevent the bar of the statute. McManus *v.* Wallis, 52 Tex. 534.

Suppression of Process.—The mere institution of the suit, with a suppression of process, does not fix the liability of an indorser. Hoffman *v.* Cage, 31 Tex. 595. Where the plaintiff filed a petition with the clerk and indorsed it, "The clerk will not issue upon this until further instructions from me," the suit was not properly commenced until the order was given for the citation; and such a deposit or filing with the clerk did not arrest the statute of limitations. Maddox *v.* Humphries, 30 Tex. 494.

Filing Note with Justice.—Filing a note with a justice of the peace for collection is not the commencement of a suit, and will not stop the running of the statute of limitations. The summons being the leading process, the suit is not commenced until it is issued. Keeble *v.* Bailey, 3 Tex. 492.

Proof of Debt in Bankruptcy.—Proof of a debt in bankruptcy is analogous to the institution of a suit. The statute of limitations ceases to run against a claim provable in bankruptcy when it is offered for proof, if not when the adjudication in bankruptcy was had; and so long as the right to prove continues, the right to amend exists. Wofford *v.* Unger, 53 Tex. 634. *Compare* Connoly *v.* Hammond, 58 Tex. 11; Grimes *v.* Watkins, 59 Tex. 133.

Posting Notices of Trust Sale.—The mere fact of posting notices of trust sale by a trustee before the debt secured by the trust deed is barred, but not in time to make the sale before the bar of limitation would be complete, cannot be held equivalent to the institution of "an action or suit' which would suspend the bar of the statute of limitations. Blackwell *v.* Barnett, 52 Tex. 326.

1. Code Civil Proced. § 262.

Filing a Complaint.—Where a complaint was filed November 13, 1888, and amended complaint Jan. 16, 1889, and no summons was ever issued, but defendant voluntarily answered, without objection that the summons had not been issued within one year, the answer having been filed in 1889,—*held*, that the commencement of the suit must be taken to be the filing of the complaint. Needham *v.* Salt Lake City, 7 Utah 319.

to avoid the statute of limitations, is the day when the writ is issued, but such writ must be served and returned.[1]

Virginia.—The *Virginia* practice is the same as the common-law practice unless altered by statute. The suit is probably commenced when the writ issues.[2]

Washington.—In the state of *Washington* an action is commenced by serving a summons.[3]

1. Day *v.* Lamb, 7 Vt. 426; Allen *v.* Mann, 1 D. Chip. (Vt.) 94.

Suing Out of Writ.—"The only question arising on this point is whether such demand [the demand by a principal on his agent for an account] is necessary before suing out the writ. We think not, for although the suing out the writ is, to some purposes, the commencement of the action,—as with reference to the statute of limitations,—yet the defendant is not subjected to costs until the writ is served;" and it was held that the demand made, after the date, but before the service of a writ against the agent, when no cost for such writ was demanded, was sufficient. Hall *v.* Peck, 10 Vt. 474.

Date of Writ Prima Facie Evidence.—The plaintiff's writ was dated Jan. 28, 1879, and was served April 21, 1879, and the account sued for was dated April 12, 1873. *Held*, that the date of the writ was *prima facie* evidence that it issued at that date. Chapman *v.* Goodrich, 55 Vt. 354. See Randall *v.* Bacon, 49 Vt. 20; 24 Am. Rep. 100; Hicks *v.* Blanchard, 60 Vt. 673; Day *v.* Lamb, 7 Vt. 426; Allen *v.* Mann, 1 D. Chip. (Vt.) 94.

Presentation of Claim against Estate.—The presentation of a claim against a deceased person's estate to the commissioners for adjudication is the commencement of a suit or action, and all future proceedings on regular appeal, or on appeal allowed on petition to the supreme court, are only a continuation of the original proceeding, and the suit is the same. Calderwood *v.* Calderwood, 38 Vt. 171; Kimball *v.* Baxter, 27 Vt. 628; Pierce *v.* Paine, 32 Vt. 229; Graham *v.* Chandler, 38 Vt. 559.

Scire Facias.—Where a writ of *scire facias* against bail was made and signed within a year [the time allowed by the statute], but was made returnable at such a time that it could not legally be served within the year, it was held no compliance with the statute. But it was doubted whether such writ must not only be made and signed, but served upon the surety, within the year. Strong *v.* Edgerton, 22 Vt. 249.

Ejectment.—The defendant in an action of ejectment is liable if he were in the possession of the demanded premises at the time of the commencement of the plaintiff's action, and for this purpose the time of the service of the writ is to be treated as the commencement of the action. McDaniels *v.* Reed, 17 Vt. 674.

Levy of an Execution.—If the petitioner claims title to the premises described in his petition, by virtue of the levy of an execution in his favor, it is no objection to his petition that it bears date prior to the time when his right of possession accrued, as against his judgment debtor, if that right became perfect before the process was served. Hawley *v.* Soper, 18 Vt. 320

2. See Code of Va. (1873) § 1083.

Attachment.—In a case of attachment in equity instituted in July, 1861, upon service of process on resident garnishee and execution of order of publication against non-resident debtor in *New York*, the proceedings subsequent to the attachment having been set aside and an amended bill filed, and the non-resident debtor brought for the first time before the court, the running of the statute of limitations was not suspended by those proceedings, and the plaintiff's claim, being an account for work and labor done, was barred before the filing of said amended bill. Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106.

Issuance of Summons.—Service of summons on defendant's agent having been made within ten days of return day, and suit having been remanded to rules to be properly matured, and an *alias* summons having been issued and duly served, *held*, commencement of suit was the issuance of the original summons, and saved the suit from being barred by the limitation clause in the policy. Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832.

3. Code Civil Proced. § 171.

West Virginia.—In *West Virginia* an action is probably commenced when the writ is issued.[1]

Wisconsin.—In *Wisconsin* the Code provides that an action is commenced by service of a summons.[2]

Wyoming.—In the state of *Wyoming* an action is deemed commenced at the date of the summons which is served on the defendant.[3]

Federal Courts.—The federal courts follow as near as may be the practice of the state where the court is held.[4]

IV. Abolition of Forms of Action—1. Statutory Provisions.—The

1. West Virginia has the common-law practice.

Amendment of Declaration.—When an amendment to a declaration is properly allowed, so far as regards the statute of limitations, it will have the same effect as if it had been originally filed in the amended form at the commencement of the suit, and a cause not then barred will not be treated as barred at the time of the amendment by reason of such amendment; but the amendment must preserve the identity of the cause of action. Kuhn *v.* Brownfield, 34 W. Va. 252; Lamb *v.* Cecil, 28 W. Va. 653; Hull *v.* Hull, 35 W. Va. 155.

2. Rev. St. § 4239; Blair *v.* Cary, 9 Wis. 543; Clarke *v.* Lincoln County, 54 Wis. 578; Prentice *v.* Ashland County, 56 Wis. 345; Large *v.* Large, 29 Wis. 60; Mariner *v.* Waterloo, 75 Wis. 438.

Service of Summons.—To constitute a commencement of a suit, or an attempt to commence one, under §§ 4239, 4240 R. S. 1878, there must be either actual service of the summons, or it must be put into the hands of a proper officer with intent that it shall be actually served. It is not sufficient to file the summons and complaint, and obtain an order of publication, or even to mail the summons to the defendant, though he actually receives it. Sherry *v.* Gilmore, 58 Wis. 324.

In *Wisconsin* an action is not commenced for the purpose of stopping the running of the statute of limitations until service of process has been effected, or until service has been attempted and followed up by actual service within 60 days. Knowlton *v.* Watertown, 130 U. S. 327.

Presentation of Claim to Commissioners.—The presentation of a claim to the commissioners appointed to adjust claims against an estate, is the prosecution of a new remedy, and does not operate as a continuance or revivor of a suit to enforce such claim pending against the decedent at the time of his death. Jones *v.* Keep, 23 Wis. 45.

Presentation to Board of Supervisors.—The presentation to the proper board of county supervisors, of a claim for moneys paid upon void tax certificates, is the commencement of an action within the meaning of ch. 112 of Laws 1867. Marsh *v.* St. Croix County, 42 Wis. 355.

Filing Claim against Town.—The filing of a claim against a town with the town clerk, to be presented to the board of audit, at a time when that board is not in session, is a "presentment of a claim to the board," within the meaning of § 4242 R. S., making that the commencement of an action. Parish *v.* Eden, 62 Wis. 272.

Presentation to County Court.—The presentation to a county court of a note made by a decedent, for allowance against his estate, is the commencement of an action within the meaning of the statute of limitations. Boyce *v.* Foote, 19 Wis. 199.

Parol Evidence of Alteration.—No record evidence of the time when a summons issued by a justice of the peace was delivered to the sheriff for service being required by statute, such time may be proved by parol. If after a summons issued by a justice of the peace is delivered to the sheriff for service the return day fixed therein is changed, such alteration makes another and entirely different process of it, which in contemplation of law the sheriff did not and could not receive until the alteration was made; and the fact and time of such alteration may be proved by parole. Woodville *v* Harrison, 73 Wis. 360.

3. Rev. St. § 2376.

4. U. S. Rev. St. § 914.

cornerstone of the American Reformed Procedure is the abolition of all forms of action. The Codes, with slight verbal changes, have enacted that the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and that in their place there shall be one form of action, which shall be called a civil action.[1]

2. Common-Law Distinction Preserved at First.—When the Code was first adopted in *New York*, the courts seemed for a time unwilling to give full force and efficacy to the provision abolishing the distinction between actions at law and suits in equity, and they held that the distinction might be recognized in practice, notwithstanding the Code.[2]

1. The following are some of the various forms in which the statutory abolition is expressed:

New York.—"There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." § 3339 *New York* Code Civil Procedure.

Ohio.—There shall be but one form of action, which shall be known as a civil action. § 4971 Rev. St. *Ohio* (1892 Ed.).

California and Nevada.—There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs. § 307 *California* Code Civil Pro.; § 3023 Genl. St. *Nevada.*

Nebraska.—The distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action. § 2 *Nebraska* Code Civil Pro.

Indiana, North Carolina, and Wisconsin.—There shall be no distinction in pleading and practice between actions at law and suits in equity, and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. § 249 Rev. St. *Indiana* (1894) § 1989 *Missouri* Rev. St. (Wag.); § 133 Code *North Carolina*; § 2600 Ann. St. *Wisconsin.*

Kansas.—This distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action. § 4087 Genl. St. *Kansas* (1889).

Connecticut.—"There shall be but one form of civil action," etc. § 872 Genl. St. *Connecticut* (1888).

Georgia.—"No suitor, however, is compelled to appear on the equity side of the court; but he may institute his proceeding for an equitable cause of action upon the common-law side of the court at his option; and the court may allow the jury to find a verdict, and a judgment be rendered thereon, so moulded and framed to give equitable relief in the case, as verdicts and decrees are rendered and framed in equity proceedings." § 3082 Code *Georgia* (1882).

"All distinctions of actions into real, personal, and mixed are abolished, etc." § 3252 Code *Georgia* (1882).

Kentucky.—There shall be but one form of action. Actions are ordinary or equitable. §§ 4 and 5 *Kentucky* Code (1888).

Iowa.—All forms of action are abolished in this state; but the proceeding in a civil action may be of two kinds, ordinary or equitable. § 2507 Rev. Code *Iowa* (1888).

All the Code States have a statutory provision similar to some one or other of the above Code provisions; they all mean the same thing, although they may differ somewhat in verbal detail.

2. "My conclusion therefore is that the statement of facts in a complaint should be in conformity with the nature of the action. If the case and the relief sought be of an equitable nature, then the rules of the chancery pleading are to be applied; otherwise those of the common law." Selden, J., in Rochester City Bank *v.* Suydam, 5 How. Pr. (N. Y. Supreme Ct.) 223.

"What are the distinctions between

3. The True Rule Followed.—But the courts have now fully come to construe the Code in the light of its real spirit, that is, that it does abolish all distinction, and that questions of form have nothing whatever to do with the construction of either pleading or practice under the code; that the courts must give relief, at

actions at law and suits in equity? The most marked distinction obviously consists in their different modes of relief. In the one, with a few isolated exceptions, relief is invariably administered, and can only be administered in the form of a pecuniary compensation in damages for the injury received; in the other, the court has a discretionary power to adapt the relief to the circumstances of the case. By what process can these two modes of relief be made identical? It is possible to abolish one or the other or both, but it certainly is not possible to abolish the distinction between them. The legislature may, unless prohibited by the constitution, enact that no court shall hereafter have power to grant any relief, except in the form of damages, and thereby abolish all suits in equity; or that all courts shall have power to mould the relief to suit the particular case, and thereby virtually abolish actions at law as a distinct class. To illustrate by a single case: they may provide that where a vendor of land, who has contracted to sell and received the purchase-money, refuses to convey, the vendee shall have no remedy but an action for damages, or, on the other hand, that he shall be confined to a suit for a specific performance. But it is clearly beyond the reach of the powers to make these two remedies the same. Another leading distinction between common-law actions and suits in equity consists in their different modes of trial. The former are to be tried by a jury, the latter by the court. Can the legislature abolish this distinction? They might, but for the restraints of the constitution, abolish either kind of trial, or reclassify the classes to which they apply; but they cannot make trial by jury and trial by the court the same thing. It is plain that the only way in which the declaration contained in § 69, that 'there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs,' can be made good, is by abolishing both the form of trial and the mode of relief in one or the other of the two classes of action. When this is done, and not till then, shall we have one homogeneous form of action for all cases." Per Selden, J., in Reubens *v.* Joel, 13 N. Y. 488.

"It is supposed by some that it was intended to abolish by the code all distinction, not only in form but substance, between legal and equitable actions; and it must be conceded that many of its provisions, taken by themselves, might seem to indicate such an intent; and yet nothing can be clearer than that the legislature has wholly failed to carry into effect such an intention, if it existed. On the contrary, the Code expressly retains the principal differences which distinguished the two classes of actions. Actions at law were to be tried by a jury; suits in equity by the court. This distinction remains undisturbed." Per Selden, J., in Voorhis *v.* Childs, 17 N. Y. 357.

The following cases hold that the rule of pleading in an action for a legal remedy is the same as formerly, that fact sand not evidence are to be pleaded, and that what was a good declaration at law is now good under the Code; they also include cases where common-law rules of pleading were applied. Allen *v.* Patterson, 7 N. Y. 476, where an *indebitatus* count in debt was sustained to recover for goods sold and delivered. People *v.* Ryder, 12 N. Y. 433. Under the Practice Act the rules of the old system of pleading and practice, whether legal or equitable, should be applied, irrespective of former technical distinctions, to all actions under the new system when they may be properly applied and are not inconsistent with statutory provisions. Rowe *v.* Chandler, 1 Cal. 168.

The subject of pleading is not treated of herein, but the three last cases cited above are given as illustrations to support the text, that the courts did not at once give full force to the abolition of the distinction between law and equity procedure.

any stage of the action, on the facts presented, no matter in what form they may be presented.[1]

4. Substantive Distinction Preserved.—The adoption of the Code only made a change in adjective law. Equity and law are as sharply differentiated, considered as substantive bodies of law, as they ever were. The Code of procedure is in no sense a civil substantive code.[2]

1. *Indiana.*—Scott *v.* Crawford, 12 Ind. 410; Woodford *v.* Leavenworth, 14 Ind. 311; Matlock *v.* Todd, 25 Ind. 128; Bonnell *v.* Allen, 53 Ind. 130; Emmons *v.* Kiger, 23 Ind. 483.

Minnesota.—First Div. St. Paul, etc., R. Co. *v.* Rice, 25 Minn. 292; Holmes *v.* Campbell, 12 Minn. 221; Berkey *v.* Judd, 14 Minn. 394; Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456; Ford *v.* Wright, 13 Minn. 518.

Iowa.—Taylor *v.* Adair, 22 Iowa 281; Sargent *v.* Pittman, 16 Iowa 473; Wadsworth *v.* Wadsworth, 40 Iowa 449; Baltzell *v.* Nosler, 1 Iowa 588, 63 Am. Dec. 466; Dyson *v.* Ream, 9 Iowa 51; McGinn *v.* Butler, 31 Iowa 163.

Kansas.—McGonigle *v.* Atchison, 33 Kan. 736; Huffman *v.* Parsons, 21 Kan. 473; Independence Town Co. *v.* DeLong, 11 Kan. 152; State *v.* Marston, 6 Kan. 524; State *v.* Jefferson County, 11 Kan. 70; Deering *v.* Boyle, 8 Kan. 527; Going *v.* Orns, 8 Kan. 89; Fitzpatrick *v.* Gebhart, 7 Kan. 43; Adams *v.* Secor, 6 Kan. 542; Chick *v.* Willetts, 2 Kan. 385; Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437.

Kentucky.—Hill *v.* Barrett, 14 B. Mon. (Ky.) 83; Richmond, etc., Turnpike Road Co. *v.* Rogers, 7 Bush (Ky.) 532; Louisville, etc., Canal Co. *v.* Murphy, 9 Bush (Ky.) 522. See Murphy *v.* Estes, 6 Bush (Ky.) 532. Martin *v.* Mobile, etc., R. Co, 7 Bush (Ky.) 116; Garret *v.* Gault, 13 B. Mon. (Ky.) 378.

North Carolina.—Parsley *v.* Nicholson, 65 N. Car. 207; Oates *v.* Gray, 66 N. Car. 442; Vass *v.* People's Bldg., etc., Assoc., 91 N. Car. 55; Moore *v.* Edmiston, 70 N. Car. 510; Belmont *v.* Reilly, 71 N. Car. 260; Haymore *v.* Yadin, 85 N. Car. 268; Bitting *v.* Thaxton, 72 N. Car. 541; Matthews *v.* McPherson, 65 N. Car. 189; Katzenstein *v.* Raleigh, etc., R. Co., 84 N. Car. 688; Pendleton *v.* Dalton, 92 N. Car. 185; John L. Loper Lumber Co. *v.* Wallace, 93 N. Car. 22.

Wisconsin.—Bonesteel *v.* Bonesteel, 28 Wis. 245; Anderson *v.* Case, 28 Wis. 505; Orient Ins. Co. *v.* Sloan, 70 Wis. 611; North Hudson B'ld'g, etc., Assoc. *v.* Childs, 82 Wis. 460; Dickson *v.* Cole, 34 Wis. 621; Peterson *v.* Stoughton State Bank, 78 Wis. 113.

Other States.—Cropsey *v.* Sweeney, 27 Barb. (N. Y.) 316; Kloune *v.* Bradstreet, 7 Ohio St. 322; Lamson *v.* Pfaff, 1 Handy (Ohio) 449; Gress *v.* Evans, 1 Dakota 387; Crosier *v.* McLaughlin, 1 Nev. 348; Hamill *v.* Thompson, 3 Colo. 518; Schilling *v.* Rominger, 4 Colo. 100; Vail *v.* Hammond, 60 Conn. 374; Mulvey *v.* Staab, 4 N. Mex. 50; Leeper *v.* Taylor, 111 Mo. 312; Bailey *v.* Chicago, etc., R. Co. (S. Dak., 1893), 54 N. W. Rep. 596; Surber *v.* Kittinger, 6 Wash. 240; Sykes *v.* First Nat. Bank (S. Dak., 1891), 49 N. W. Rep. 1058; Uhe *v.* Chicago, etc., R. Co. (S. Dak., 1893), 54 N. W. Rep. 596; Hurlbutt *v.* Spaulding, 93 Cal. 55; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; DeWitt *v.* Hays, 2 Cal. 463, 61 Am. Dec. 352; Meyers *v.* Field, 37 Mo. 434; McLaughlin *v.* Dunn, 45 Mo. App. 645; Richardson *v.* Means, 22 Mo. 495; Maguire *v.* Vice, 20 Mo. 429.

2. "To allow a mode of pleading in suits of equitable cognizance, different from that required in suits at law, would frustrate the obvious design of this legislation. It would be in conflict with its plain provisions, and perpetuate, at least in part, the very mischief at which it was specially aimed. The intention of the legislature manifestly was to permit a party to state the facts of his case in his complaint, as they may exist, without imposing upon him the responsibility of determining in advance whether relief should be administered to him according to the rules of legal or equitable jurisprudence. The court pronounce such judgment as the facts which are stated and proved require, whether it be legal or equitable. If the different modes of pleading remain, as is contended, it is now as important as ever to determine before

5. No New Causes of Action Created.—The Codes create no new causes of action. Rights are entirely independent of remedies. Whatever was a cause of action at law, or a ground for relief in equity, before the Codes, is now remediable in a civil action; and whatever was remediless before is now remediless under the Codes.[1]

6. The Civil Action a Substitute.—The effect of the abolition of the distinction between actions at law and suits in equity may be said to be that the civil action is now a substitute for all such proceedings as were previously known either as actions at law or suits in equity; that the plaintiff may set forth in his complaint both legal and equitable grounds for relief; and that if the facts appear, legal or equitable relief must be given, irrespective of any question of pleading or practice.[2]

hand to which class the action belongs, and a mistake on this point must produce the same mischief which the framers of the constitution, and the legislature, have tried to prevent." Per Sill, J., in Millikin *v.* Cary, 5 How. Pr. (N. Y. Supreme Ct.) 272 where it was held that pleading evidence is improper under the Code. Butler *v.* Lee, 33 How. Pr. (N. Y. Ct. App.) 251; Crary *v.* Goodman, 12 N. Y. 266, 64 Am. Dec. 506; Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608; Fowler *v.* Fowler, 50 Conn. 256; McVane *v.* Williams, 50 Conn. 548; State *v.* Wright, 50 Conn. 580; Bennett *v.* Collins, 52 Conn. 1; Wall *v.* Toomey, 52 Conn. 35; Baker *v.* Lee, 52 Conn. 145; DeWitt *v.* Hays, 2 Cal. 463, 61 Am. Dec. 352; Sampson *v.* Shaeffer, 3 Cal. 196; Lubert *v.* Chauviteau, 3 Cal. 458, 58 Am. Dec. 415; Smith *v.* Rowe, 4 Cal. 6; Parsons *v.* Tuolumne County, 5 Cal. 43; Cordier *v.* Schloss, 12 Cal. 143; Scott's Estate, 15 Cal. 220; Payne *v.* Treadwell, 16 Cal. 220; Jones *v.* Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142.

1. "By the Code, the distinction between actions at law and suits in equity is abolished. The course of proceeding in both classes of cases is now the same. Whether the action depends upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction. But while this is so in reference to the form and course of proceeding in the action, the principles by which the rights of the parties are to be determined remain unchanged. The Code has given no new cause of action. In some cases parties are allowed to maintain an action who could not have maintained it before, but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If under the former system a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the Code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the Code requires, obtain the same judgment. The question is therefore whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the Code, have sustained an action at law or a suit in equity." Per Harris, J., in Cole *v.* Reynolds, 18 N. Y. 76; Wilcox *v.* Saunders, 4 Neb. 585.

2. *Ohio.*—Chinn *v.* Trustees, etc., 32 Ohio St. 236; Barger *v.* Cochran, 15 Ohio St. 460; Clayton *v.* Freet, 10 Ohio St. 544; Goble *v.* Howard, 12 Ohio St. 165; Ward *v.* Howard, 12 Ohio St. 158; Mack *v.* Bonner, 3 Ohio St. 366; Dixon *v.* Caldwell, 15 Ohio St. 412, 76 Am. Dec. 487; Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110; Jones *v.* Timmons, 21 Ohio St. 596; Hager *v.* Reed, 11 Ohio St. 626; Culver *v.* Rodgers, 33 Ohio St. 537; Penn *v.* Hayward, 14 Ohio St. 302; Kloune *v.* Bradstreet, 7 Ohio St. 323; Morgan *v.* Spangler, 20 Ohio St. 38; Kennedy *v.* Thompson, 3 Ohio Cir. Ct. 446.

California.—Wiggins *v.* McDonald,

V. CHARACTER OF ACTION; HOW DETERMINED UNDER CODES—1. A Question of Construction.—At common law the form of the action always determined its character; but under the codes questions of difficulty present themselves when it is necessary to determine the character of the action. As a general rule the allegations of the complaint, without reference to the prayer for relief, determine the character of the action. It is now, under the codes, wholly a question of construction of the complaint as to whether the action is a legal or an equitable one; and, as a rule which admits of exceptions, the prayer for relief is not invoked in aid of this construction.[1]

18 Cal. 126; Smith *v.* Richmond, 19 Cal. 477; Humiston *v.* Smith, 21 Cal. 129; Miller *v.* Van Tassel, 24 Cal. 458; O'Connor *v.* Dingley, 26 Cal. 11; Kimball *v.* Lohmas, 31 Cal. 154; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Connecticut.—Trowbridge *v.* True, 52 Conn. 190, 52 Am. Dec. 579; Merwin *v.* Richardson, 52 Conn. 223; Donaghue *v.* Gaffy, 53 Conn. 43; Kelly *v.* Wiard, 49 Conn. 443; Cake *v.* Peet, 49 Conn. 501.

Nebraska.—Turner *v.* Althaus, 6 Neb. 54.

New York.—Farmer's, etc., Nat. Bank *v.* Rogers (Buffalo Super. Ct.), 1 N. Y. Supp. 757; Vinton *v.* Cattaraugus County, 2 N. Y. Supp. 367. 50 Hun (N. Y.) 600; Lattin *v.* McCarthy, 41 N. Y. 107; New York Ice Co. *v.* Northwestern Ins. Co., 23 N. Y. 357; Cropsey *v.* Sweeney, 27 Barb. (N. Y.) 210; Getty *v.* Hudson River R. Co., 6 How. Pr. (N. Y. Supreme Ct.) 269; Williams *v.* Slote, 70 N. Y. 601; Stevens *v.* New York, 84 N. Y. 296; Anderson *v.* Hunn, 5 Hun (N. Y.) 79; Ireland *v.* Nichols, 1 Sweeney (N. Y.) 208; Wright *v.* Wright, 54 N. Y. 443; Marquat *v.* Marquat, 12 N. Y. 336; Emery *v.* Pease, 20 N. Y. 64; Corning *v.* Troy Iron Nail Factory, 40 N. Y. 207; Corn Exchange Ins. Co. *v.* Babcock, 42 N. Y. 613, 1 Am. Rep. 601; Barlow *v.* Scott, 24 N. Y. 40; Davis *v.* Morris, 36 N. Y. 569; Parker *v.* Laney, 58 N. Y. 469; Peck *v.* Newton, 46 Barb. (N. Y.) 173; Wooden *v.* Waffle, 6 How. Pr. (N. Y. Supreme Ct.) 145; Farmer's, etc., Nat. Bank *v.* Rogers (Buffalo Super. Ct.), 1 N. Y. Supp. 757; Vinton *v.* Cattaraugus County, 2 N. Y. Supp. 367, 50 Hun (N. Y.) 600.

Where in a civil suit under the Practice Act a plaintiff seeks equitable relief, it is no ground of objection that he ought to have availed himself of his legal remedy, since the court under the act can render in the same suit either a legal or an equitable judgment, as the case may require. Kelly *v.* Wiard, 49 Conn. 443; Cake *v.* Peet, 49 Conn. 501.

"Relief is to be given consistent with the facts stated, although it be not the relief specifically demanded. And in determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies." Per Comstock, J., in Emery *v.* Pease, 20 N. Y. 62.

In an action to recover the possession of land, the plaintiffs may attach a deed under which the plaintiffs claim title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance. Phillips *v.* Gorham, 17 N. Y. 270; Laub *v.* Buckmiller, 17 N. Y. 620.

1. *New York.*—Johnson *v.* Golder, 132 N. Y. 116; Tuers *v.* Tuers, 100 N. Y. 196; Whatling *v.* Nash, 41 Hun (N. Y.) 579; Gilbert *v.* Pritchard, 41 Hun (N. Y.) 46; Welch *v.* Platt, 32 Hun (N. Y.) 194; Lehnen *v.* Purvis, 55 Hun (N. Y.) 535; U. S. Life Ins. Co. *v.* Jordan, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 330; Whitner *v.* Perhacs, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 130; Newcombe *v.* Chicago (Supreme Ct.), 8 N. Y. Supp. 366; Leary *v.* Melcher, 14 N. Y. Supp. 689; Cahoon *v.* Bank of Utica, 7 N. Y. 486; Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263; Gooding *v.* McAlister, 9 How. Pr. (N. Y. Supreme Ct.) 123; Chautauqua County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442; Phillips *v.* Gorham, 17 N. Y. 270; Laub *v.* Buckmiller, 17 N. Y. 620; Lattin *v.* McCarthy, 41 N. Y. 107; Hall *v.* Hall, 38 How. Pr. (N. Y. Supreme Ct.) 97; Simonson *v.* Blake, 20

2. When the Prayer may be Consulted.—Where it is doubtful as to whether an action is in tort or contract, the prayer for relief may sometimes determine the question.[1]

3. Actions Ex Contractu and Actions Ex Delicto.—Although the form of all actions at law and suits in equity, and all the forms of pleading existing before the Codes, were thereby abolished, and it is sufficient to state in a plain and concise manner the facts constituting the cause of action, yet the substantive distinctions between actions on contract and those founded in tort still exist.[2]

But whether the pleader sues for the tort, or waives the tort and sues in contract, is often a very difficult question of construction,

How. Pr. (N. Y. Supreme Ct.) 484; Hammond *v.* Cockle, 2 Hun (N. Y.) 495; Onderdonk *v.* Mott, 34 Barb. (N. Y.) 106; Warwick *v.* New York, 28 Barb. (N. Y.) 210; Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668; Le Roy *v.* Marshall, 8 How. Pr. (N. Y. Supreme Ct.) 373; Young *v.* Edwards, 11 How. Pr. (N. Y. Supreme Ct.) 201; Eldridge *v.* Adams, 54 Barb. (N. Y.) 417; Emery *v.* Pease, 20 N. Y. 62; Hale *v.* Omaha Nat. Bank, 39 N. Y. Super. Ct. 207; Howard *v.* Tiffany, 3 Sandf. (N. Y.) 695; Graves *v.* Spier, 58 Barb. (N. Y.) 349; Sternberger *v.* McGovern, 56 N. Y. 12; Short *v.* Barry, 3 Lans. (N. Y.) 143, Johnson *v.* Hathorn, 42 N. Y. 476; Armitage *v.* Pulver, 37 N. Y. 494.

Wisconsin. — Douglas County *v.* Walbridge, 38 Wis. 179; Liedersdorf *v.* Flint, 50 Wis. 401; Collins *v.* Cowan, 52 Wis. 634; Butler *v.* Kirby, 53 Wis. 188; Sayles *v.* Bemis, 57 Wis. 315; Moon *v.* McKnight, 54 Wis. 551; Damon *v.* Damon, 23 Wis. 510; Harrison *v.* Juneau Bank, 17 Wis. 340; Bassett *v.* Warner, 23 Wis. 673; Blake *v.* Van Tilborg, 21 Wis. 672; Winslow *v.* Dousman, 18 Wis. 456; Gates *v.* Boomer, 17 Wis. 455; Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109; Whetstone *v.* Beloit Straw Board Co., 76 Wis. 613; Sauer *v.* Steinbauer, 14 Wis. 70; Faesi *v.* Goetz, 15 Wis. 231; Cary *v.* Wheeler, 14 Wis. 281; Jesup *v.* City Bank, 14 Wis. 331; Stilwell *v.* Kellogg, 14 Wis. 461.

Nebraska. — Stewart *v.* Carter, 4 Neb. 564.

South Carolina.—Barrett *v.* Watts, 13 S. Car. 441; Westlake *v.* Farrow, 34 S. Car. 270.

Connecticut.—Trowbridge *v.* True, 52 Conn. 190, 52 Am. Rep. 579.

California.—Lovdal *v.* Gridley, 70 Cal. 507; Grandona *v.* Goodal, 70 Cal. 161; Eastman *v.* Turman, 24 Cal. 379; Rollins *v.* Forbes, 10 Cal. 299; Farwell *v.* Jackson, 28 Cal. 105; Loveland *v.* Garner, 71 Cal. 541; Wickersham *v.* Crittenden, 93 Cal. 17; Reedy *v.* Smith, 42 Cal. 245.

Indiana.—Smiley *v.* Deweese, 1 Ind. App. 211; Rigsbee *v.* Trees, 21 Ind. 227; Hunter *v.* McCoy, 14 Ind. 528.

Kentucky.—Louisville, etc., R. Co. *v.* Neafus (Ky., 1892), 18 S. W. Rep. 1030.

Nevada.—Weil *v.* Howard, 4 Nev. 384.

Iowa.—Greither *v.* Alexander, 15 Iowa 470; Bowers *v.* Keesecher, 9 Iowa 422.

Minnesota.—Connor *v.* Board of Education, 10 Minn. 439; Gurnsey *v.* American Ins. Co., 17 Minn. 104; North *v.* Bradway, 9 Minn. 183.

North Carolina.—Thames *v.* Jones, 97 N. Car. 121; McCown *v.* Sims, 69 N. Car. 159.

Missouri.—McClurg *v.* Phillips, 49 Mo. 315; Henderson *v.* Dickey, 50 Mo. 161; Duvall *v.* Tinsley, 54 Mo. 93.

Form of Summons.—The character of the action is determined by the complaint and not by the form of the summons. Gopen *v.* Crawford, 53 How. Pr. (N. Y. Supreme Ct.) 278.

1. Chambers *v.* Lewis, 2 Hilt. (N. Y.) 595. See Edick *v.* Crim, 10 Barb. (N. Y.) 445; Thompson *v.* Strauss, 29 Hun (N. Y.) 256.

The nature of the action is determined by the complaint, and particularly by the relief demanded. Seymour *v.* Van Curen, 18 How. Pr. (N. Y. Supreme Ct.) 94. See Prudden *v.* Lockport, 43 How. Pr. (N. Y. Supreme Ct.) 286.

2. Per Lott, Ch. C., in Austin *v.* Rawdon, 44 N. Y. 71.

especially where the facts of the transaction are alone set forth, not aided by any allegations of legal conclusions.[1]

VI. Splitting Causes of Action—1. Generally.—It is a well-established rule of of law that a single cause of action cannot be split in order that separate suits may be brought for the various parts of what really constitutes but one demand.[2]

1. A complaint which alleges a joint agreement by the defendants to deliver up specified securities, demand therefor, and that the defendants wrongfully refused to deliver them and have wrongfully disposed of and converted them to their own use, to the great damage of the plaintiff, and praying judgment for the value of the securities, with interest, states a cause of action on contract, and not *ex delicto*. Austin *v.* Rawdon, 44 N. Y. 63. See Sager *v.* Blain, 44 N. Y. 445; Andrews *v.* Bond, 16 Barb. (N. Y.) 633; Bernhard *v.* Seligman, 54 N. Y. 661; Degraw *v.* Elmore, 50 N. Y. 1.

Waving Tort.—Where property has been wrongfully taken or detained, the owner may waive the tort and sue upon an implied promise to pay. Formerly the tort was waived by bringing an action in assumpsit, but under the present system of pleading the character of the action, and whether or not the tort is waived, is determined by the facts stated in the complaint. Chambers *v.* Lewis, 2 Hilt. (N. Y.) 591.

Insertion in Complaint that Defendant Undertook and Promised.—Where tort and assumpsit are concurrent remedies, the nature of the action is determined by the insertion or omission of an averment that the defendant undertook and promised. Booth *v.* Farmers', etc., Nat. Bank, 65 Barb. (N. Y.) 457; Ledwich *v.* McKim, 53 N. Y. 307; People *v.* Halberstro, 16 Alb. L. J. 151.

Incorrect Legal Conclusion.—Where a complaint sets forth facts constituting a cause of action *ex contractu*, an allegation therein of an incorrect legal conclusion, having the aspect of a tort, does not change the nature of the action. Greentree *v.* Rosenstock, 61 N. Y. 583; Sheahan *v.* Shanahan, 5 Hun (N. Y.) 461.

Sale of Property.—In all cases where the pleader avers the sale and delivery of property to the defendant at a fixed and agreed price, which remains unpaid, and also alleges that he perpetrated a fraud in making the purchase by means of false representations as to his solvency, and a question of doubt is presented as to whether it was the intention of the pleader to set forth a cause of action *ex contractu* or *ex delicto*, the omission to allege that damages have accrued to the plaintiff by reason of the fraud is accepted by the court as a circumstance indicating the purpose of the pleader to rely upon the contract as constituting the cause of action. McDonough *v.* Dillingham, 43 Hun (N. Y.) 493; Hinton *v.* Wilson, 22 N. Y. Wkly. Dig. 90.

Converting Action Ex Delicto into one Ex Contractu.—Where a complaint states a cause of action *ex delicto*, it is not competent at the trial to convert it into one *ex contractu*. Neudecker *v.* Kohlberg, 81 N. Y. 296.

Judgment Must Follow Pleadings.—Notwithstanding the liberal rule of construction applied to pleadings under the Code, the principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*. Neudecker *v.* Kohlberg, 81 N. Y. 296.

2. *New York.*—Secor *v.* Sturgis, 16 N. Y. 548; Farrington *v.* Payne, 15 Johns. (N. Y.) 432; Smith *v.* Jones, 15 Johns. (N. Y.) 229; Phillips *v.* Berick, 16 Johns. (N. Y.) 137; Miller *v.* Covert, 1 Wend. (N. Y.) 487; Guernsey *v.* Carver, 8 Wend. (N. Y.) 492; Stevens *v.* Lockwood, 13 Wend. (N. Y.) 644; Colvin *v.* Corwin, 15 Wend. (N. Y.) 557; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; Willard *v.* Sperry, 16 Johns. (N. Y.) 121; Brockway *v.* Kinney, 2 Johns. (N. Y.) 210; Hillman *v.* Hillman, 14 How. Pr. (N. Y. Supreme Ct.) 456; Van Zandt *v.* Mayor, 8 Bosw. (N. Y.) 375; Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209; Mills *v.* Garrison, 42 N. Y. 40; Smith *v.* Moonelis (C. Pl.), 44 N. Y. St. Rep. 638; Haskin *v.* New York, 11 Hun (N. Y.) 436; Hayes *v.* Reese, 34 Barb. (N. Y.) 151; Stowell *v.* Chamberlain, 60 N. Y. 272; Dobson *v.* Pearce, 12 N. Y. 156; Van Alen *v.* Rogers 1 Johns Cas. (N. Y.) 281; Clark *v.* Jones, 1 Den. (N. Y.) 519; Tuska *v.* O'Brien,

Foundation of Rule.—The reason for this rule is one of substantive law, and has its foundation in the two maxims, *Interest rei pub-*

68 N. Y. 446; Benson *v.* Matsdorf, 2 Johns. (N. Y.) 369; Pray *v.* Hegeman, 98 N. Y. 352; Jackson *v.* Randall, 11 Johns. (N. Y.) 405; Staples *v.* Goodrich, 21 Barb. (N. Y.) 317; Thompson *v.* Wood, 1 Hilt. (N. Y.) 93; Coggins *v.* Bulwinkle, 1 E. D. Smith (N. Y.) 434; Reformed, etc., Church *v.* Brown, 54 Barb. (N. Y.) 191; Fish *v.* Folley, 6 Hill (N. Y.) 54; O'Beirne *v.* Lloyd, 43 N. Y. 248.

Virginia.—Bates *v.* Quattlebom, 2 Nott & M. (S. Car.) 205; Hite *v.* Long, 6 Rand. (Va.) 457; Tilson *v.* Davis, 32 Gratt. (Va.) 92.

Pennsylvania.—Ingraham *v.* Hall, 11 S. & R. (Pa.) 78; Simes *v.* Zane, 24 Pa. St. 242; Kilheffer *v.* Herr, 17 S. & R. (Pa.) 319; Smith *v.* Elliott, 9 Pa. St. 345; Sykes *v.* Gerber, 98 Pa. St. 179; Alcott *v.* Hugus, 105 Pa. St. 350; Kille *v.* Ege, 82 Pa. St. 102; Logans *v.* Caffrey, 30 Pa. St. 196; Smedley *v.* Tucker, 3 Phila. (Pa.) 259; Carvill *v.* Garrigues, 5 Pa. St. 152; Buck *v.* Wilson, 113 Pa. St. 423; Marsh *v.* Pier, 4 Rawle (Pa.) 273; Corbet *v.* Evans, 25 Pa. St. 310; Lyon *v.* Miller, 24 Pa. St. 392; Com. *v.* Trimmer, 84 Pa. St. 65; Kane *v.* Fisher, 2 Watts (Pa.) 246.

Missouri.—Ruddle *v.* Horine, 34 Mo. App. 616; Kavanaugh *v.* Shaughnessy, 41 Mo. App. 657; Funk *v.* Funk, 35 Mo. App. 246; Wickersham *v.* Whedon, 33 Mo. 561; Carroll *v.* Woodlock, 13 Mo. App. 574; Piel *v.* Finck, 19 Mo. App. 338; Laine *v.* Francis, 15 Mo. App. 107; Kitchen *v.* Clark, 1 Mo. App. 430; Union, etc., R. Co. *v.* Traube, 59 Mo. 355; Wagner *v.* Jacoby, 26 Mo. 532; Kerr *v.* Simmons, 9 Mo. App. 376; Taylor *v.* Heitz, 87 Mo. 660.

Massachusetts.—Stearns *v.* Quincy Mut. F. Ins. Co., 124 Mass. 61; Gibson *v.* Cooke, 20 Pick. (Mass.) 15; Stevens *v.* Tuite, 104 Mass. 328; Goodrich *v.* Yale, 8 Allen (Mass.) 454; White *v.* Moseley, 8 Pick. (Mass.) 356; Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 331; Clark *v.* Baker, 5 Met. (Mass.) 452; Minor *v.* Walter, 17 Mass. 237; Denny *v.* Williams, 5 Allen (Mass.) 4; Brigham *v.* Fayerweather, 140 Mass. 411; Emerson *v.* Thompson, 2 Pick. (Mass.) 473; Warren *v.* Comings, 6 Cush. (Mass.) 103; Jones *v.* Richardson, 5 Met. (Mass.) 247; Osborne *v.* Atkins, 6 Gray (Mass.) 423.

Alabama.—Liddell *v.* Chidester, 84 Ala. 508; Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; Strang *v.* Moog, 72 Ala. 460; Broda *v.* Greenwald, 66 Ala. 538; Alabama Warehouse Co. *v.* Jones, 62 Ala. 550; Wilkins *v.* Judge, 14 Ala. 135; Yarborough *v.* Avant, 66 Ala. 526; Jenkins *v.* Harrison, 66 Ala. 345; Brady *v.* Huff, 75 Ala. 81; Norwood *v.* Kirby, 70 Ala. 397; Haralson *v.* George, 56 Ala. 295; O'Neal *v.* Brown 21 Ala. 482; Moorer *v.* Moorer, 84 Ala. 353.

North Carolina.—Young *v.* Young, 81 N. Car. 91; Pendleton *v.* Dalton, 92 N. Car. 185.

Ohio.—Stein *v.* Steamboat Prairie Rose, 17 Ohio St. 471; Erwin *v.* Lynn. 16 Ohio St. 539.

Illinois.—Brewer *v.* Christine, 9 Ill. App. 57.

Georgia.—Evans *v.* Collier, 79 Ga. 319; Baldwin *v.* McCrea, 38 Ga. 650.

California.—Nightingale *v.* Scannell, 6 Cal. 506; Herriter *v.* Porter, 23 Cal. 385; Shinn *v.* Young, 57 Cal. 525; Taylor *v.* Castle, 42 Cal. 367.

Kansas.—Tootle *v.* Wells, 39 Kan. 452; Bond *v.* Weed Sewing Mach. Co., 23 Kan. 119; Wichita, etc., R. Co. *v.* Beebe, 39 Kan. 465; Whitaker *v.* Hawley, 30 Kan. 317; Barton County *v.* Plumb, 20 Kan. 147.

Connecticut.—Marlborough *v.* Sisson, 31 Conn. 332; Pinney *v.* Barnes, 17 Conn. 420; Lane *v.* Cook, 3 Day (Conn.) 255; Bunnel *v.* Pinto, 2 Conn. 431; Avery *v.* Fitch, 4 Conn. 362; Pearce *v.* Olney, 20 Conn. 544.

Iowa.—Watson *v.* Van Meter, 43 Iowa 76.

Wisconsin.—Williams *v.* Williams, 63 Wis. 58.

Maine.—Ware *v.* Percival, 61 Me. 391.

Vermont.—Hayward *v.* Clark, 50 Vt. 612; Perkins *v.* Walker, 19 Vt. 144; Hunt *v.* Payne, 29 Vt. 172.

Michigan.—Clark *v.* Wiles, 54 Mich. 323.

New Jersey.—School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115; Hendrickson *v.* Norcross, 17 N. J. L. 417.

Indiana.—Faught *v.* Faught, 98 Ind. 470.

Minnesota.—Wisconsin *v.* Torinus, 28 Minn. 175; Hardin *v.* Palmerlee, 28 Minn. 450.

Nebraska.—Beck *v.* Deveraux, 9 Neb. 109.

licæ, ut sit finis lituum, and *Nemo debet bis vexari pro una et eadam cause.*[1]

2. What Constitutes an Entire Cause of Action.—There is no precise rule for determining what constitutes an entire cause of action within the meaning of the above rule. It depends upon the facts of each particular case, and is often a difficult question. Certain general rules, however, may be formulated.[2]

United States.—Marine Ins. Co. *v.* Hodgson, 7 Cranch (U. S.) 332; Hendrickson *v.* Hinckley, 17 How. (U. S.) 444; Parker *v.* Judges, 12 Wheat. (U. S.) 561; Davenport *v.* Lord, 9 Wall. (U. S.) 409; Embry *v.* Palmer, 107 U. S. 3; Bartels *v.* Schell, 16 Fed. Rep. 341; Hughes *v.* Dundee Trust Invest. Co., 26 Fed. Rep. 831; Stockton *v.* Ford, 18 How. (U. S.) 418; Stark *v.* Starr, 94 U. S. 492; Baird *v.* U. S., 96 U. S. 430.

England.—Fetter *v.* Beale, 1 Salk. 11; Barwell *v.* Kensey, 3 Lev. 179; Gibbs *v.* Cruskshanks, L. R. 8 C. P. 454; Bagot *v.* Williams, 3 B. &. C. 235, 10 E. C. L. 62; Hodsoll *v.* Stallebrass, 11 Ad. & El. 301, 39 E. C. L. 94; Burn *v.* Carvalho, 4 Myl. & C. 690; Phosphate Sewage Co. *v.* Molleson, 4 App. Cas 801; Beere *v.* Fleming, 13 Ir. C. L. 506; Dundas *v.* Waddell, 5 App. Cas. 249; Woods *v.* Russell, 5 B. & A. 942; Seddon *v.* Tutop, 6 T. R. 607; Harris *v.* Mulkern, 1 Exch. Div. 31; Aslin *v.* Parkin, 2 Burr. 665; Man *v.* Drexel, 2 Pa. St. 202; Newington *v.* Levy, L. R. 6 C. P. 180; Routledge *v.* Hislop, 2 El. & El. 549; Finney *v.* Finney, L. R. 1 P. & M. 483; Buckland *v.* Johnson, 15 C. B. 145, 80 E. C. L. 145; Hitchin *v.* Campbell, 3 Wils. 240; Slade's Case, 4 Coke 92 b.; Eastmure *v.* Laws, 5 Bing. N. Cas. 444; 35 E. C. L. 170.

Mistake.—Taking judgment by mistake for a less sum than due will not justify the plaintiff in recovering the residue in a new action. Ewing *v.* McNairy, 20 Ohio St. 315; Keokuk County *v.* Alexander, 21 Iowa 379; Wickersham *v.* Whedon, 33 Mo. 561; Saddler *v.* Apple, 9 Humph. (Tenn.) 342. But see Byrket *v.* State, 3 Ind. 248.

1. See remarks of Miller, J., *passim*, in U. S. *v.* Throckmorton, 98 U. S. 65; Brunsden *v.* Humphry, 14 Q. B. Div. 141.

Not a Technicality.—The principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice, and not to be classed among technicalities. It was intended to suppress serious grievances. Dutton *v.* Shaw, 35 Mich. 431.

Exhausting Possibilities of Suit.—Where a pending suit is one in which it is legally possible for a judgment to be rendered upon the cause of action alleged in the second, and was brought for the purpose of obtaining such a judgment, the plaintiff is bound to exhaust the possibilities of that suit before subjecting the defendant to the cost of a second suit. Damon *v.* Denny, 54 Conn. 253. See also Hitchin *v.* Campbell, 2 W. Bl. 827; Martin *v.* Kennedy, 2 B. & P. 71; Seddon *v.* Tutop, 6 T. R. 607; Thorpe *v.* Cooper, 5 Bing. 116, 15 E C. L. 387.

Justice of Rule Questioned.—The rule against splitting a cause of action has not in all cases gone unchallenged; the fact that it may be used as a sword instead of as a shield has been pointed out by an eminent judge: "For the defendant reliance has in effect been placed upon the maxim *Interest rei publicæ ut sit finis lituum;* and it has been contended that it enunciates an admirable rule of law. When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and if it were now for the first time put forward I could not assent to its being pushed to the length to which it has sometimes been carried; in fact it is never wanted except when injury, undeveloped at the time of action brought, is afterwards developed." Per Brett, J., in Brunsden *v.* Humphrey, 14 Q. B. Div. 145.

Application in Equity.—While the rule is rigidly enforced in common-law actions, there are many cases in equity where the courts having ample power so to mould the relief granted as to prevent injustice, will not enforce it unless equity in the particular case requires it. O'Dougherty *v.* Remington Paper Co., 81 N. Y. 499.

2. Hill *v.* Joy, 149 Pa. St. 243.

3. Contracts Generally.—In respect to contracts express or implied, each contract affords one and only one cause of action.[1]

While the law does not favor the unnecessary splitting of causes of action, it does not require that two distinct causes of action shall be brought into one litigation. The nearer the controversy is to being single, the more likely the jury is to dispose of it with full intelligence and justice. Morehouse *v.* Baker, 48 Mich. 335.

In Stickel *v.* Steel, 41 Mich. 350, the principle is advanced that claims originally one and indivisible may become single and separated, and in turn may again return to their indivisible state. Cooley, J., uses this language: "In short if the two bills constituted one demand in their origin, they must have become two for all legal purposes when the one fell due before the other; and if united again by the other falling due, they would be again separated when the remedy on one was barred, or whenever anything occured which should render one the subject of a suit when the other was not."

1. *New York.*—Secor *v.* Sturgis, 16 N.Y. 548; Miller *v.* Covert, 1 Wend. (N. Y.) 487; Farrington *v.* Payne, 15 Johns. (N. Y.) 432; Phillips *v.* Berick, 16 Johns. (N. Y.) 136; Millard *v.* Missouri, etc., R. Co., 86 N. Y. 441; Stoneman *v.* Erie R. Co., 52 N. Y. 429; Sloman *v.* Great Western R. Co., 267 N. Y. 208; Gardner *v.* Patten (C. Pl.), 15 N. Y. Supp. 324; Millard *v.* Missouri, etc., R. Co., 20 Hun (N. Y.) 191; Mills *v.* Garrison, 42 N. Y. 40; O'Beirne *v.* Lloyd, 43 N. Y. 248.

Missouri.—Brooks *v.* Ancell, 51 Mo. 178; Comstock *v.* Davis, 51 Mo. 569; Ruddle *v.* Horine, 34 Mo. App. 616.

Mississippi.—McLendon *v.* Pass, 66 Miss. 110; Grayson *v.* Williams, Walker Miss. 298; Ash *v.* Lee, 51 Miss. 101; Pittman *v.* Chrisman, 59 Miss. 124; Scofield *v.* Pensons, 26 Miss. 402; Mobile, etc., R. Co. *v.* State, 51 Miss. 137.

Wisconsin.—Roehring *v.* Huebschmann, 34 Wis. 185.

Kansas.—Madden *v.* Smith, 28 Kan. 798.

Indiana.—Smiley *v.* Deweese, 1 Ind. App. 211.

Massachusetts.—Harding *v.* Hale, 2 Gray (Mass.) 399; Badger *v.* Titcomb, 15 Pick. (Mass.) 409.

Michigan.—Beecher *v.* Pettee, 40 Mich. 181; Morehouse *v.* Baker, 48 Mich. 335.

California.—Wetmore *v.* San Francisco, 44 Cal. 295.

Iowa.—Clark *v.* Sammons, 12 Iowa 368; Taylor *v.* Chambers, 1 Iowa 124; Aultman *v.* Mount, 62 Iowa 674; Drake *v.* Vorse, 42 Iowa 653; Street *v.* Beckman, 43 Iowa 496.

Nebraska.—Gapen *v.* Bretternitz, 31 Neb. 302.

Alabama.—South & North Alabama R. Co. *v.* Henlein, 56 Ala. 368; Rake *v.* Pope, 7 Ala. 161; Oliver *v.* Holt, 11 Ala. 574; O'Neal *v.* Brown, 21 Ala. 482; McLane *v.* Miller, 12 Ala. 643.

Connecticut.—Bunnell *v.* Pinto, 2 Conn. 431.

New Hampshire.—Britton *v.* Turner, 6 N. H. 481.

England.—Rex *v.* Herefordshire, 1 B. & Ad. 572.

Attachment Bond.—An attachment bond is indivisible. Davis *v.* Milburn, 4 Iowa 246.

Indemnity Bond.—An indemnity bond may give rise to several causes of action. Orendorff *v.* Utz, 48 Md. 298; Ahl *v.* Ahl, 60 Md. 207. See Bristowe *v.* Fairclough, 1 M. & G. 143; Florence *v.* Drayson, 1 C. B. N. S. 584, 87 E. C. L. 584; Butler *v.* Wright, 2 Wend. (N. Y.) 369.

Accounting.—Several causes of action may grow out of an accounting. Kane *v.* Morehouse, 46 Conn. 300.

Taxes.—Each year's taxes constitute a separate and distinct cause of action. Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633. See also Arnold *v.* Arnold, 17 Pick. (Mass.) 4; Ferrer's Case, 6 Coke 7; Beere *v.* Fleming, 13 Ir. C. L. 506; Cleaton *v.* Chambliss, 6 Rand. (Va.) 86; Clark *v.* Young, 1 Cranch (U. S.) 181; Washington, etc., Steam Packet Co. *v.* Sickels, 5 Wall. (U. S.) 580; Norton *v.* Huxley, 13 Gray (Mass.) 285; Harding *v.* Hale, 2 Gray (Mass.) 399; Marsh *v.* Pier, 4 Rawle (Pa.) 273; Myers *v.* Johnson, 14 Iowa 47; Clark *v.* Sammons, 12 Iowa 368; Ricker *v.* Hooper, 35 Vt. 457.

Board.—A single claim for board cannot be split. Bowers *v.* Smith (Supreme Ct.), 8 N. Y. Supp. 226. See O'Beirne *v.* Lloyd, 43 N. Y. 248; Hopf *v.* Myers, 42 Barb. (N. Y.) 270.

Money Lost at Gaming.—Money lost at gaming on different days constitutes

But just what makes a single contract, giving only the one right of action which cannot be split, is often a difficult question, and the cases are not altogether harmonious.[1]

Independent Stipulations.—The bare fact that two causes of action spring out of the same contract does not *ipso facto* render a judgment on one a bar to a suit on the other.[2] The same contract may contain independent stipulations, and an action may be maintained on each stipulation as it is broken.[3]

different causes of action. Caldwell *v.* Caldwell, 2 Bush (Ky.) 446; Betts *v.* Hillman, 15 Abb. Pr. (N. Y. C. P. L.) 184.

1. **Parsons' Rules.**—The following are Parsons' rules for the determination of the question whether a contract is seperable or entire:

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. 2 Parsons on Contracts 517, citing Johnson *v.* Johnson, 3 B. & P. 162; Withers *v.* Reynolds, 2 B. & Ad. 882; Mayfield *v.* Wadsley, 3 B. & C. 357; Mavor *v.* Pyne, 3 Bing. 285, 11 E. C. L. 104; Robinson *v.* Green, 3 Met. (Mass.) 159; Perkins *v.* Hart, 11 Wheat. (U. S.) 237; Sickels *v.* Pattison, 14 Wend. (N. Y.) 257; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Snook *v.* Fries, 19 Barb. (N. Y.) 313; Carleton *v.* Woods, 28 N. H. 290; Robinson *v.* Snyder, 25 Pa. St. 203; Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351; Quigley *v.* DeHaas, 82 Pa. St. 267; Scott *v.* Kittanning Co., 89 Pa. St. 231.

The contract is severable where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. 2 Parsons on Cont. 517, citing Woods *v.* Russell, 5 B. & Ad. 942; Clarke *v.* Spence, 4 Ad. & El. 448, 31 E.C. L. 107; Laidler *v.* Burlinson, 2 M. & W. 602; Wood *v.* Bell, 5 El. & Bl. 772, 85 E. C. L. 771; Cunningham *v.* Morrell, 10 Johns. (N. Y.) 203; Andrews *v.* Durant, 11 N. Y. 35; Moody *v.* Brown, 37 Me. 107.

But the mere fact that the subject of the contract is sold by weight or measure, and the value is ascertained by the price affixed to each pound, or yard, or bushel of the quantity contracted for, will not be sufficient to render the contract severable. 2 Parsons on Contracts, citing Clark *v.* Baker, 5 Met. (Mass.) 452; Davis *v.* Maxwell, 12 Met. (Mass.) 286; Baker *v.* Higgins, 21 N. Y. 397; Mansfield *v.* Trigg, 113 Mass. 350; Young *v.* Wakefield, 121 Mass. 91.

If the consideration is entire, this makes the contract one and indivisible. 2 Parsons on Contracts, citing Miner *v.* Bradley, 22 Pick. (Mass.) 457; Johnson *v.* Johnson, 3 B. & P. 162; Bigg *v.* Whisking, 14 C. B. 195, 78 E. C. L. 193; Jones *v.* Dunn, 3 W. & S. (Pa.) 109; White *v.* Brown, 2 Jones (N. Car.) 403; Dula *v.* Cowles, 2 Jones (N. Car.) 454;

Common Agent.—The fact that several corporations employ a common agent does not make a contract by him in that capacity a single one; it is severable. Clegg *v.* Aikens, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 95.

Separate Pieces of Property.—Where the owner of several and distinct pieces of property places the same in the hands of an agent, who disposes of and receives the money for the same, the owner has as many causes of action against the agent as there are segregated pieces of property disposed of. Sweeny *v.* Daugherty, 23 Iowa 291.

Defendant Liable in Severable Capacities.—The cause of action may be one and the same, although the defendant is liable thereon in several capacities. Lord *v.* Vreeland, 15 Abb. Pr. (N. Y. Supreme Ct.) 122, where the defendant was liable as executor and as grantee from a devisee. See also Richtmyer *v.* Richtmyer, 50 Barb. N. Y. 55; Austin *v.* Munro, 47 N. Y. 360.

2. Perry *v.* Dickerson, 85 N. Y. 345.

3. Coe *v.* Goetschins, 7 Alb. L. J. 413; McIntosh *v.* Lown, 49 Barb. (N. Y.) 550; Phillips *v.* Berick, 16 Johns. (N. Y.) 140; Perry *v.* Harrington, 2 Met. (Mass.) 368; Andrews *v.* Durant, 11 N. Y. 35; Beach *v.* Crain, 2 N. Y. 86; Guernsey *v.* Carver, 8 Wend.

All Breaches to be Sued for.—But where there are breaches of several and distinct covenants contained in the same instrument, all these breaches must be sued for together; while independent stipulations may be sued for as the breaches occur, all the breaches existing at the time the action is brought are only one cause of action.[1]

4. Specific Contracts—*a.* SALES.—There is but one cause of action for chattels sold at one time.[2]

b. ACCOUNTS.—A debt due upon a continuous account of book entries, made in the ordinary course of dealing, is entire; it cannot, without agreement to that effect, be split up into separate and distinct demands, so as to form the basis of several suits.[3]

(N. Y.) 492; Stevens *v.* Lockwood, 13 Wend. (N. Y.) 644; Staples *v.* Goodrich, 21 Barb. (N. Y.) 317; Colvin *v.* Corwin, 15 Wend. (N. Y.) 557; Denny *v.* Williams, 5 Allen (Mass.) 1; Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271; Merchants' Ins. Co. *v.* Algeo, 31 Pa. St. 446; Andrew *v.* Schmitt, 64 Wis. 664; Breckenridge *v.* Lee, 3 A. K. Marsh (Ky.) 449; Griffin *v.* Wallace, 66 Ind. 410; Boyce *v.* Christy, 47 Mo. 70; Johnson *v.* Pirtle, 1 Swan (Tenn.) 262; Florence *v.* Jenings, 2 C. B. N. S. 454, 89 E. C. L. 454; Doe *v.* Woodbridge, 9 B. & C. 376, 17 E. C. L. 399; Gambrell *v.* Falmouth, 4 Ad. & El. 73, 31 E. C. L. 30; Steel *v.* Spight, 2 Roll. 178; Palmer *v.* Stanage, 1 Lev. 43; Doe *v.* Peck, 1 B. & A. 428; 20 E. C. L. 417; Welbie *v.* Phillips, 2 Vent. 129; Dulaney *v.* Payne, 101 Ill. 325; Wehrly *v.* Morfoot, 103 Ill. 183.

1. Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; Coggins *v.* Bulwinkle, 1 E. D. Smith (N. Y.) 434; Guernsey *v.* Carver, 8 Wend. (N. Y.) 492; Colvin *v.* Corwin, 15 Wend. (N. Y.) 557; Stevens *v.* Lockwood, 13 Wend. (N. Y.) 644; Winslow *v.* Stokes, 3 Jones (N. Car,) 285; Hill *v.* Joy, 149 Pa. St. 243; McLaughlin *v.* Hill, 6 Vt. 20; Avery *v.* Fitch, 4 Conn. 362; Bunnel *v.* Pinto, 2 Conn. 431; Lane *v.* Cook, 3 Day (Conn.) 255; Girling *v.* Aldas, 2 Keb. 617; Bagot *v.* Williams, 3 B. & C. 235, 10 E. C. L. 62; Rex *v.* Herefordshire, 1 B. & Ad. 672; Young *v.* Munby, 4 M. & S. 183, White *v.* Moseley, 8 Pick. (Mass.) 356; Whitaker *v.* Hawley, 30 Kan. 317; Whitaker *v.* Hawley, 25 Kan. 674; Barton County *v.* Plumb, 20 Kan. 147; Houston *v.* Delahay, 14 Kan. 125; Bond *v.* Weed Sewing Mach. Co., 23 Kan. 121; Madden *v.* Smith, 28 Kan. 802; Gripton *v.* Thompson, 32 Kan. 370; Andrews *v.* Alcorn, 13 Kan. 351; Ambrose *v.* Parrott, 28 Kan. 693; Muzzy *v.* Knight, 8 Kan. 456; Kennion *v.* Kelsey, 10 Iowa 443; Stein *v.* Steamboat Prairie Rose, 17 Ohio St. 472; Hibbard *v.* McKindley, 28 Ill. 240; Joyce *v.* Moore, 10 Mo. 272; State *v.* Davis, 35 Mo. 406; Kansas City Hotel Co. *v.* Sigement, 53 Mo. 176; Fisk *v.* Tank, 12 Wis. 276; Roehing *v.* Huebschman, 35 Wis. 185; Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Leggett *v.* Lippincott, 50 N. J. L. 462.

2. Smith *v.* Jones, 15 Johns. (N. Y.) 229; Miller *v.* Covert, 1 Wend. (N. Y.) 487; Madden *v.* Smith, 28 Kan. 799; Magruder *v.* Randolph, 77 N. Car. 79; Dutton *v.* Shaw, 35 Mich. 433.

Two distinct sales of lottery tickets by different agents of the plaintiff, at different places, were held an entire demand. Colvin *v.* Corwin, 15 Wend. (N. Y.) 557.

Separate Sales.—Separate and independent sales constitute separate causes of action. Cashman *v.* Bean, 2 Hilt. (N. Y.) 340.

Where the contract is that goods sold by weight shall be paid for in cash on delivery, and some goods are delivered daily, the weight being taken on each delivery, that payment was not exacted on each delivery does not compel the seller to treat the annual deliveries as part of one transaction. Stifel *v.* Lynch, 7 Mo. App. 326.

Credit.—Giving credit on the items of the sale will change the rule; a cause of action on each item arises as its credit expires. Zimmerman *v.* Erhard, 83 N. Y. 74; Campbell Printing, etc., Co. *v.* Walker (Supreme Ct.), 9 N. Y. St. Rep. 725; Staples *v.* Goodrich, 21 Barb. (N. Y.) 317.

3. Buck *v.* Wilson, 113 Pa. St. 430; Lucas *v.* Le Comte, 42 Ill. 303; Born-

c. INSTALMENTS.—When several claims, payable at different times, arise out of the same contract or transaction, separate ac-

gesser *v.* Harrison, 12 Wis. 544; Memmer *v.* Carey, 30 Minn. 458; American Buttonhole, etc., Co. *v.* Thornton, 28 Minn. 418; Stevens *v.* Damon 29 Vt. 521; Tootle *v.* Wells, 39 Kan. 452; Waffle *v.* Short, 25 Kan. 503; Bond *v.* Weed Sewing Mach. Co., 23 Kan. 119; Stevens *v.* Lockwood, 13 Wend. (N. Y.) 644; Guernsey *v.* Carver, 8 Wend. (N. Y.) 492; McIntosh *v.* Lown, 49 Barb. (N. Y.) 550; Erie, etc. R. Co. *v.* Patrick, 41 N. Y. 256; Thompson *v.* McDonald, 84 Ga. 5; Macon. etc., R. Co. *v.* Garrard, 54 Ga. 327; Evans *v.* Collier, 79 Ga. 319.

"The demand [of the plaintiff] was composed of various items for professional services, every one of which, according to his view, was a separate demand, and therefore he might bring as many separate actions as there were items in his account. This cannot be tolerated. A party is trading at a store, where he has a running account, which in the aggregate exceeds $100. Can it be, the merchant has a right to divide this demand, so as to give a court jurisdiction, which, of the entire demand, has it not? It cannot be." *Per* Breese, J., in Lucas *v.* Le Compte, 42 Ill. 303.

What Constitutes an Account.—It seems that the term account has no very clearly defined legal meaning. The primary idea conveyed by it is some matter of debt, or a demand in the nature of a debt, arising out of contract. Thus rent after it is due is the subject of an account. Watson *v.* Penn, 108 Ind. 25; Nelson *v.* Posey County, 105 Ind. 287.

An itemized claim by a county clerk for extra services is an account. Nelson *v.* Posey County, 105 Ind. 287. But it must be continuous. An interruption of two years between items was held to deprive the items of the quality of an account. Tucker *v.* Quimby, 37 Iowa 18.

It has been held that a "running account" must consist of items on both sides. Leonard *v.* U. S., 18 Ct. of Cl. 385. See Oliver *v.* Holt, 11 Ala. 574; Bartels *v.* Schell, 16 Fed. Rep. 341; Hennequin *v.* Barney, 24 Fed. Rep. 580; Baird *v.* U. S., 96 U. S. 430; Pinney *v.* Barnes, 17 Conn. 420; Bunnel *v.* Pinto, 2 Conn. 433; Kansas City Hotel Co. *v.* Sigement, 53 Mo. 176; Butler *v.* Kirby, 53 Wis. 188; Rex *v.* Herefordshire, 1 B. & Ad. 672.

But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or account. Secor *v.* Sturgis, 16 N. Y. 548.

Probably the best test of an account is, were the dealings continuous? Magruder *v.* Randolph, 77 N. Car. 79; Waldo *v.* Jolly, 4 Jones (N. Car.) 173; Caldwell *v.* Beatty, 69 N. Car. 365. See Lucas *v.* Le Compte, 42 Ill. 303; Shaw *v.* Beers, 25 Ala. 449; Oliver *v.* Holt, 11 Ala. 524; Pittman *v.* Chrisman, 59 Miss. 124; Grayson *v.* Williams, Walker (Miss.) 298; Ammons *v.* Whitehead, 31 Miss. 99; Ash *v.* Lee, 51 Miss. 101; Scofield *v.* Pensons, 26 Miss. 402; Mobile, etc., R. Co. *v.* State, 51 Miss. 137.

Credit.—Where credit is given on some of the items of a running account, such items need not be included in a suit for other items due. McLaughlin *v.* Hill, 6 Vt. 20; Zimmerman *v.* Erhard, 83 N. Y. 74.

Separate Accounts.—There may be two or more running accounts in favor of one party against another which might be the subject of separate suits. Secor *v.* Sturgis, 16 N. Y. 548. This case is a leading one on the subject of splitting the causes of action. The facts were that the business of ship-carpenters was carried on in one part of a building, under the direction of two of the partners of a firm, and the business of ship-chandlers in another part of the same building, under the direction of a third partner. Separate books of account were kept. Work was done from the carpentry branch in repairing a brig, and goods of ship-chandlery were furnished to the same brig. It was held that the two accounts formed two causes of action. Corby *v.* Taylor, 35 Mo. 447; Beck *v.* Devereaux, 9 Neb. 109.

But the presumption is that the accounts are all one. Barngesser *v.* Harrison, 12 Wis. 544. See Ranney *v.* Higby, 12 Wis. 62.

May Sue for Less.—But an account is not so far treated as an entire demand that a creditor is compelled to sue for

tions can be brought as each liability accrues.[1] Yet, if no action is brought until more than one is due, all that are due must be included in one action; and if an action is brought when more than one is due, a recovery in that suit will be an effectual bar to a second action, brought to recover the other claims that were due when the first was brought.[2]

d. RENT.—Instalments of rent are subject to the same rule as are other instalments of money due. An action may be brought as each instalment falls due, but all instalments due are but one cause of action.[3]

the whole of it against his wishes. He may sue for a part, but of course this bars a recovery on the residue. Corey *v.* Miller, 12 R. I. 337; Guernsey *v.* Carver, 8 Wend. (N. Y.) 492; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; Barngesser *v.* Harrison, 12 Wis. 544.

Massachusetts.—In *Massachusetts* it is held that a running account for goods sold, money lent, or money paid at different times is *not* an entire demand incapable of being divided for the purpose of bringing separate suits, unless there be an agreement to that effect. Badger *v.* Titcomb, 15 Pick. (Mass.) 409. But see this case severely criticised in Barngesser *v.* Harrison, 12 Wis. 611.

North Carolina.—In *North Carolina* an account may be split for the purpose of giving jurisdiction to a justice of the peace. Caldwell *v.* Beatty, 69 N. Car. 365. See also Waldo *v.* Jolly, 4 Jones (N. Car.) 173; McCasten *v.* Quinn, 4 Ired. (N. Car.) 43; Green *v.* Caldcleugh, 1 Dev. & B. (N. Car.) 320; Person *v.* State Bank, 4 Hawks (N. Car.) 295; Buie *v.* Kelly, 7 Jones (N. Car.) 266; Boyle *v.* Robbins, 71 N. Car. 130; Kearns *v.* Heitman, 104 N. Car. 332.

1. Reformed, etc., Church *v.* Brown, 54 Barb. (N. Y.) 191; Sterner *v.* Gower, 3 W. & S. (Pa.) 136; Miller *v.* Union Switch, etc., Co. (Supreme Ct.), 13 N. Y. Supp. 711; Stowell *v.* Chamberlain, 60 N. Y. 272; Gardner *v.* Patten (C. Pl.), 15 N. Y. Supp. 324: Union R., etc., Co. *v.* Traube, 59 Mo. 355; Ryall *v.* Prince, 82 Ala. 264; Wilkinson *v.* Black, 80 Ala. 329; Strauss *v.* Meertief, 64 Ala. 299; Davis *v.* Preston, 6 Ala. 83; Robbins *v.* Harrison, 31 Ala. 160; Herrin *v.* Buckelew, 37 Ala. 585; Oliver *v.* Holt, 11 Ala. 574.

With respect to instalments of money due at successive days under the same contract, a difference was taken at early common law, that if the action were debt, it must be brought for the whole. Rudder *v.* Price, 1 H. Bl. 556; Badger *v.* Titcomb, 15 Pick. (Mass.) 415, But if it were covenant or assumpsit, the action might be for each instalment as it fell due. Cooke *v.* Whorwood, 2 Saund. 337; Ashford *v.* Hand, Andr. 370; Badger *v.* Titcomb, 15 Pick. (Mass.) 419.

Assignment.—An assignee, under separate and distinct assignments of different instalments of royalties, for distinct periods of time, under a contract, may maintain separate actions for such separate instalments. Miller *v.* Union Switch, etc., Co. (Supreme Ct.), 13 N. Y. Supp. 711.

2. Reformed, etc., Church *v.* Brown, 54 Barb. (N. Y.) 191; Union R., etc., Co. *v.* Traube, 59 Mo. 355; Nickerson *v.* Rockwell, 90 Ill. 460.

Contra.—Sterner *v.* Gower, 3 W. & S. (Pa.) 136.

Divisible Contract.—The rule that all instalments of money due upon a contract must be embraced in one suit is not applicable where there has been an adjudication in a prior action between the same parties on the same contract, to the effect that the contract is divisible in respect to the several instalments. Lorillard *v.* Clyde, 122 N. Y. 41. See Beach *v.* Crain, 2 N. Y. 86.

3. Love *v.* Waltz, 7 Cal. 250; Underhill *v.* Collins (Supreme Ct.), 39 N. Y. St. Rep. 795; Smith *v.* Dittenhoefer, 1 Rob. C. C. (N. Y.) 143; Hopf *v.* Myers, 42 Barb. (N. Y.) 270; Jex *v.* Jacob, 19 Hun (N. Y.) 105; Reformed, etc., Church *v.* Brown, 54 Barb. (N. Y.) 191; Warren *v.* Comings, 6 Cush. (Mass.) 103; Jarrett *v.* Self, 90 N. Car. 478; Caldwell *v.* Beatty, 69 N. Car. 365; Boyle *v.* Robbins, 71 N. Car. 130; Cooke *v.* Whorwood, 2 Saund. 337; Ashford *v.* Hand, Andr. 370; Burritt *v.* Belfy, 47 Conn. 323; Moore *v.* Nowell, 94 N. Car. 265; Magruder *v.* Randolph, 77

e. NOTES.—Each separate promissory note constitutes a cause of action. Where several notes are given at one time and as part of the same transaction, they may be sued on separately. There is no obligation on the holder to include in one suit all the notes due.[1]

f. JUDGMENTS.—A judgment is a contract, within the meaning of the rule against splitting a cause of action. If suit is brought upon it, it must include all that is due thereon, including costs.[2]

N. Car. 79; Shepherd *v.* Willis, 19 Ohio 147; Thayer *v.* Brooks, 17 Ohio 489; Lucas *v.* Le Compte, 42 Ill. 303; Rosenmueller *v.* Lampe, 89 Ill. 212; Nickerson *v.* Rockwell, 90 Ill. 460; Casselberry *v.* Farquer, 27 Ill. 170.

A recovery of double rent, under the terms of the lease, for holding over one month is a bar to a recovery, under the same covenant, for a second month. Kerr *v.* Simmons, 9 Mo. App. 376.

But where four suits were instituted simultaneously for instalments of rent, and were practically tried as one, and the defendant made no objection to their severance, he was held to have waived the objection. Fox *v.* Althorp, 40 Ohio St. 322. See Schuricht *v.* Broadwell, 4 Mo. App. 160.

Separate Leases.—But where the renting takes place under separate leases, as where a lease expires and a new one is made, the rents due under the two leases are separate causes of action. McLendon *v.* Pass, 66 Miss. 110. See Grayson *v.* Williams, Walker (Miss.) 298; Ash *v.* Lee, 51 Miss. 101; Pittman *v.* Chrisman, 59 Miss. 124; Mobile, etc., R. Co. *v.* State, 51 Miss. 137.

Illinois.—In *Illinois* it is held that where a lease provides for the payment of a given sum annually, separate actions may be brought upon the lease for each year's rent; and if, when suit is brought for one year's rent, the rent on the following year is then due, a judgment for the first is no bar to a second action for the rent of the subsequent year. McDole *v.* McDole, 106 Ill. 452. *Compare* Dulaney *v.* Payne, 101 Ill. 325; Wehrly *v.* Marfoot, 103 Ill. 185.

1. Williams *v.* Kitchen, 40 Mo. App. 604; Nathans *v.* Hope, 77 N. Y. 420; Eastman *v.* Cooper, 15 Pick. (Mass.) 276; Perry *v.* Harrington, 2 Met. (Mass.) 368; Crouse *v.* Holman, 19 Ind. 30; Bliss *v.* Weil, 14 Wis. 38.

The holder of a note cannot split it to give jurisdiction to a justice. Willard *v.* Sperry, 16 Johns. (N. Y.) 121.

But see Conklin *v.* Field, 37 How. Pr. (N. Y.) 455, where it was held that the fact that a party has sued for a part of a promissory note and recovered, supposing at the time that the remainder had been paid, does not preclude him afterwards, on discovering that the remainder has not been paid, from maintaining an action to recover it.

2. Camp *v.* Morgan, 21 Ill. 255; Ross *v.* Weber, 26 Ill. 221; Clayes *v.* White, 83 Ill. 540.

A judgment which charges an annuity on land is severable, and an action may be brought on each instalment. Priest *v.* Deaver, 22 Mo. App. 276.

Creditor's Bill.—A creditor's bill only states one cause of action, although seeking relief on two judgments. Jacot *v.* Boyle, 18 How. Pr. (N. Y. Supreme Ct.) 106.

Error in Entry—A judgment is so far entire that an error in entering up the proper amount due, and the omission of items in it, bars a suit on such items. Town *v.* Smith, 14 Mich. 347.

Assignment.—A judgment is incapable of being divided by assignment. Hopkins *v.* Stockdale, 117 Pa. St. 365.

And when a judgment has been assigned to several persons, each owner of a part thereof cannot have his separate *sci. fa.* to revive. Dietrich's Appeal, 107 Pa. St. 175. Hopkins *v.* Stockdale, 117 Pa. St. 365; Arrison *v.* Com., 1 Watts Pa. 374. *Compare* Peterson *v.* Lothrop, 34 Pa. St. 223, where the judgment was conditioned for the payment of different sums to different persons at different times.

But see Eldred *v.* Hazelett, 38 Pa. St. 16, where it is held that the revival of a judgment by *scire facias* is but a continuation of it, and is a distinct action in form only. Under this ruling there would appear to be no objection to allowing a part owner to revive.

g. SERVICES.—There can be no recovery in two suits for services of the same character, rendered within the same period of time[1].

Servant Wrongfully Discharged.—A judgment in an action of damages for wrongful discharge from employment before the expiration of the term of service is not a bar to a subsequent action for wages earned and due before the discharge.[2]

h. INSURANCE POLICIES.—There can be no splitting of causes of action on a single insurance policy. Whoever sues must be able to enforce the whole of it.[3]

i. INTEREST.—The promise to pay interest is a distinct cause

1. Green *v.* Von der Ahe, 36 Mo. App. 394.

Where a party was employed by the trustees of a church to perform certain services for one year for a fixed compensation, and afterwards performed similar services in the next year at the request of the priest, on the promise of the same compensation, it was held that there was only one cause of action for all the services so rendered. Rosenmueller *v.* Lampe, 89 Ill. 212.

Distinct Contracts.—But services performed at different times under distinct contracts are separate causes of action. Phillips *v.* Berick, 16 Johns. (N. Y.) 136.

2. Perry *v.* Dickerson, 85 N. Y. 345; Butler *v.* Rice, 17 Hun (N. Y.) 406; Hartley *v.* Harman, 11 Ad. & El. 798, 39 E. C. L. 231.

Compare Goodman *v.* Pocock, 15 Q. B. 576, 69 E. C. L. 574; Brodar *v.* Lord, 46 N. Y. Super. Ct. 205; Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381; Howard *v.* Daly, 61 N. Y. 362; Booze *v.* Pacific R. Co., 33 Mo. 212; Soursin *v.* Salorgne, 14 Mo. App. 486.

Wages Paid.—But where an employé engaged under a contract for a specified time, the wages being payable in instalments, is wrongfully discharged before the expiration of the period of hire, and all wages actually earned at the time of the discharge have been paid, an action will not lie to recover the future instalments, the remedy is an action for the wrongful discharge. James *v.* Allen County, 44 Ohio St. 226; Moody *v.* Leverick, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 145; Moody *v.* Leverick, 4 Daly (N. Y.) 401; Howard *v.* Daly, 61 N. Y. 362; Archard *v.* Hornor, 3 C. & P. 349, 14 E. C. L. 342; Smith *v.* Hayward, 7 Ad. & El. 544, 34 E. C. L. 154; Goodman *v.* Pocock, 15 Q. B. 576; 69 E. C. L. 574; Beckham *v.* Drake, 2 H. L. Cas. 606; Emmens *v.* Elderton, 4 H. L. Cas. 624; Clossman *v.* Lacoste, 28 Eng. L. & Eq. 140; Chamberlin *v.* Morgan, 68 Pa. St. 168; Willoughby *v.* Thomas, 24 Gratt. (Va.) 522; Whitaker *v.* Sandifer, 1 Duv. (Ky.) 261; Chamberlin *v.* McCalister, 6 Dana (Ky.) 352; Miller *v.* Goddard, 34 Me. 102.

Contra.—The servant, under the doctrine of "constructive service," may hold himself in readiness to perform, and recover his instalments of wages as they fall due. Gardell *v.* Pontigny, 4 Camp. 375; Hartley *v.* Harman, 11 Ad. & El. 498, 39 E. C. L. 231; Cutter *v.* Powell, 2 Smith's Leading Cas. part 1; Huntington *v.* Ogdensburgh, etc., R. Co., 7 Amer. Law Reg. N. S. 143; Thompson *v.* Wood, 1 Hilt. (N. Y.) 96; Heim *v.* Wolf, 1 E. D. Smith (N. Y.) 70; Strauss *v.* Meertief, 64 Ala. 299; Davis *v.* Ayres, 9 Ala. 292; Ramey *v.* Holcombe, 21 Ala. 567; Fowler *v.* Armour, 24 Ala. 194; Davis *v.* Preston, 6 Ala. 83; Hamlin *v.* Race, 78 Ill. 422; Armfield *v.* Nash, 31 Miss. 361.

3. Hartford F. Ins. Co. *v.* Davenport, 37 Mich. 609.

In Equity.—But where each of several persons assured by the same policy have distinct insurable interests, they can enforce their rights under the policy in equity if they cannot at law. Mercantile Ins. Co. *v.* Holthaus, 43 Mich. 423; Watertown F. Ins. Co. *v.* Grover, etc., Sewing Mach. Co. 41 Mich. 131; Fire Ins. Co. *v.* Felrath, 77 Ala. 194; North Western Mut. L. Ins. Co. *v.* Germania F. Ins. Co. 40 Wis. 446; Hammil *v.* Queen Ins. Co., 50 Wis. 240.; State Ins. Co. *v.* Maackens, 38 N. J. L. 564; Stearns *v.* Quincy Mut. F. Ins. Co., 124 Mass. 64; Thatch *v.* Metropole Ins. Co., 11 Fed. Rep. 29.

of action from the promise to pay the principal. Each promise constitutes a distinct cause of action.[1]

j. ASSIGNMENTS.—A cause of action arising upon a contract which is an entirety cannot be severed by means of partial assignments.[2]

k. COLLATERAL SECURITIES.—Where a suit is brought on collateral securities, this does not preclude one on the obligation itself. The collateral security constitutes a different contract from the debt itself.[3]

l. FRAUD.—Where there is fraud practiced in obtaining a contract, there are two causes of action, one for the fraud and one on the contract.[4]

1. Dulaney *v.* Payne, 101 Ill. 325; Walker *v.* Kimball, 22 Ill. 537; Goodwin *v.* Goodwin, 65 Ill. 497; Wehrly *v.* Morfoot, 103 Ill. 183; Andover Bank *v.* Adams, 1 Allen (Mass.) 28; Sparhawk *v.* Wills, 6 Gray (Mass.) 163.

Instalments Due.—But after the principal becomes due, the unpaid instalments of interest become merged in the principal, and must be sued for if the principal is. Parsons on Con., vol. 2, 636. Howe *v.* Bradley, 19 Me. 31; Matthias *v.* Cook, 31 Ill. 83.

2. Chicago R. Co. *v.* Nichols, 57 Ill. 464; Potter *v.* Groubeck, 117 Ill. 404; German F. Ins. Co. *v.* Bullene, 51 Kan. 764; Dolbeer *v.* Stout (Super. Ct.), 19 N. Y. Supp. 820; Gardner *v.* Patten (C. Pl.), 15 N, Y. Supp. 324; Mills *v.* Garrison, 42 N. Y. 40. *Compare* Mandeville *v.* Welch, 5 Wheat. (U. S.) 277; Thatch *v.* Metropole Ins. Co., 11 Fed. Rep. 29; Stearns *v.* Quincy Mut. F. Ins. Co., 124 Mass. 64; Fire Ins. Co. *v.* Felrath, 77 Ala. 194; Hartford F. Ins. Co. *v.* Davenport, 37 Mich. 609.

Subrogation.—Where an insurance company, on payment of a portion of the loss sustained by reason of the destruction of the insured property, caused, as claimed by the insured, by the negligence of a third person, is subrogated to a proportionate amount of the claim of the insured against said third person, the company cannot maintain an action to recover the portion of the claim covered by the subrogation. Continental Ins. Co. *v.* Loud & Sons' Lumber Co., 93 Mich. 139.

Parties.—A complaint on an assignment of part of an entire demand should make the other holders parties, and if not it is demurrable for want of parties. Grain *v.* Aldrich, 38 Cal. 514. See Hassie *v.* G. I. W. U. Congregation, 35 Cal. 378; Thomas *v.* Rock Island, etc., Co., 54 Cal. 578.

Who Can Object.—While the creditor has not a right to assign the debt in parcels, still no person but the debtor can object. Marzion *v.* Pioche, 8 Cal. 536.

3. Drake *v.* Mitchell, 3 East 251; Sykes *v.* Gerber, 98 Pa. St. 179; White *v.* Smith, 33 Pa. 186; McCullough *v.* Hellman, 8 Oregon, 192; Fisher *v.* Fisher, 98 Mass. 303; Howell *v.* McCracken, 87 N. Car. 399; Fairchild *v.* Holly, 10 Conn. 474.

The agreement to procure an indorser is a different contract from the note itself. Vanuxem *v.* Burr, 151 Mass. 386.

Where the creditor consumes the goods given as collateral security, this constitutes a defense to an action on the debt; but if the debtor sets this up in an action on the debt, he is precluded from suing the creditor for the goods so consumed. Simes *v.* Zane, 24 Pa. St. 242.

Liens.—But the lien for a debt is a part of it. Kittridge *v.* Stevens, 16 Cal. 381. See Gray *v.* Dougherty, 25 Cal. 266; Bacon *v.* Raybauld, 4 Utah 357.

The right to foreclose a mortgage and the causes of action for instalments of interest are separate. Pope *v.* Durant, 26 Iowa 233.

Guaranty.—Where a guarantor is liable, under his contract, for attorney's fees, they must be included in the action on the guaranty. Abbott *v.* Brown, 131 Ill. 108.

4. Morgan *v.* Skidmore, 3 Abb. N.Cas. (N.Y. Ct. App.) 92; Goldberg *v.* Dougherty, 39 N. Y. Super. Ct. 189; Calkins *v.* Smith, 48 N. Y. 614; Bruce *v.* Kelly,

5. Torts—A single wrong gives only one cause of action, no matter how numerous the items of damage may be. Damages resulting from one and the same cause of action must be assessed and recovered once for all.[1]

While the principle is well settled, the great difficulty consists in its application, for the same wrongful act may give rise to two or more causes of action.[2]

5 Hun (N. Y.) 229; Lattin *v.* McCarty, 41 N. Y. 107; Morgan *v.* Powers, 66 Barb. (N. Y.) 35; Gutchess *v.* Whiting, 46 Barb. (N. Y.) 139; Wanzer *v.* De Baun, 1 E. D. Smith (N. Y.) 291; Paige *v.* Wilson, 8 Bosw. (N. Y.) 294.

1. Brunsden *v.* Humphrey, 14 Q. B. Div. 141; Secor *v.* Sturgis, 16 N. Y. 548; Filer *v.* New York Cent. R. Co., 49 N. Y. 42; Porter *v.* Cobb, 22 Hun (N. Y.) 278; Law *v.* McDonald, 62 How. Pr. (N. Y. Supreme Ct.) 340; Wichita, etc., R. Co. *v.* Beebe, 39 Kan. 465; Whitaker *v.* Hawley, 30 Kan. 317; Saline County *v.* Bondi, 23 Kan. 119; Madden *v.* Smith, 28 Kan. 798; Brannenburg *v.* Indianapolis, etc., R. Co., 13 Ind. 103; Lafayette *v.* Nagle, 113 Ind. 425; Folsom *v.* Clemence, 119 Mass. 473; Warren *v.* Comings, 6 Cush. (Mass.) 103; Marble *v.* Keyes, 9 Gray (Mass.) 221; Bennett *v.* Hood, 1 Allen (Mass.) 47; Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 33; Knowlton *v.* New York, etc., R. Co., 147 Mass. 606; Hempstead *v.* Des Moines, 63 Iowa 36; Herriter *v.* Porter, 23 Cal. 385; Morey *v.* King, 51 Vt. 383; Whitney *v.* Clarendon, 18 Vt. 253; Milroy *v.* Spurr Mt. Iron Min. Co., 43 Mich. 231; Thompson *v.* Ellsworth, 39 Mich. 719; South & North Ala. R. Co. *v.* Henlein, 56 Ala. 368; Pierro *v.* St. Paul, etc., R. Co., 39 Minn. 451; Hite *v.* Long, 6 Rand. (Va.) 457; Pucket *v.* St. Louis, etc., R. Co., 25 Mo. App. 650; Steiglider *v.* Missouri Pac. R. Co., 38 Mo. App. 511; Baird *v.* U. S., 96 U. S. 430. *Compare* Burrell *v.* New York, etc., Salt Co., 14 Mich. 34; Sheahan *v.* Barry, 27 Mich. 217; Allison *v.* Chandler, 11 Mich. 542; Scripps *v.* Reilly, 38 Mich. 10; Tefft *v.* Windsor, 17 Mich. 486; Ferrer's Case, 6 Coke 9; Sparry's Case, 5 Coke 61; Higgins' Case, 6 Coke 45; Hudson *v.* Lee, 4 Coke 43; Bird *v.* Randall, 3 Burr. 1345; Phillips *v.* Berryman, 3 Dougl. 287; Hitchin *v.* Campbell, 2 W. Bl. 827; Martin *v.* Kennedy, 2 B. & P. 71; Seddon *v.* Tutop, 6 T. R. 607; Thorpe *v.* Cooper, 5 Bing. 116, 15 E. C. L. 387; Fetter *v.* Beale, 1 Ld. Raym. 339; Embrey *v.* Owen, 6 Exch. 353; Williams *v.* Morland, 2 B. & C. 910, 9 E. C. L. 269; Fay *v.* Prentice, 1 C. B. 835, 50 E. C. L. 834; Nelson *v.* Couch, 15 C. B. (N. S.) 99, 109 E. C. L. 99; Hodsoll *v.* Stallebrass, 11 Ad. & El. 301, 39 E. C. L. 94; Lamb *v.* Walker, 3 Q. B. Div. 389.

A single act can only give a single cause of action, even when it is of such a nature that it may be treated either as a breach of contract or a duty imposed by law. Fern *v.* Vanderbilt, 13 Abb. Pr. (N. Y. Supreme Ct.) 72. See Smith *v.* Way, 9 Allen (Mass.) 472; Bennett *v.* Hood, 1 Allen (Mass.) 47; Eastman *v.* Cooper, 15 Pick. (Mass.) 285; Norton *v.* Doherty, 3 Gray (Mass.) 372; Burnett *v.* Smith, 4 Gray (Mass.) 50; Warren *v.* Comings, 6 Cush. (Mass.) 103.

But the same tort may give causes of action to different persons. Taylor *v.* Manhattan R. Co. (Supreme Ct.), 6 N. Y. Supp. 488; Wilton *v.* Middlesex R. Co., 125 Mass. 130; Karr *v.* Parks, 44 Cal. 46; Bradley *v.* Andrews, 51 Vt. 525. *Compare* McReynolds *v.* Kansas City, etc., R. Co., 34 Mo. App. 581.

2. The Test to be Applied to determine whether there is more than one cause of action, where damages have been inflicted by one wrongful act, is, is the injury occasioned an infringement of different rights? If it is, there are as many rights of action as separate rights infringed. Brunsden *v.* Humphrey, 14 Q. B. Div. 141.

The above case is a leading one. The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence. *Held*, by Brett, M.R., and Bowen, L.J., that the action in the High Court was maintainable, and was not barred by the previous proceeding

But, as a general rule, it may be said that if separate rights are not infringed, a single tortious act, or a series of them all done at one time, constitute only one cause of action.[1]

Fraud.—A fraud cannot be separated into two causes of action; it is an entirety.[2]

in the county court. Lord Coleridge dissented. In his dissenting opinion he used this language: "But it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if besides his arm and leg being injured his trousers, which contain his leg, and his coat-sleeve, which contains his arm, have been torn. The consequences of holding this are so serious and may be very properly so oppressive that I at last must respectfully dissent from a judgment which establishes it."

See the case of Howe *v.* Peckham, 10 Barb. (N. Y.) 656, which recognizes the distinction between the infringement of separate rights by one wrongful act. It holds that where an injury has resulted both to the person and the property of another, from an act of negligence on the part of the defendant, both causes of action may be joined in the same complaint.

1. Where two detached lots of woodland were destroyed by fire from a locomotive, there was held only one cause of action. Knowlton *v.* New York, etc., R. Co., 147 Mass. 606.

And all buildings burnt by one negligent fire must be included in one action. Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 331.

Where two horses are killed by the same negligent act, the recovery for one bars recovery for other. Brannenburg *v.* Indianapolis, etc., R. Co., 13 Ind. 103.

But where two horses go upon a railroad track, and one is killed at a distance of 30 rods from where the other was, as the railroad might not have been guilty of negligence in killing one, and yet might have been with reference to the other, the suit for the value of one horse does not bar that for the value of the other. Missouri Pac. R. Co. *v.* Scammon, 41 Kan. 521. See Folsom *v.* Clemence, 119 Mass. 473; Goodrich *v.* Yale, 8 Allen (Mass.) 454; Perley *v.* Eastern R. Co., 98 Mass. 414; Warner *v.* Bacon, 8 Gray (Mass.) 397.

Illegal Discrimination by Common Carrier.—A series of illegal discriminations by a common carrier at different times against a shipper of goods constitutes but one cause of action. Langdon *v.* New York, etc., R. Co., 27 Abb. N. Cas. (N. Y. Supreme Ct.) 166.

Same Transaction.—But the mere fact that only one transaction took place does not necessarily give only one cause of action. Thus the recovery by the passenger of the statutory penalty for an illegal overcharge of fare is no bar to a suit for damages for an unlawful ejection from the train. St. Louis R. Co. *v.* Trimble, 54 Ark. 354.

And a recovery in an action for the hire of a horse, buggy, and harness is not a bar to another action to recover damages for injuries done to the buggy and harness while in the possession of the bailee. Shaw *v.* Beers, 25 Ala. 449. See also Oliver *v.* Holt, 11 Ala. 574; O'Neal *v.* Brown, 21 Ala. 482; Lenoir *v.* Wilson, 36 Ala. 600; Hyde *v.* Noble, 13 N. H. 494; Greenfield *v.* Wilson, 13 Gray (Mass.) 384; Jones *v.* Oswald, 2 Bailey (S. Car.) 214

2. Allison *v.* Connor, 36 Mich. 283. A misrepresentation by the purchaser of a horse, as to the balance due on a promissory note transferred by him to the seller in part payment of the price, is a single and entire cause of action. Berringer *v.* Payne, 68 Ala. 154.

Creditor's Bill.—A creditor's bill can be filed against several persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiff, in which all the defendants were more or less concerned, though not jointly in each act; in such a case there is only a single cause of action. Graves *v.* Corbin, 132 U. S. 571; Ayers *v.* Chicago, 101 U. S. 184; Fidelity Ins. Co. *v.* Huntington, 117 U. S. 280; Louisville R. Co. *v.* Ide, 114 U. S. 52; Putnam *v.* Ingraham, 114 U. S. 57; Pirie *v.* Tvedt, 115 U. S. 41; Starin *v.* New York City, 115 U. S. 248; Sloane *v.* Anderson, 117 U. S. 275;

Seizing and Converting Chattels.—Where a tort is committed by the taking at one time of several chattels, it gives but one cause of action, and the plaintiff cannot be allowed to split it and bring separate suits for separate articles.[1]

Trespass.—All acts done by the same trespass are indivisible. They must all be included in one action.[2]

Assault and Battery.—Each assault and battery constitutes a distinct cause of action.[3]

Plymouth Min. Co. *v.* Canador Canal Co., 118 U. S. 264; Little *v.* Giles, 118 U. S. 596; East Tennessee, etc., R. Co. *v.* Grayson, 119 U. S. 240; Brooks *v.* Clark, 119 U. S. 502; Laidly *v.* Huntington, 121 U. S. 179; Peninsula Iron Co. *v.* Stone, 121 U. S. 631; Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535; Young *v.* Parker, 132 U. S. 267; Brinkerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139; Fellows *v.* Fellows, 4 Cow. (N. Y.) 682; New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592.

Distinct Frauds.—But separate and distinct frauds give separate actions. Thus where separate and distinct purchases are fraudulently made on different days, a separate cause of action accrues to the seller for the damages, as each purchase is an independent act of fraud. Lee *v.* Kendall, 56 Hun 610.

And the embezzling of separate sums by a bank cashier constitutes separate causes of action. Phillips *v.* Bossard, 35 Fed. Rep. 99; Shook *v.* Lyon (C. Pl.), 34 N. Y. St. Rep. 19. *Compare* Gordon *v.* Hostetter, 37 N. Y. 99; Storm *v.* Livingston, 6 Johns. (N. Y.) 44; Eddy *v.* Smith, 13 Wend. (N. Y.) 488; Garr *v.* Martin, 20 N. Y. 306; Byrnes *v.* Byrnes, 102 N. Y. 4.

1. Farrington *v.* Payne, 15 Johns. (N. Y.) 432; Draper *v.* Stowneval, 38 N. Y. 219; Herriter *v.* Porter, 23 Cal. 385; Cunningham *v.* Harris, 5 Cal. 81; The Kalamazoo, 9 Eng. L. & Eq. 558; Marble *v.* Keyes, 9 Gray (Mass.) 221; Folsom *v.* Clemence, 119 Mass. 473; Bennett *v.* Hood, 1 Allen (Mass.) 47; Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 331.

Trespass.—Where the taking of chattels is part of a trespass on land, both the taking and trespass are only one cause of action. Johnson *v.* Smith, 8 Johns. (N. Y.) 383.

But see Savage *v.* French, 13 Ill. App. 17, where it is held that breaking into a house and taking goods may at the election of the owner constitute two causes of action.

Possessed in Different Capacities.—The rule against bringing separate actions for separate articles obtains although the plaintiff was possessed of some in his own right and some in his right as trustee. Bringing suit as trustee for some of the chattels bars an individual suit for others. O'Neal *v.* Brown, 21 Ala. 482.

Fraud by Defendant.—Although the plaintiff was prevented from including some of the chattels by the fraudulent acts of the defendant, still he cannot recover their value. McCaffrey *v.* Carter, 125 Mass. 330. *Contra*, Moran *v.* Plankinton, 64 Mo. 337.

Replevin and Trover.—Where several articles are wrongfully taken in one act, the plaintiff cannot split the cause of action so as to sue for a part of them in replevin, and retain his right of action in trover for the residue. Funk *v.* Funk, 35 Mo. App. 246. See Moran *v.* Plankinton, 64 Mo. 337, Stevens *v.* Tuite, 104 Mass. 328; Bennett *v.* Hood, 1 Allen (Mass.) 47.

But an action of replevin against one for chattels does not bar replevin against another for the same chattels. Turner *v.* Brock, 6 Heisk. (Tenn.) 50.

2. Goodrich *v.* Yale, 8 Allen (Mass.) 454; Dick *v.* Webster, 6 Wis. 481; Hempstead *v.* Des Moines, 63 Iowa 36.

Trespassing of Cattle.—Where a trespass is continuous, as in the trespass of cattle upon land day after day, there is only one cause of action, either with respect to the means by which the trespass was committed, or as regards the time of its commission. De La Guerra *v.* Newhall, 53 Cal. 141. But a judgment in action for the trespassing of cattle is not a bar to a subsequent action for similar trespasses occurring prior to those alleged in the former action. De La Guerra *v.* Newhall, 55 Cal. 21.

Distinct Trespasses.—But where the trespasses are distinct there are separate causes of action. White *v.* Moseley, 8 Pick. (Mass.) 356; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207.

3. Adams *v.* Haffards, 20 Pick,

Slander, Malicious Prosecution, and False Imprisonment.—Every publication of slander is a new and distinct injury.[1]

A slander may be perpetrated by means of a malicious suit. In such case the party injured may at his option prosecute for either slander or malicious prosecution, but they are only one cause of action, and a recovery in one form bars the other.[2]

Every continuation of an illegal imprisonment is a new trespass.[3]

6. Claims with Reference to Real Property.—Claims for the recovery of land and rents are separate causes of action.[4]

Ejectment.—The law encourages the owner to recover all the parcels of his land in one ejectment suit.[5]

Specific Performance.—One cause of action for specific performance cannot be split into several actions against grantees of the vendor.[6]

Waste.—Different acts of waste constitute different causes of action.[7]

7. Fraud and Concealment by Defendant.—A fraudulent concealment of a cause of action by the defendant will justify the plaintiff in splitting it.[8]

(Mass.) 127. The same quarrel may give a cause of action to each combatant. Cade *v.* McFarland, 48 Vt. 48.

1. Woods *v.* Pangburn, 75 N. Y. 495; Thomas *v.* Rumsey, 6 Johns. (N.Y.) 31; Rockwell *v.* Brown, 36 N. Y. 207.

Partners.—A joint judgment procured by partners in business in a slander suit is no bar to a separate suit by one of the partners on the same cause of action. Duffy *v.* Gray, 52 Mo. 528.

2. Sheldon *v.* Carpenter, 4 N. Y. 578; Jarnigan *v.* Flemming, 43 Miss. 710; Tidwell *v.* Witherspoon, 21 Fla. 359.

But a judgment in an action for malicious prosecution is not a bar to an action for slander for words uttered on a subsequent occasion, although alluding to the same general accusation. Rockwell *v.* Brown, 36 N. Y. 207; Woods *v.* Pangburn, 75 N. Y. 495.

3. Leland *v.* Marsh, 16 Mass. 389.

Malicious prosecution and false imprisonment are only one cause of action when they both relate to the issuance of the same warrant. Boeger *v.* Langenberg, 97 Mo. 390.

4. Walker *v.* Mitchell, 18 B. Mon. (Ky.) 541; Burr *v.* Woodrow, 1 Bush (Ky.) 602.

But a judgment for damages in an action of ejectment is a bar to a suit for rents received prior to such judgment. Stewart *v.* Dent, 24 Mo. 111.

And a recovery for use and occupation in ejectment bars an action for injury to the real estate during the period of occupation. Pierro *v.* St. Paul, etc., R. Co., 37 Minn. 314.

Georgia.—A recovery in ejectment bars an action for rents and profits. Cunningham *v.* Morris, 19 Ga. 583.

5. Bryan *v.* Spivey, 106 N. Car. 95. See Thames *v.* Jones, 97 N. Car. 121; Love *v.* Wilbourn, 5 Ired. (N. Car.) 344; Doe *v.* South, 10 Ired. (N. Car.) 237.

Where several tracts of land are prayed for in the same ejectment suit, recovery of one bars claims for the others. Woodin *v.* Clemons, 32 Iowa 280; Thompson *v.* McKay, 41 Cal. 221.

Forcible Entry and Detainer.—The issue embraced in a suit for the forcible entry and detainer of certain premises cannot be retried after judgment, because the subsequent suit may embrace premises not included in the first. Harvie *v.* Turner, 46 Mo. 444.

6. Agard *v.* Valencia, 39 Cal. 292.

And an entire contract to convey land cannot be so divided that a party can be compelled by speeific performance to convey different parcels to different persons or at different times. Stone *v.* Pratt, 25 Ill. 16.

A judgment in an action at law upon a covenant will not bar a suit for specific performance, although the same covenant was assigned in the action at law. Givens *v.* Peake, 1 Dana (Ky.) 225.

7. Rutherford *v.* Aiken, 2 Thomp. & C. (N. Y.) 281.

8. Johnson *v.* Provincial Ins. Co., 12 Mich. 216.

VII. JOINDER OF ACTIONS AT COMMON LAW—1. Common-Law States.—Seventeen States, the *District of Columbia*, and one Territory have not adopted what is technically termed the Reformed American Procedure. But most of these States have more or less legislated on pleading and practice, while some have practice acts, based more or less on the common law.[1]

Where it is not known at the time the first action is commenced that the defendants have possession of other property of the plaintiff than that sought to be recovered in that action, a second action may be brought for such additional property. Risley *v.* Squire, 53 Barb. (N. Y.) 280; Moran *v.* Plankinton, 64 Mo. 337; Bennett *v.* Hood, 1 Allen (Mass.) 47.

The rule prohibiting a multiplicity of suits has no reference to a case where the party has no knowledge of his means of redress. Moran *v.* Plankinton, 64 Mo. 337.

In the case of U. S. *v.* Throckmorton, 98 U. S. 66, Mr. Justice Miller uses this language: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, . . . these are reasons for which a new trial suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

Compare Pearce *v.* Olney, 20 Conn. 544; Wierich *v.* De Zoya, 7 Ill. 385; Kent *v.* Ricards, 3 Md. Ch. 392; Smith *v.* Lowry, 1 Johns. Ch. (N. Y.) 320; De Louis *v.* Meek, 2 Greene (Iowa) 55.

1. The following States adhere to the common-law practice more or less closely: *Delaware*, *District of Columbia*, *Florida*, *Illinois*, *Maine*, *Maryland*, *Massachusetts*, *Michigan*, *Mississippi*, *New Hampshire*, *New Jersey*, *New Mexico*, *Pennsylvania*, *Rhode Island*, *Tennessee*, *Vermont*, *Virginia*, *West Virginia*.

Alabama has a scheme of procedure very similar to *Tennessee*, and also has separate chancery courts; but as its Code, at least in its provisions as to joinder of actions, closely assimilates to the Reformed Procedure, it has been classified as a Code State.

Louisiana.—While *Louisiana* has a complete Code, both adjective and substantive, yet its Code of Procedure is as technical, at least in its nomenclature, as is the common-law procedure, and therefore it will be treated in this article together with the common-law States.

Maryland.—"Causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment; but the Court shall have power to prevent the trial of different causes of action together if, in the opinion of the Court, such trial would be inexpedient; and in such case the Court may, when the case comes on for trial, or before, direct separate cases to be docketed, and separate trials to be had in their order of priority, either immediately or at such time or times as the Court shall deem most equitable and just." § 33 Act of Simplification of *Maryland*. A count in debt cannot be joined with a count in assumpsit, and such misjoinder may be taken advantage of by motion in arrest of judgment. "The Act of 1856, ch. 112, § 33, authorized causes of action of whatever kind, except replevin and ejectment, to be joined in the same suit, provided they were by and against the same parties, and in the same right. But the code does not authorize such joinder of causes of action or counts, and if they are so joined, the misjoinder may be taken advantage of by the motion in arrest of judgment." Per Grason, J., in Canton Nat. B'l'dg Assoc. *v.* Weber, 34 Md. 669. See Swem *v.* Sharretts, 48 Md. 408.

New Mexico has, paradoxically it would seem, since her first settlers were of the Spanish race, adopted the common-law method of procedure. "All suits at law in the district courts shall be commenced by filing a declaration in the office of the clerk of the court, and the pleadings and practice

2. Joinder of Actions Dependent on Form.—At common law the joinder of actions was dependent on form. If two causes of action could be enforced by means of the same kind of original writ, they might be joined; otherwise not.[1] The rule was laid down that, "wherever the same plea could be pleaded and the same judgment be given on several counts, they could be joined in the same declaration."[2]

shall be according to the forms and rules of the common law; and all suits in equity shall be commenced by filing a bill in the office of the clerk of the court." § 1907 Compiled Laws *New Mexico* (1884).

Tennessee has what is termed a "Code," but as this State differentiates law and equity, and has chancery courts, and as its Code is not a sweeping one, it is classified here as a common-law State. "The declaration shall state the plaintiff's cause of action. It may contain several statements or counts. But where several distinct causes of action against the same party are joined, the court may direct separate trials of the issues." § 3606 Code *Tennessee* (1884). "Whenever the facts of the case entitle the plaintiff to sue for breach of contract, or, at his election, for the wrong and injury, he may join statements of his cause of action in both forms, or either." § 3442 Code *Tennessee* (1884) (Millikin and Vertrees).

1. "Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same suit, subject to certain rules which the law prescribes as to joining such demands only as are of similar quality or character. Thus, he may join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same action of debt. So, if several distinct trespasses have been committed, these may all form the subject of one declaration in trespass; but, on the other hand, a plaintiff cannot join in the same suit a claim of debt on bond and a complaint of trespass, these being dissimilar in kind. Such different claims or complaints, when capable of being joined, constitute different parts or sections of the declarations, and are known in pleading by the description of several counts." Stephen on Pleading, 267.

"**Forms of action . . . created artificial distinctions** which prevented causes of action from being joined, which in themselves might be conveniently tried together. We have seen that if a log of wood be thrown upon a man and breaks his arm, he must under the old law bring an action of trespass; but if he falls over the log after it has fallen, and breaks his arm, he must bring an action on the case; the difference in the forms of action consisting in the insertion or omission of the words *vi et armis*. Now if it so happened that a person had received injuries both ways, from the same person, he could not have joined the two causes of action in one suit, because trespass and case could not be joined. Forms of action created difficulties in two ways: first, in the application of the wrong form of action to a particular case; and secondly, in the misjoinder of forms of action. If a wrong form was applied, it was fatal to the action; and if causes of action were joined which the forms of action forbid, it was fatal too. The supposal of forms of action was that they were founded upon substantial distinctions which prevented incongruous and dissimilar causes of action from being inconveniently mixed together in the same suit. But this is not so. For causes the most dissimilar in their intrinsic nature might be joined under the doctrine of forms of action, while those most identically alike could not be joined. 'The plaintiff might join in one action a claim on a promissory note, on a breach of promise of marriage, and a complaint of negligence against an attorney; in a second he might join a claim for criminal conversation with trespass to his person, his lands, or his goods; in a third he might sue for the seduction of his daughter, infringing his patent, and for negligently driving over, and for slandering him; because in all these cases the form of action was the same.' The joinder, therefore, of the most incongruous causes of action might occur under the old procedure with its forms of actions supposed to guard against it." *Per* Tyler in his "Treatise on the *Maryland* Procedure," 41, 42.

2. Thus the first count was **trover**

3. Single Cause of Action.—In common-law joinder, as well as in joinder under the Code, the question as to whether the matter constitutes a single cause of action, or more than one, is material and relevant. Of course, if the matter only makes one cause of action, no question of misjoinder can arise. But as to what constitutes a single cause of action, the common-law States are, like the Code States, somewhat divided, especially in reference to its bearing on joinder.[1]

for a dog. The second and third counts were on the custom of the realm against the carrier for not safely delivering the dog. It was held a proper joinder. "Perhaps the rule of judging whether two counts can be joined, by considering whether the same judgment can be given on both, is not true in its extent; but by adding another requisite it is universally true. For wherever the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration. Assumpsit and tort cannot be joined together, because the pleas to both are not the same. But the whole of this is case; the same plea of not guilty goes to the whole declaration; and the court may give the same judgment on the whole. The common way of declaring against a carrier now is in assumpsit, to which trover cannot be joined; but if the plaintiff declare on the custom of the realm, a count in trover may be joined; it only depends on the form of the action." *Per* Buller, J., in Brown *v.* Dixon, 1 T. R. 276.

1. **Injury to Person and Property by Same Act.**—Where a person is injured in his person and property by the same negligent act, he may declare for damages, both to his person and property, in one count, or he may declare for each separately, in different counts. Chicago West Div. R. Co. *v.* Ingraham, 131 Ill. 659. See Baltimore, etc., R. Co. *v.* Ritchie, 31 Md. 191, where it was held that the injuries could be united and counted on in the same count. See also Brunsden *v.* Humphrey, 14 Q. B. Div. 141.

Action for Suborning Witnesses.—A declaration in an action for suborning witnesses to defame the character of the plaintiff, each count of which alleges a series of connected acts as parts of a scheme designed to defame the plaintiff, sets out but one cause of action. Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Dec. 279.

Bond not Merged by Parol Promise.—Where a party, being liable upon a replevin bond, promised in writing to pay the amount of his liability by the next term of court if no suit was brought on the bond, but the bond was not released, it was held that no action would lie upon the subsequent promise, as it could not merge or destroy the higher security. Leland *v.* Barry, 69 Ill. 348.

Injuring Plaintiff and his Child.—It is improper to join a count for injuring the plaintiff by a train and for killing his child at the same time. Specht *v.* Railroad Co., 7 Pa. Co. Ct. Rep. 54.

Contract and Note.—The plaintiff cannot be required to elect between a contract and a promissory note where both are parts of the same transaction and the action is based on both. Plano Mfg. Co. *v.* Parmenter, 30 Ill. App. 569.

Consolidation of Suits in Equity.—Upon a motion to consolidate suits in equity, the only inquiry is in respect to the identity of the subject-matter involved. Such a motion is addressed to the discretion of the court, and courts of error will not interfere unless it is clear that such discretion has been greatly abused. Woodburn *v.* Woodburn, 23 Ill. App. 289.

Separate Breaches.—A declaration upon the covenants in a deed averred the making of covenants of seizin, of power to sell, and of warranty, only; the breach included not only these, but also covenants against incumbrances and for quiet enjoyment. The defendant assigned as a ground for demurrer that this one count set forth more than one cause of action. *Held*, that as all these causes of action were of the same nature, and could be answered by one plea, they might be joined in one count; that the separate breaches were to be regarded as so many distinct counts. Brady *v.* Spurck, 27 Ill. 478.

4. Inconsistent Counts.—The common-law states somewhat assimilate their rulings on the subject of inconsistent counts to the Code states. As under the Codes, where two causes of action are on their face inconsistent, they cannot be joined.[1]

Libel Published on Different Days.—Where libellous articles are published upon different days, each article constitutes a separate cause of action, but all may be joined in the same declaration. Randall *v.* Gartner, 96 Mich. 284.

Wrongful Acts Aimed at a Single Result.—A series of wrongful acts, all aiming at a single result and contributing to the injury complained of, to wit, the destruction of one's business, credit, and reputation, may be counted upon collectively, as producing that result, in an action on the case. Oliver *v.* Perkins, 92 Mich. 304.

Flooding Land.—In a suit to recover damages caused by the alleged wrongful flooding of plaintiff's land by the use of flash-boards on defendant's dam, the declaration may cover several years if it alleges that the flooding was caused *each* year by the use of said flash-boards. Hamilton *v.* Plainwell Water Power Co., 81 Mich. 21.

Reserved as One Cause on Appeal.—Several original bills in chancery and cross-bills filed by creditors and lienholders of a defendant company, involving a settlement of various and conflicting claims and liens upon substantially the same property, were heard together, by consent, and under an agreement of all parties that all the evidence in any one or more of the causes should apply to every other of the suits, so far as applicable, and the evidence was preserved by one common certificate. *Held*, that as the causes were heard and determined as one cause in the trial court, the same might well be reviewed, on appeal or error, in the same manner, as one cause. Chicago, etc. R. Co. *v.* Peck, 112 Ill. 408.

Separate Cars Destroyed by Fire.—In an action by a rolling-stock company against a railroad company engaged in the general business of switching cars to recover the value of several leased cars which were destroyed in the same conflagration, said cars having been switched at different dates, it was held that if the plaintiff has a cause of action, it has a separate one for each car; that the fact that the declaration was amended after the cause of action was barred as to one of the cars, so as to include such car and to make appellees the parties plaintiff, did not have the effect of reviving the claim as to said car; that the owner of the car was the proper party to bring the suit; and that such owner was in no way bound by contracts existing between the defendant and its lessee. Peoria, etc., R. Co. *v.* U. S. Rolling Stock Co., 28 Ill. App. 79.

Plaintiffs Different.—Where the plaintiffs in two suits are different, the court has no authority to consolidate on a motion of the defendants alleging that the suits make only one cause of action. Miles *v.* Danforth, 37 Ill. 156.

Louisiana.—Two or more demands, not exclusive of each other, may be properly cumulated in one suit. Tertron *v.* Durand, 29 La. Ann. 506.

Michigan.—The right of action given by How. Sts. § 8314, to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under Act No. 113, Laws of 1885 (3 How. Sts. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced into a cause based upon the right given under the first statute cited, by way of amendment to the declaration. Hurst *v.* Detroit City R. Co., 84 Mich. 539.

1. Consolidation Coal Co. *v.* Shannon, 34 Md. 144; McLennan *v.* McDermid, 50 Mich. 381; Barton *v.* Gray, 57 Mich. 623; Gott *v.* Superior Court, 42 Mich. 625. But it is not necessary that special counts in assumpsit should be harmonious, even when the same instrument is set out in each as the foundation of the action. Barton *v.* Gray, 48 Mich. 164. See Hall *v.* Woodin, 35 Mich. 67; Wyman *v.* Crowly, 33 Mich. 84; Wetmore *v.* McDougall, 32 Mich. 276; Berringer *v.* Cobb, 58 Mich. 557; Portage Lake Miners, etc., Ben. Soc. *v.* Phillips, 36 Mich. 22; Watson *v.* Watson, 49 Mich. 540.

Breach of Contract and Rescission.—Counts for breaches of a contract and

5. **Debt.**—Any cause of action which can be brought by means of the action of debt may be joined with any other cause of action which can be so brought. It is immaterial whether one cause of action is on a sealed instrument and the other on a parol contract.[1]

counts for rescinding a contract cannot be joined. Toledo, etc., R. Co. *v.* Jacksonville Depot Bldg. Co., 63 Ill. 308. But counts in the declaration for a rescission provided for by contract, and for a rescission because of fraud, are not repugnant. Pearsoll *v.* Chapin, 44 Pa. St. 9; but a count for damages for the fraud and one for a rescission would be. *Ibidem.*

Where a contract provides that a chattel sold is good, and if not, will be made good, the right to return it in case of failure is in pursuance and not in avoidance of the contract, and a count for breach of warranty is not inconsistent with one averring return, or with the common count for money had and received. Kimball, etc., Mfg. Co. *v.* Vroman, 35 Mich. 310, 24 Am. Rep. 558.

Breach of Warranty and Fraud.—Counts for breach of warranty in the sale of a chattel and for fraud practised in the sale are not inconsistent. Counts for fraudulent representations of soundness in the sale of a horse, and for a breach of warranty of soundness in the sale of the same horse, may be united. Patterson *v.* Kirkland, 34 Miss. 423.

A special count in assumpsit for a breach of warranty on the sale of a horse, and a second count for the recovery of money paid without consideration, setting up the circumstances under which it was obtained, and that the horse purchased was absolutely without value, are not inconsistent, and plaintiff cannot be compelled to elect upon which he will proceed. Murphy *v.* McGraw, 74 Mich. 318.

Note and its Consideration.—A count upon a promissory note and one upon the precedent demand upon which the note was founded may be joined in the same declaration. Kennel *v.* Mungey, Peck (Tenn.) 273.

Expulsion from Premises, and Assault and Battery.—A count for assault and battery is not inconsistent with one for wrongful expulsion from premises.

A declaration in case contained two counts, one of which alleged the wrongful expulsion of plaintiff from premises occupied, and the other an assault and battery. *Held*, that as no inconsistency between these counts was pointed out, there was no error in refusing to require an election between them. Taylor *v.* Adams, 58 Mich. 187.

Trespass for Injuries and Contract in Settlement. — A contract which liquidates a tort merges it, and a cause of action for the tort is inconsistent with one on the contract. A declaration containing a count in trespass for personal injuries, and a count upon a contract made in settlement of plaintiff's claim for damages for such injuries, is bad for repugnancy on demurrer. Henderson *v.* Boyd, 85 Tenn. 21.

Principal and Agent.—In suits by a principal against his agent, a count based upon the duty of the agent, as such, is inconsistent with a count which shows that the agent was not such, but a party to a contract with the principal. A declaration in a suit by a principal against an agent averring the duty of the agent to pay to the principal certain moneys and property received by him upon a mortgage belonging to the principal, and sufficient in amount to pay the same in full, and also counting upon the promise of the agent that, if the principal would make a sale of the mortgaged premises under a decree before then taken on a foreclosure of the mortgage, he would pay him any deficiency arising on such sale, sets forth two inconsistent causes of action. Perkins *v.* Hershey, 77 Mich. 504.

Recovery on One Count.—Joinder of repugnant counts in the same declaration does not preclude recovery on one of them. Berringer *v.* Cobb, 58 Mich. 557. See also Ives *v.* Williams, 53 Mich. 636.

1. Chitty on Pleadings (16th Am. ed.), 222; Bacon Abr., Actions, C.; Com. Dig., Actions, G.; 2 Vin. Ab., pl. 42; Tidd Pr. 10, 11; Barclay *v.* Moore, 17 Ala. 634; Union Cotton Mfg. Co. *v.* Lobdell, 13 Johns. (N. Y.) 462; De Proux *v.* Sargent, 70 Me. 266; Smith *v.* First Congregational Meetinghouse,

6. Trover and Case.—Trover and case may be joined.[1]

8 Pick. (Mass.) 178; Van Deusen *v.* Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Mardis *v.* Terrell, Walk. (Miss.) 327; Bogardus *v.* Trial, 2 Ill. 63; Beardsley *v.* Southmayd, 14 N. J. L. 534.

Debt and Assumpsit cannot be joined. Chitty on Pleadings (16th Am. ed.), 222; Adams *v.* Hardin, 19 Ill. 273; Rutan *v.* Hopper, 29 N. J. L. 112; American Linen Co. *v.* Sheldon, 31 N. J. L. 420; Graines *v.* Craig, 24 Ark. 477.

Debt and Detinue.—Counts in debt and detinue may be joined. Chitty on Pleadings (16th Am. ed.), 222; 2 Saunders 117; Bedford *v.* Alcock, 1 Wils. 252; Dalston *v.* Janson, 5 Mod. 92; Calvert *v.* Marlow, 18 Ala. 67. An action of debt in the debet and detinet cannot be maintained against a person in his own right and as executor. Watson *v.* Dickey, Tapp. (Ohio) 235.

Debt and Covenant cannot be joined. Chitty on Pleadings (16th Am. ed.), 222; Brumbaugh *v.* Keith, 32 Pa. St. 327.

The Action of Debt Very Technical.—The action of debt was very technical at common law, and the courts often used very slight distinctions to differentiate it from assumpsit; and statutes often gave rise to the question as to whether the action could be maintained. See Chitty on Pleadings, action "Debt," *passim*.

Where the declaration contained counts on the record of a judgment and a common count for interest, and contained the words "in consideration of the indebtedness the defendant undertook and then and there faithfully promised to pay the same when thereunto afterwards requested," *held*, that this made the latter a count in assumpsit, and that it is error to join counts in debt and assumpsit in the same declaration. Had the word "agreed" been used in the common count, instead of "promised," it would have been a count in debt. Guinnip *v.* Carter, 58 Ill. 296.

Virginia Statute Respecting the Requisition of Bail.—Debt on a specialty and on a *mutuatus* or other simple parol contract may be joined in the same action, the rule of common-law practice not being at all varied, in this respect, by the statute of *Virginia* respecting the requisition of bail upon the process, and the right of appearance bail to defend the action. Eib *v.* Pindall, 5 Leigh (Va.) 141.

1. Chitty on Pleadings (16th Am. ed.), 222; Brown *v.* Dixon, 1 T. R. 274; Mast *v.* Goodson, 3 Wils. 348; Smith *v.* Goodwin, 4 B. & Ad. 413, 24 E. C. L. 89; Horsely *v.* Branch, 1 Humph. (Tenn.) 199; Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472; Wait *v.* Kellogg, 63 Mich, 138; Ayer *v.* Bartlett, 9 Pick. (Mass.) 160; McConnell *v.* Leighton, 74 Me. 415; Blackstone Bank *v.* Lane, 80 Me. 165.

Count in Assumpsit.—In a declaration on the case, one count stated that the plaintiff at the request of the defendant had caused to be delivered to him certain pigs, to be taken care of by the defendant for plaintiff, and in consideration thereof defendant undertook and then and there agreed with the plaintiff to take care of the pigs and to redeliver them on request. *Held*, on motion in arrest of judgment, that this was a count in assumpsit, and could not be joined with counts in case. Corbett *v.* Packington, 6 B. & C. 268, 13 E. C. L. 170.

A count stating "that defendant had and received for plaintiff a sum of money, to wit, 10s., to be paid by defendant to plaintiff upon request; yet defendant, not regarding his duty, had converted and disposed thereof to his own use," is laid in assumpsit, though colorably in trover, and cannot be joined with counts in case; and it is demurrable generally, though the demurrer goes only to that particular count. Orton *v.* Butler, 2 Chit. Rep. 343, 18 E. C. L. 361.

Count in Case.—A count stating that the plaintiff had delivered a note to the defendant to get it discounted, and account with the plaintiff for the money raised on it, and that the defendant received the note for that purpose, but, intending to defraud the plaintiff, had not, though requested, accounted with him, etc., is laid in tort (whether formal or not in its frame) and not in assumpsit; and no objection can be taken upon a general demurrer to the whole declaration because such count was joined with a count in trover. Samuel *v.* Judin, 6 East 335. See Remarks of Ellenborough, C.J., on joinder.

7. **Assumpsit.**—The action of assumpsit is one brought to recover damages for the breach of a contract not under seal. All causes of actions enforceable in assumpsit may be joined.[1] Sometimes other matters have been held either joinable or not joinable with assumpsit.[2]

8. **Trespass.**—Several distinct trespasses may be joined in the same declaration in trespass.[3]

Trover and Fraud.—It is doubtful whether a count for trover and a count for fraud in the sale of a horse can be joined in the same declaration, without an allegation that the contract has been rescinded. Kennet *v.* Robinson, 2 J. J. Marsh. (Ky.) 96.

1. Chitty on Pleadings (16th Am. ed.), 222; Appleman *v.* Michael, 43 Md. 269; Bruen *v.* Ogden, 18 N. J. L. 125; McDowell *v.* Oyer, 21 Pa. St. 417; Hallock *v.* Powell, 2 Cai. (N.Y.) 216; Boylston *v.* Sherman, 31 Ala. 538; Livingston *v.* Pippin, 31 Ala. 542.

2. **Covenant and Assumpsit.**—Counts in covenant and the common counts in assumpsit cannot be joined. Maguire *v.* Rabenau, 16 W. N. C. (Pa.) 479; Smaltz *v.* Hancock, 118 Pa. St. 550.

Tort and Assumpsit cannot be joined. Wickliff *v.* Davis, 2 J. J. Marsh. (Ky.) 69.

Assumpsit and Trover cannot be joined. Little *v.* Gibbs, 4 N. J. L. 212; Howe *v.* Cook, 21 Wend. (N. Y.) 29.

Warranty and Fraud.—A count on a warranty and another for fraud in the sale of a slave cannot be joined. Carstarphen *v.* Graves, 1 A. K. Marsh. (Ky.) 435.

Tort and Contract Connected.—A plaintiff may join in the same petition a cause of action on a contract and a cause of action for fraud or negligence directly connected with the contract. Jones *v.* Johnson, 10 Bush (Ky.) 649.

Award, Assumpsit, and Covenant.—Counts on an award, simple contract, and specialty may be joined. Brown *v.* Warnock, 5 Dana (Ky.) 494.

Gravamen being either Tort or Contract.—Where a declaration contained several counts, in each of which the gravamen stated was a tortious breach of the defendant's duty as an attorney, as well as of the implied promise arising from an employment for him, *held*, that as each count contained allegations sufficient to support it, either in tort or assumpsit, they were not incompatible, and might be joined in the same declaration. Church *v.* Mumford, 11 Johns. (N. Y.) 479.

Count Held one in Tort.—A count charging that the defendant, in consideration that the plaintiff would sell him a horse worth $60, agreed to pay $60 in notes on the Bank of the United States of the value of $60, but that he fraudently paid in spurious notes on that bank, may be joined with a count charging deceit and a fraudulent representation that the notes were genuine. Lane *v.* Hogan, 5 Yerg. (Tenn.) 290.

Cause of Action Cannot be Divided.—A cause of action under a special contract cannot be so divided that recovery can be had partly on a general count and partly on a special. Beecher *v.* Pettee, 40 Mich. 181.

3. Chitty on Pleadings (16th Am. ed.), 222; Ferguson *v.* Terry, 1 B. Mon. (Ky.) 96; Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678; Barton Coal Co. *v.* Cox, 39 Md. 17, 17 Am. Rep. 525.

Obstructing Way.—Counts for obstructing a private way may be joined with others for obstructing a highway. Lansing *v.* Wiswall, 5 Den. (N. Y.) 213.

Trespass and Rescous.—D. sued B. before a justice by a summons in trespass on the case, and declared for a trespass, for breaking his close by the hogs of the defendant, and also for a pound breach or rescous. The two causes of action were allowed to be joined. Baker *v.* Dumbolton, 10 Johns. (N. Y.) 249.

Trespass and Trover.—Trespass *vi et armis* and trover cannot be joined. Cooper *v.* Bissell, 16 Johns. (N. Y.) 146; not a Code case.

Trespass and Case cannot be joined. Sheppard *v.* Furniss, 19 Ala. 760; Bell *v.* Troy, 35 Ala. 184; Bordentown Co. *v.* Camden R. Co., 17 N. J. L. 317; Dale Mfg. Co. *v.* Grant, 34 N. J. L. 142; Sollenberger *v.* Schnader (Pa.), 4 L. Bar, Dec. 14, 1872; Brant *v.* Lorenz, 34 Leg. Int. (Pa.) 115; Dalson *v.* Brad-

9. Actions ex Contractu and Actions ex Delicto.—The common-law procedure inhibits the joinder of causes of actions *ex contractu* and those *ex delicto*.[1] In the note will be found a collection of cases involving questions of construction, as to whether they sounded in tort or contract.[2]

berry, 50 Ill. 82; Harwood *v.* Tompkins, 24 N. J. L. 425; Waggoner *v.* White, 11 Heisk. (Tenn.) 741.

Distinction Between Case and Trespass Abolished.—Some states have abolished the distinction between trespass and case, and causes of action heretofore classified under either action may now be joined. Goodloe *v.* Potts, Cooke (Tenn.) 399; Moore *v.* Thompson, 92 Mich. 498; Haskins *v.* Ralston, 69 Mich. 63, 13 Am. St. Rep. 376; Shepherd *v.* Staten, 5 Heisk. (Tenn.) 79; Moulton *v.* Smith, 32 Me. 406; Barker *v.* Koozier, 80 Ill. 205; Krug *v.* Ward, 77 Ill. 603; Nybladh *v.* Herterius, 41 Fed. Rep. 120; Williams *v.* Bramble, 2 Md. 313; Barr *v.* White, 22 Md. 259; Gent *v.* Cole, 38 Md. 110.

Statutes Liberally Construed.—How. Mich. Sts. § 7759 removes all objection to the joinder of a count in trespass with one in case, in the same declaration, and should be liberally construed by the courts. Therefore a count for obstructing a navigable river with saw-logs so that plaintiff could not use it in floating his logs and timber; a count for a like obstruction at another time, by which he lost the sale of his logs; a count for breaking booms and chains, and setting his logs adrift; and a count for breaking said booms and chains at another time by reason of which plaintiff was put to expense in recovering his logs—may all be joined. Bellant *v.* Brown, 78 Mich. 294.

Doctrine Limited.—It is only in the form of declaring, and not in any matter of substance, that the Rev. Sts. Me. c. 115, § 13, has abolished the distinction between trespass and case. An allegation of breaking and entering into land is of substance and not of form merely. To a declaration in trespass *quare clausum*, alleging immediate acts of injury to land, an amendment, introducing a count, framed as in case, alleging damages to have been consequential, is not allowable. Sawyer *v.* Goodwin, 34 Me. 419.

1. Chitty on Pleadings (16th Am. ed.), 222; Beasley *v.* Bradley, 2 Swan (Tenn.) 180; Holland *v.* Pack, Peck (Tenn.) 151; Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250; Soper *v.* Jones, 56 Md. 503; Penniman *v.* Winner, 54 Md. 127; Township *v.* Railroad Co., 2 Del. Co. Ct. Rep. (Pa.) 9; Noble *v.* Laley, 50 Pa. St. 281; Ryle *v.* Howlet, 3 Bibb (Ky.) 348; Louisville, etc., Canal Co. *v.* Rowan, 4 Dana (Ky.) 607; Trundle *v.* Arnold, 7 J. J. Marsh. (Ky.) 407; Wilson *v.* Marsh, 1 Johns. (N. Y.) 503.

2. A Count on Contract Changed to Tort.—Where the defendant, "for value received, promised to pay the plaintiff a sum of money if and when the defendant should recover his demands against A.," it was held competent for the plaintiff to prove that the defendant had no demands against A. (and so the promise was absolute), or that he had not used due diligence to collect them. A count upon such contract, alleging that the promisor, intending to wrong the plaintiff, had never attempted to recover his demands against A., cannot be joined with a count in assumpsit. Tort and contract cannot be joined. White *v.* Snell, 5 Pick. (Mass.) 425.

Count for not Building a Wagon-way.—A count in tort against a railroad company for not building a wagon-way over their road where it crosses a farm, as required by their charter, cannot be joined with a count to recover the cost of a wagon-way which the plaintiff had erected over the road, after twenty days' notice, which by their charter the company in such case were liable to pay. One count is founded on tort, the other on contract. Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

Damages for Sale of Liquor and for Money Paid.—A count for damages for the unlawful sale of liquor cannot include a claim for the recovery of the money paid. Friend *v.* Dunks, 37 Mich. 25.

Adding a Damnum Clause.—Misjoinder in a single count of two incompatible causes of action, such as tort and assumpsit, is cured by judgment if no demurrer or other objection is interposed. Adding a single *ad damnum* clause "for the damages as aforesaid suffered" will not cure the

10. Penalties.—Actions on statutes giving penalties often give rise to the question, in what form should the action be brought.

misjoinder of causes of action in assumpsit and case. Schafer *v.* Boyce, 41 Mich. 256; Friend *v.* Dunks, 39 Mich. 733.

Count Setting Forth a Cause of Action on Contract.—When a count in a declaration sets forth a cause of action arising out of a contract, and maintainable only by referring to the contract as creating the right for violation of which the plaintiff complains, a recovery can be had only in an action on contract, and not in an action for tort. Such a count cannot be joined with counts in tort. McDermott *v.* Morris Canal, etc., Co., 38 N. J. L. 53.

Count Added after Arbitration. — A count in assumpsit cannot be joined with acount for a deceit; and, where added after an award of arbitrators, and an appeal therefrom by the defendant, under a declaration containing a count for deceit only, it was properly stricken off by the court on the trial. Pennsylvania R. Co. *v.* Zug, 47 Pa. St. 480.

Withdrawal of Count.—While it is true that counts declaring for damages *ex contractu* may not be joined with counts for damages *ex delicto*, yet if on the trial under the plea of not guilty the court withdraw the counts *ex contractu* from the consideration of the jury, the defendant suffers no harm. Erie City Iron Works *v.* Barber, 118 Pa. St. 6.

Judgment Arrested. — Where there were two counts in a declaration—one in assumpsit, founded on the alleged promise of the defendant; the other for negligence or want of care of the defendant, and sounding in tort—and issue was joined upon the plea of non-assumpsit, and a general verdict was rendered for the plaintiff, upon motion judgment was arrested. Peabody *v.* Kingsley, 40 N. H. 416. See Boody *v.* Watson, 64 N. H. 162.

Allegation Sounding in Contract.—A suit being brought for fraudulent representations in the sale of the right to sell a certain invention, the plaintiff also alleged that defendant failed to deliver to plaintiff a certain number of the patented articles as agreed. *Held*, that this latter allegation was not a cause of action sounding in contract, but was an allegation of defendant's fraudulent scheme, and was joinable with the former. Iowa Economic Heater Co. *v.* American Economic Heater Co., 32 Fed. Rep. 735.

Joinder by Consent.—A count for money had and received may be joined by consent with counts for deceit for falsely representing that one was a creditor of the government, and thereby obtaining a certificate of stock in the public funds. Fenemore *v.* U. S., 3 Dall. (U. S.) 357.

Mere Negligence.—Counts requiring different pleas and judgments cannot be joined. A count ascribing to the defendant's mere negligence the loss of a negro whom he, as hirer, was bound to redeliver is a count in tort, and may be joined with another in trover. Angus *v.* Dickerson, Meigs (Tenn.) 458; Baxter *v.* Pope, Meigs (Tenn.) 467.

Deceit and Assumpsit.—Counts in deceit and assumpsit cannot be joined. Crooker *v.* Willard, 28 N. H. 134.

Against Bailee.—A count against a bailee for neglect of duty may be joined with others *ex delicto*. Pettit *v.* Sanger, 2 Pearson (Pa.) 84.

Partly Breach of Contract.—A complaint consisting partly of breach of contract and partly of misfeasance, in which the plea is not guilty, may be joined with trover. Smith *v.* Rutherford, 2 S. & R. (Pa.) 358.

Against Sheriff.—Where, in an action against the sheriff, the plaintiff's declaration contained one count in case against him as sheriff for so negligently executing the writ as to cause plaintiff to lose his debt, and another in trover and conversion against him individually for the value of the goods, such joinder is not error, for they are both actions on the case, the plea and judgment being the same in each. Patterson *v.* Anderson, 40 Pa. St. 359, 80 Am. Dec. 579.

Trover and Negligence.—Trover may be joined with case for negligence. McCahan *v.* Hirst, 7 Watts (Pa.) 175.

Action for Fraudulently Getting Possession of a Policy of Insurance.—Where an insurance company had obtained possession, from the guardian of the beneficiaries, of the policy of insurance by means of a fraudulent settlement with him, *held*, that the beneficiaries could sue the company for fraud and for conversion; that is, case and trover

Generally, it is a question of the construction of the statute.[1] After it is determined in what form the action is to be brought, other causes of action, remediable by the same form, may be joined.[2]

could be joined. Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626.

Count Held to be One in Assumpsit.—A count the gist of which is that the parties agreed to make a joint purchase of certain land, each to pay one half the price, and that defendant made the purchase for fifteen hundred dollars, but represented to plaintiff that the price paid was two thousand dollars, and thereby induced him to pay one thousand dollars instead of seven hundred and fifty dollars as his share, and which seeks to recover back the amount thus procured from the plaintiff in excess of his share of the actual purchase-price, with interest thereon, embodies the subject of a good count in assumpsit, and may be joined with the common counts. Young *v.* Taylor, 36 Mich. 25.

Option to Sue in Special or General Counts.—One who had contracted to deliver all his lumber sold part of it to third persons. *Held*, that recovery might be sought against him under common and special counts in the same declaration. The special count would lie for breach of contract or wrongful conversion or both, and the common counts for the conversion. Hart *v.* Summers, 38 Mich. 399.

Count Held to be One in Case.—A declaration in a plea of trespass on the case, which was evidently intended to claim damages for defendant's wrongful act in permitting plaintiff's horse to be turned into a pasture, knowing of the existence of disease among the other horses therein, was held a declaration in case and not in assumpsit. Costello *v.* Ten Eyck, 86 Mich. 348, 24 Am. St. Rep. 128.

Tennessee. — Counts in assumpsit, tort, and upon the facts of the case may be united in a declaration. Louisville, etc., R. Co. *v.* Guthrie, 10 Lea (Tenn.) 432.

Pennsylvania.—A count in the nature of deceit may be joined with the common counts in assumpsit. Jones *v.* Conoway, 4 Yeates (Pa.) 109.

Michigan. — *Ruling in Bellant v. Brown Limited.*—A count in trover cannot be joined with one in trespass nor with one in assumpsit. A count in a declaration which recites that the plaintiff was a lessee of the defendants, and in the possession of a certain room, and that it was defendants' duty to permit the plaintiff to occupy the room as their tenant, and that, in disregard of this duty, the defendants fastened up the door of the room and prevented plaintiff from entering, sets up a trespass. What was said in Bellant *v.* Brown, 78 Mich. 297, relative to the joinder of trespass and case must be construed as limited to cases in which either form of action is permissible. Therefore trespass to real property and conversion of personal property cannot be joined. Haines *v.* Beach, 90 Mich. 563.

1. **Actions for Different Penalties** may be joined. Holland *v.* Bothmar, 4 T. R. 229; Young *v.* Rex, 3 T. R. 103; 2 Vin. Ab. 44, pl. 49.

2. **Trespass and Penalty.**—A count on debt for the statutory penalty for cutting trees, and a count on trespass for damages, cannot be joined. Elder *v.* Hilzheim, 35 Miss. 231.

Enticing Away Servants.—Counts for a penalty founded on statute, for enticing away servants, may be joined with counts for common-law damages for enticing away servants. Hays *v.* Borders, 6 Ill. 46.

All for Same Cause of Action.—Where there are three counts in a declaration in trespass to recover damages for personal injuries received by the plaintiff from the dogs of defendants, two of which counts are founded on the common-law liability for such injury, and the other based upon a special statute, it cannot be said as a legal proposition, that they are all for the same cause of action. Swift *v.* Applebone, 23 Mich. 252.

Taking Illegal Fees.—A count for taking illegal fees cannot be joined with other counts in case, for a tort. Denoon *v.* Binns, 2 Clark (Pa.) 397.

Trover and Penalty.—Trover cannot be joined with an action to recover the penalty of double damages, for distress and sale, where no rent is in arrears and due. Smith *v.* Meanor, 16 S. & R. (Pa.) 375.

Injury from Defect in Bridge.—A count

11. Touching Real Estate.—Where real estate forms the subject-matter of the suit, certain matters have been held either properly or improperly joined. The cases will be found in the note.[1]

at common law claiming damages for an injury sustained in consequence of a defect in a bridge may be joined with a count on St. 1786, c. 81, § 7, claiming double damages for the same injury, the form of the action being the same in both counts. Worster *v.* Canal Bridge, 16 Pick. (Mass.) 541; Heridia *v.* Ayres, 12 Pick. (Mass.) 334.

Form of Action Same.—A count on a statute, for double damages, may be joined with a count at common law for damage of like kind, where the form of action given by the statute is the same as that at common law. Fairfield *v.* Burt, 11 Pick. (Mass.) 244.

Count Held One for Penalty.—A count in trespass for cutting down and carrying away a tree from the plaintiff's land, which commences like a count in trespass *q. cl. fr.*, but concludes with an allegation that the trespass is "contrary to the statute in such case made and provided, whereby the plaintiff is entitled to recover of the defendant treble the aforesaid value of said tree, etc.," will be construed to be a count for the penalty prescribed by the statute, and not a count in trespass at common law. Keyes *v.* Prescott, 32 Vt. 86.

Debt the Remedy to Recover Penalty for Cutting Trees.—Trespass, to recover the statutory penalty for wilful cutting of trees, cannot be joined with trespass for breaking and entering the plaintiff's close, nor with trespass for taking and carrying away goods. Debt, and not trespass, is the proper remedy to recover such a penalty. Morrison *v.* Bedell, 22 N. H. 234.

Treble Damages.—The treble damages given by the provincial act of 1 Geo. II, c. 4, are to be sued for in an action of trespass. Prescott *v.* Tufts, 4 Mass. 146.

Against Witness for Non-Attendance.—In an action against a witness for non-attendance, a count in case, and one in debt for the penalty, may be joined. Smith *v.* Merwin, 15 Wend. (N. Y.) 184.

Penalty for Extortion.—Counts in debt for the statute penalties for extortion may be joined with one for money had and received, where the entire recovery goes to the party aggrieved. Spence *v.* Thompson, 11 Ala. 746.

1. **Forcible Entry and Unlawful Detainer.**—A proceeding to recover against a "forcible entry" and one to recover against an "unlawful detainer" cannot be joined in one complaint under the forcible entry and detainer statute. Liddon *v.* Hodnett, 22 Fla. 271; Walls *v.* Endel, 17 Fla. 478.

Land and Mesne Profits.—The act of December 20, 1859, authorizing a recovery in an action of ejectment "of the land in controversy, together with mesne profits," combined the action of ejectment with the common-law action of trespass *vi et armis* for mesne profits. In this action damages for the detention of the land may be recovered from the initial date of the detention to the trial of the cause. Ashmead *v.* Wilson, 22 Fla. 255.

Suit in Equity to Recover Land.—A suit in equity to recover the possession of lands under a legal title, and for mesne profits, cannot be maintained. All the issues of law and fact in regard to the title and the rents and profits may be tried in a court of law. Cavedo *v.* Billings, 16 Fla. 261.

Bill to Set Aside Deed and for Rents and Profits.—A bill in equity to set aside a deed or mortgage cannot be sustained without the presence of the grantee or mortgagee; and with such matters cannot be joined a demand for rents and profits. Mattair *v.* Payne, 15 Fla. 682.

Ejectment and Specific Performance.—It is improper to unite an action for specific performance against one party, and an action of ejectment against another, in the same suit. Where making a person a party defendant to a complaint seeking a specific performance would have this effect, a motion to be made a party defendant should be denied. Fagan *v.* Barnes, 14 Fla. 53.

One Count.—A declaration which contained but one count, in which the plaintiff declared on all the covenants in the deed, being the covenant of seizin, of freedom from incumbrances, and to warrant and defend, *held*, bad. Hacker *v.* Storer, 8 Me. 228.

Land Twice Demanded in a Writ of Right.—If the same land is twice de-

12. Certiorari and Mandamus.—Certiorari and mandamus cannot be joined in one writ.[1]

13. Replevin.—Joining two counts in a writ of replevin is bad.[2]

14. Slander and Malicious Prosecution.—Slander and malicious prosecution may be joined.[3]

15. Statement of Same Cause in Different Forms.—Closely allied with the subject of joinder is that of the statement of the same cause of action in different counts. At common law the pleader could insert as many counts as he chose, provided they were all in the same form of action. The object of this was to guard against the danger of an insufficient statement, and the contingency that the evidence might not support the case.[4] Some of the common-law states allow a plaintiff to state his cause of action in several ways, so as to meet the evidence, and under these statutes there is no objection if case and trespass, or tort and contract, are joined in one action, provided they all purport to be different statements of the same cause of action.[5]

manded in a writ of right, the writ is abatable. Overseers *v.* Otis, 20 Pick. (Mass.) 38.

Damages for Unlawful Foreclosure of Mortgage and for Trover.—A declaration in trespass on the case for damages from the unlawful foreclosure of a mortgage may include a count in trover for the excess of the proceeds of sale retained by the mortgagee beyond his debt. Bearss *v.* Preston, 66 Mich. 11.

Common Counts and for Use and Occupation.—The common counts may be joined with a count for use and occupation of a house and lot, a count upon a special contract to pay rent, a count on a special contract for the purchase of a house and lot upon which a balance was claimed, and counts on judgments—under How. Sts., § 7778, allowing assumpsit to be brought on judgments. Hogsett *v.* Ellis, 17 Mich. 361.

Recovery of Land and Damages.—A cause of action for damages for withholding the possession of real property may be joined with one for the possession of such property. Pengra *v.* Munz, 29 Fed. Rep. 830.

Rent and Use and Occupation.—A count to recover rent due on a lease and a count for use and occupation may be joined. Wagle *v.* Bartley (Pa., 1887), 11 Atl. Rep. 223.

1. Fairbanks *v.* Amoskeag Nat. Bank, 30 Fed. Rep. 602.

2. Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

3. Miles *v.* Oldfield, 4 Yeates (Pa.) 423, 2 Am. Dec. 412. In Kentucky an action for malicious arrest cannot be joined with one for slander. Dragoo *v.* Levi, 2 Duv. (Ky.) 520.

4. "One object proposed in inserting two or more counts in one declaration, when there is in fact but one cause of action, is in some cases to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two or more different modes of declaring. But the more usual end proposed in inserting more than one count in such a case is to accommodate the statement of the cause, as far as may be, to the possible state of the proof to be exhibited on the trial; or to guard, if possible, against the hazard of the proofs varying materially from the cause of action. So that if one or more of the several counts should not be adapted to the evidence, some other of them may be so." Gould on Pleading, chap. iv, § 4.

5. Teague *v.* Irwin, 134 Mass. 303; New Haven, etc., Co. *v.* Campbell, 128 Mass. 104, 35 Am. Rep. 360; Clapp *v.* Campbell, 124 Mass. 50; Morse *v.* Hutchins, 102 Mass. 439; Hulett *v.* Pixley, 97 Mass. 29; Clay *v.* Barlow, 123 Mass. 378; Jenkins *v.* Bacon, 111 Mass. 373; May *v.* Western Union Tel. Co., 112 Mass. 90; Cunningham *v.* Hall, 7 Gray (Mass.) 559; Black *v.* Howard, 50 Vt. 27; Hagar *v.* Brainerd, 44 Vt. 294; Skinner *v.* Wilder, 38 Vt. 115, 88 Am. Dec. 645; Templeton *v.*

16. Actions at Law and Suits in Equity.—Actions at law and

Clogston, 59 Vt. 628; Rutherford *v.* Whitcher, 60 N. H. 110; Little *v.* Blunt, 13 Pick. (Mass.) 473; Bishop *v.* Baker, 19 Pick. (Mass.) 517; Kennedy *v.* Saunders, 142 Mass. 9; Allen *v.* Codman, 139 Mass. 136; Kellogg *v.* Kimball, 142 Mass. 124; Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696; National Exchange Bank *v.* Abell, 63 Me. 346; Hartsock *v.* Mort, 76 Md. 28; Kellogg *v.* Kimball, 122 Mass. 163; Ames *v.* Stevens, 120 Mass. 218; Mason *v.* Field, 119 Mass. 585; Mahon *v.* Blake, 125 Mass. 477; Owen *v.* Weston, 63 N. H. 599, 56 Am. Rep. 547; Walker *v.* Walker, 63 N. H. 321, 56 Am. Rep. 514; Metcalf *v.* Gilmore, 59 N. H. 417, 47 Am. Rep. 217.

Must Appear in Declaration that it is Same Cause of Action.—A count in trespass joined with a count in trover is bad on dumurrer, unless it appears from the declaration that they are for the same cause of action. Thus, where the count in trespass alleged that the defendant broke and entered the plaintiff's close, and cut down and carried away 3000 spruce trees, 1000 hemlock trees, and 1000 other trees, and the count in trover alleged that the defendant converted to his own use 250,000 feet of spruce lumber and 10,000 feet of hemlock lumber, etc., possessed by the plaintiff, *held*, a misjoinder. Templeton *v.* Clogston, 59 Vt. 628.

Scope of License to Insert Counts Limited.—A. and B., owners of adjacent lands and buildings, made a contract whereby B. agreed to make certain alterations in the roof of A.'s building where it abutted upon B. In an action by A. for a breach of this contract, he joined counts in tort, averring that they were for the same cause of action. *Held*, that under these counts A. could not show acts of B. done in regard to portions of A.'s roof not abutting on B. Mason *v.* Field, 119 Mass. 585.

Discharge of Sureties by Amendment.—If the declaration in an action contains a count in contract and one in tort, not alleged to be for the same cause of action, and a demurrer to the declaration is sustained for misjoinder of counts, and the count in tort is stricken out, and, by amendment, a count in tort is added for the same cause of action, and this is properly averred, such amendment does not discharge the sureties on a bond given to dissolve an attachment in the action, although the amendment is made without notice to the sureties. Kellogg *v.* Kimball, 142 Mass. 124.

Same Cause of Action Presumed.—The first count alleged that on divers days defendant with force and arms broke and entered plaintiff's close and tore down and destroyed the division fence between said close and land of defendant, and with his cattle, etc., trod down and destroyed the herbage there growing. The third count alleged that it was defendant's duty to maintain part of the division fence, but that he had not done so, by reason of which the cattle of defendant trespassed on plaintiff's close. *Held*, that the two counts were meant to embrace the same cause of action, and were joinable under § 14, c. 33, of Gen. Sts. Black *v.* Howard, 50 Vt. 27.

Action Entitled in Writ one of Contract.—Under Gen. Sts. c. 129, § 2, cl. 5, a count in contract may be joined in the same declaration with a count in tort when it is deemed doubtful to which class the cause of action belongs, although the action is entitled in the writ an action of contract. Hulett *v.* Pixley, 97 Mass. 29. See Clay *v.* Barlow, 123 Mass. 378.

Inconsistent Counts.—In an action of tort by a mortgagee for the conversion of personal property against an officer who attached it as the property of the mortgagor, and sold it under the Gen. Sts. c. 123, § 72, there was a count for money had and received, both counts being alleged to be for the same cause of action. *Held*, that the two counts were inconsistent, and that the defendant had the right to require the plaintiff to elect upon which count he would proceed. Clapp *v.* Campbell, 124 Mass. 50.

Practice.—A declaration contained three counts, two in tort and the third in contract, for money had and received, not alleged to be for one and the same cause of action. A demurrer to the declaration was sustained because of a misjoinder of a count in tort with a count in contract. An amended declaration was filed, as a substitute for the first and second counts of the original declaration, containing two counts, one in contract and one in tort, and alleging that the count in tort was for the same cause of action

suits in equity cannot be joined.[1]

17. Louisiana.—The joinder of actions in *Louisiana* is technically termed "cumulation of actions." The Code is very broad and liberal, allowing almost all demands to be cumulated which are not inconsistent with each other.[2] The inconsistency which will preclude the joinder of the causes of action must be a real inconsistency. Mere technical inconsistency, such as that arising from demanding inconsistent relief, or different kinds of relief, will not make the joinder an improper one.[3]

as set out in the three counts of the original declaration. A demurrer, filed to the amended declaration because neither count stated a legal cause of action and for misjoinder, was sustained as to the first amended count and overruled as to the others. *Held*, that the count for money had and received in the original declaration remained in the record as one of the counts upon which the plaintiff relied. Kellogg *v.* Kimball, 122 Mass. 163.

1. Cherokee Nation *v.* Southern Kan. R. Co., 135 U. S. 641; Hurt *v.* Hollingworth, 100 U. S. 100; Buzard *v.* Houston, 119 U. S. 342.

Massachusetts.—A count praying for relief in equity under Sts. 1853, c. 371, cannot be joined with a count at law without the affidavit required by Sts. 1840, c. 87, § 1, to give jurisdiction to the supreme judicial court. Harvey *v.* De Witt, 13 Gray (Mass.) 536.

New Hampshire.—Justice may require the prosecution of an action at law and a bill in equity on the same cause of action at the same time. Brooks *v.* Howison, 63 N. H. 382.

2. "Separate actions may be cumulated in the same demand, except in the cases hereafter expressed. This is termed cumulation of actions. The plaintiff is not allowed to cumulate several demands in the same action when one of them is contrary to or precludes another. As, when one has bought a thing in the name of another, and with his funds, without his authorization, the person for whom the purchase has been made cannot demand by the same action both the thing bought in his name and the money employed for paying the price. Nor can a vendor demand at the same time the rescission of the sale he had made and the price for which it was made; he must decide for one or the other of the two causes of action, as the one precludes the other. If the plaintiff has several causes of action tending to the same conclusion, not contrary to nor exclusive of each other, though they arise from different contracts, he may cumulate and bring them in the same suit; as, for example, if one claim from another one hundred dollars in virtue of a sale and one thousand dollars in virtue of a loan; or if he claim a movable from another both by inheritance and by purchase." Rev. Code 1875 (Voorhies), arts. 148, 149, 151, p. 66; Petitpain *v.* Frey, 15 La. 195; De L'Homme *v.* De Kerlegand, 4 La. 353; Copley *v.* Flint, 16 La. 380; Bank of Louisiana *v.* Delery, 2 La. Ann. 648; Ouliber *v.* His Creditors, 16 La. Ann. 287; Theuver *v.* Knorr, 24 La. Ann. 597; Kenney *v.* Dow, 10 Martin (La.) 577, 13 Am. Dec. 342; Williams *v.* Close, 12 La. Ann. 873; Cross *v.* Richardson, 2 Martin N. S. (La.) 323; Montross *v.* Hillman, 11 Rob. (La.) 87; Buquet *v.* Watkins, 1 La. 131; Wrincle *v.* Wrincle, 8 Martin N. S. (La.) 333; Atkinson *v.* Atkinson, 15 La. Ann. 491; Medart *v.* Fasnatch, 15 La. Ann. 621; Nouvet *v.* Bollinger, 15 La. Ann. 293; Tertrou *v.* Durand, 29 La. Ann. 506; Mills *v.* Fellows, 30 La. Ann. 824; McNair *v.* Gourrier, 40 La. Ann. 353; Millandon *v.* Sylvestre, 8 La. 262; Miller *v.* Rougieux, 20 La. Ann. 577; Judice *v.* Provost, 18 La. Ann. 601; Succession of Serret, 4 La. Ann. 100; Hollingshead *v.* Sturges, 16 La. Ann. 334.

3. Simulated and Fraudulent Sale.—It is not an inconsistency, in pleading in a direct action to annul, to allege that a sale is simulated, and if not simulated that it is fraudulent. Johnson *v.* Mayer, 30 La. Ann. 1203; Chaffe *v.* Scheen, 34 La. Ann. 684. See Smith *v.* Donnelly, 27 La. Ann. 98.

Judgment and Note.—Where, in an action on a foreign judgment, the petition alleges that a note which was the original evidence of the debt is merged

18. Actions Brought in a Representative Capacity—Executors and Administrators.—Where an action is brought by the personal repre-

in the judgment, and the action cannot under the evidence be maintained upon the judgment, the petition must be dismissed. The action under the pleadings cannot be sustained on the note. Bordelais *v.* Mangars, 3 La. Ann. 375.

Partition and Petitory Action.—A suit should not be dismissed for inconsistency and improper cumulation of causes of action in having cumulated an action of partition with a petitory action. Demands not inconsistent may be brought in one petition when between the same persons in the same capacity, and when they are not contrary to each other, either as to the cause of action prayed for or the relief. Thus an action to recover possession of land and for partition may be cumulated. Durbridge *v.* Crawley, 43 La. Ann. 504; Morris *v.* Lalaurie, 34 La. Ann. 204.

Definite Sum and Indefinite Sum.—In a suit in which the plaintiff makes claim for a definite sum invested as her share of the capital stock of a partnership, and also for another and indefinite sum as her share of the net profits thereof on final liquidation and settlement, a motion to compel her to elect will not prevail. McNair *v.* Gourrier, 40 La. Ann. 353.

Prayer Does Not Authorize Inconsistent Relief.—A prayer for "general relief" does not authorize a judgment recognizing the plaintiffs as owners of cotton, when in their petition they aver the sale of the cotton, non-payment of the price of sale, and claim a lien and privilege on it. The two reliefs are inconsistent. Adler *v.* Wolff, 36 La. Ann. 169.

Slander and False Imprisonment.—A demand for compensation in consequence of slander is not contrary to, and does not exclude, a demand for damages sustained by false imprisonment. Buquet *v.* Watkins, 1 La. 131.

Rescission of a Sale for Lesion Beyond Moiety and on Account of the Nonpayment of the Price.—A suit for the rescission of a sale for lesion beyond moiety, and on account of the nonpayment of the price, cannot be maintained for both demands, as they should not be cumulated in the same action. Copley *v.* Flint, 16 La. 380.

Warranty and Fraud.—One suit may be brought on two different causes of action if they be not inconsistent. Thus, a cause of action on a contract of warranty, by which the warrantor bound himself to the plaintiff for the good conduct of a clerk; and a cause of action for fraudulent and deceitful representations in regard to the clerk, by reason of which the plaintiff took him into his service, and suffered injury from his malfeasance, may be joined. Cross *v.* Richardson, 2 Martin N. S. (La.) 323.

Different Grounds.—A plaintiff may set forth in his petition different grounds upon which he expects to recover, provided he does not make demands one of which necessarily excludes the other. Montross *v.* Hillman, 11 Rob. (La.) 87.

Opposition to the Homologation of a Tableau.—Oppositions having been filed to the homologation of a tableau of distribution presented by the syndic of an insolvent, praying for the cancelling of the sales made by the syndic, that the property be disposed of again for the benefit of all the creditors, and the tableau set aside, the opponents subsequently filed other oppositions by way of amendment, in which, abandoning the objects of the first oppositions, and waiving their purpose of disturbing the sales and resisting the homologation of the tableau, they pray that the syndic may be condemned, personally, to pay them the amounts for which they were placed in the tableau as creditors of the insolvent, on the ground of his having acted without any regular appointment, having sold the property illegally, and for his neglect and waste of the property. *Held*, that the demands in the original and amended oppositions are inconsistent, the one precluding the other, and cannot be cumulated in the same action. Blake *v.* His Creditors, 6 Rob. (La.) 520.

Petitory Action for One Tract of Land and Slander of Title of Another.—A party may institute a petitory action for one tract of land, and in the same petition may sue the same defendant for slander of title of another and distinct tract, but cannot in the same suit sue for a tract of land and for damages

sentative of a decedent, the right to join causes of action is determined by the question whether the sum, when recovered, would be assets.[1] An executor or administrator may declare, as such, for goods sold or money paid by him in that character, and may join such counts with counts on promises to the testator or intestate.[2] But an executor cannot include counts on causes of action accruing to him in his private right and individual character, with counts on causes of action which are laid to have been vested in him in his representative capacity.[3] In an action against an executor a count cannot be introduced which would charge him

for slander of title to such tract. Williams *v.* Close, 12 La. Ann. 873.

Dissolution of a Lease and for Rent.—There is nothing inconsistent in a demand for the dissolution of a lease being coupled with a demand for the rent up to the time that possession is delivered to the lessor. Dubois *v.* Xiques, 14 La. Ann. 430.

Demand in Separation of Property by Wife, and to Enjoin the Seizure of Property Claimed by Her.—There is no objection to the cumulation of a demand in separation of property by the wife, with an action to enjoin the seizure of certain property, claimed by her as her separate property, and seized under execution by the creditors of her husband. Atkinson *v.* Atkinson, 15 La. Ann. 491.

Possessory Action.—Damages may be allowed in a possessory action for a tortious possession. Chinn *v.* Blanchard, 6 La. Ann. 66.

1. "It is now a well-settled rule, in actions by a plaintiff who is an executor or administrator, that where the money, when recovered, would be assets, the executor may declare for it in his representative character; and that the best line to adopt in determining whether counts may be joined is to consider whether the sum, when recovered, would be assets." Chitty on Pleadings (16th Am. ed.), 222.

2. Howard *v.* Powers, 6 Ohio 92; McKinley *v.* Call, 1 T. B. Mon. (Ky.) 54; Wilson *v.* Hunt, 6 B. Mon. (Ky.) 383; Sullivan *v.* Holker, 15 Mass. 374; Haskell *v.* Bowen, 44 Vt. 580; Cowel *v.* Watts, 6 East 405; Thompson *v.* Stent, 1 Taunt. 332; Powley *v.* Newton, 2 Marsh. 147; Dowbiggan *v.* Harrison, 9 B. & C. 666, 17 E. C. L. 470; Ord *v.* Fenwick, 3 East 104; Edwards *v.* Grace, 2 M. & N. 190; Chitty on Pleadings (16th Am. ed.), 222.

Count Construed.—A count upon a promise made to the plaintiff's intestate cannot be joined with a count alleging that the defendant, "being indebted to the plaintiff as aforesaid" (the plaintiff having been previously described as administrator) in a certain sum "for goods sold and delivered by the plaintiff to the defendant, in consideration thereof promised to pay the same to the plaintiff;" and a declaration in which such counts are joined is bad even after verdict. Brown *v.* Webber, 6 Cush. (Mass.) 560.

Vermont.—The mere fact that two causes of action do not accrue to a plaintiff in the same right is no reason why they may not be joined in the same suit, for the court can instruct the jury to assess separate damages on the several counts. So an administrator may join a count for damages done his intestate in life by the neglect of the defendant with a count for damages accruing to the widow and next of kin by the death of the intestate, also resulting from the negligence of the defendant. Ranney *v.* St. Johnsbury, etc., R. Co., 64 Vt. 277, a case where the plaintiff was injured by a train and, after having had medical care for twenty-four hours, died. One count was for her pain and expense until she died, the other was for the benefit of the next of kin for whom it was brought. The court treated the matter as two distinct causes of action, and allowed their joinder. See also Preston *v.* St. Johnsbury, etc., R. Co., 64 Vt. 280.

3. Chitty on Pleadings (16th Am. ed.), 226; Petrie *v.* Hannay, 3 T. R. 659; Richardson *v.* Griffin, 5 M. & S. 294; Henshall *v.* Roberts, 5 East 150; King *v.* Thom, 1 T. R. 489; Nicholas *v.* Killegrew, 1 Ld. Ray, 457; Webster *v.* Spencer, 3 B. & Ald. 360.

personally, for the judgment in the one case would be *de bonis testatoris*, and in the other *de bonis propriis*.[4]

4. Chitty on Pleadings (16th Am. ed.), 227; Vaughn *v.* Gardner, 7 B. Mon. (Ky.) 326; Moody *v.* Ewing, 8 B. Mon. (Ky.) 521; Godbold *v.* Roberts, 20 Ala. 354; Jefford *v.* Ringgold, 6 Ala. 544; Terhune *v.* Bray, 16 N. J. L. 54. See Partridge *v.* Court, 5 Price 412; Catherwood *v.* Chaband, 1 B. & C. 150, 8 E. C. L. 67; Brassington *v.* Ault, 2 Bing. 177, 9 E. C. L. 369; Hosier *v.* Arundel, 3 B. & P. 7; Sarell *v.* Wine, 3 East 409; Hickman *v.* Walker, Willes 27; Pittan *v.* Foster, 2 D. & R. 363; Hurst *v.* Parker, 1 B. & Ald. 93; Short *v.* McCarthy, 3 B. & Ald. 626; Whitehead *v.* Howard, 5 Moore 105; Ward *v.* Hunter, 6 Taunt. 210.

Fund out of which Damages are to be Paid being Same.—A count against an executor, as such, for money paid by plaintiff since the testator's death, on a bond in which he was testator's surety, and charging the executor with such payment to his use as executor, and with his promise to repay, is a count on which a judgment *de bonis testatoris* may be rendered, and which may be joined with counts for promises made by testator in his lifetime. Counts may be joined where the fund out of which the damages are to be applied is the same. Cawley *v.* Reeve, 17 N. J. L. 415.

On Promise of Testator and for Funeral Expenses.—In assumpsit against an executor, a count on a promise by the testator may be joined with a count for the funeral expenses, alleging that they were incurred at the request of the executor, and that he, as executor, promised to pay therefor. But it seems that a count on a promissory note of the executor, given in payment of the funeral expenses, cannot be joined with a count upon a promise of the testator. Hapgood *v.* Houghton, 10 Pick. (Mass.) 154.

Proceeding on Bond for Support.—The administrator of the obligor on a bond for support being ordered to retain a sum in his hands for such support unless a bond was given to expend it for that purpose, the guardian of the obligor's heir gave bond, and the same was so expended, but proved insufficient. The administrator and various creditors of the obligee thereupon brought a bill in equity against the heir and the guardian to reach and apply the obligor's real estate in payment of their claims. *Held*, that the administrator's remedy was by an action at law on the bond, and that of the creditors, if any, was by charging the heir as trustee in a proceeding against the administrator. *Held*, also, that the misjoinder was a formal defect that could be cured by amendment. Clark *v.* Holbrook, 146 Mass. 366.

Amending Pleading.—The plaintiff, having declared "that the defendant, administrator, etc., being indebted for money had and received by the intestate, promised," etc., amended by declaring that "the intestate, being indebted for money had and received by him, promised," etc. *Held*, that the amendment was for the same cause of action as the original count. Eaton *v.* Whitaker, 6 Pick. (Mass.) 465; Clark *v.* Lamb, 6 Pick. (Mass.) 512.

Action against Bondsmen of Administrator and for Fraudulent Acts of Decedent.—A cause of action against the sureties upon the bond of an administrator, arising from the breach of the condition of the bond, cannot be united in the same complaint with a cause of action against the administrator, arising from acts of the deceased intestate in fraudulently disposing of his property. Howse *v.* Moody, 14 Fla. 59.

Unconnected Demands.—Unconnected demands against different estates cannot be united in the same bill, though the defendant is executor of both. Daniel *v.* tMorrison, 6 Dana (Ky.) 186.

Individual Promise and upon Promise of Testator.—Counts charging the defendants, as executors, upon the promise of their testator, and upon their own promise as executors in consideration of assets, may be joined in the same declaration, and the judgment upon each count will be *de bonis testatoris*. Dixon *v.* Ramsay, 1 Cranch (C. C.) 472.

Kentucky.—Promises by the testator or intestate and a third person, and promises by the testator alone, may be joined in a suit against the executor or administrator since the statute of 1796. Haggins *v.* Gilman, 10 B. Mon. (Ky.) 217; Hamlet *v.* Bates, 10 B. Mon. (Ky.) 437.

19. Joinder in Equity.—The joinder of two or more distinct subjects in an equity bill is multifarious. The cause of action in equity is broader than at law, and embraces more matters; but it is a cardinal rule in equity practice that only one separate and distinct matter can be prosecuted in one suit. There is no such thing recognized in equity practice as the joinder of different actions or suits.[1]

VIII. Joinder of Causes of Action under the Codes—1. Code States.—Twenty-seven states and three territories have adopted a Code of Civil Procedure.[2] These Codes all reduce to the form of a statute the law on the subject of the joinder of causes of action.

Statutory Provisions.—While the statutes differ in some minor details, they all are more or less similar to the *New York* Code. They are in the main founded on the chancery principle that all controversies should, as far as practicable, be settled in one action.[3]

1. See article "Multifariousness." In endeavoring to avoid the error of making a bill not sufficiently extensive to answer the purpose of complete justice, care must be taken not to run into the opposite defect, viz., that of attempting to embrace in it too many objects; for it is a rule in equity, that two or more distinct subjects cannot be embraced in the same suit. The offence against this rule is termed multifariousness, and will render a bill liable to a demurrer. Daniell on Chancery Pleading and Practice (4th ed.), vol. i. 334. "By multifariousness in a bill is meant the improperly joining, in one bill, distinct and independent matters, and thereby confounding them; as, for example, by uniting in one bill several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story Eq. Pl. § 271. The general rule in equity is that several grievances must be redressed by *several* proceedings, the only recognized exceptions being where a single right is asserted on one side which affects all the parties on the other side in the same way, or where a single wrong is complained of which falls on them all simultaneously and together. Familiar instances are rights in common which are resisted by the owner of the estate on which they are charged, tax-rolls assessing all parties on an equal ratio, and frauds by trustees affecting the beneficiaries. If there is any distinction in the proportion or character of the several grievances, there can be no joinder. Winslow *v.* Jenness, 64 Mich. 84; Jenness *v.* Smith, 64 Mich. 91.

2. *Alabama*, *Arkansas*, *California*, *Colorado*, *Connecticut*, *Georgia*, *Idaho*, *Indiana*, *Iowa*, *Kansas*, *Kentucky*, *Minnesota*, *Missouri*, *Montana*, *Nebraska*, *Nevada*, *New York*, *North Carolina*, *North Dakota*, *Ohio*, *Oregon*, *South Carolina*, *South Dakota*, *Texas*, *Washington*, *Wisconsin*, *Wyoming*, *Arizona Territory*, *Oklahoma Territory*, and *Utah Territory*. *New Mexico* has by statute established the common-law practice.

3. **Different Code Provisions.**—"The plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

"1. Upon contract, express or implied.

"2. For personal injuries, except libel, slander, criminal conversation, or seduction.

"3. For libel or slander.

"4. For injuries to real property.

"5. Real property, in ejectment, with or without damage for the withholding thereof.

"6. For injuries to personal property.

"7. Chattels, with or without damages for the taking or detention thereof.

"8. Upon claims against a trustee

2. Causes of Action Arising Out of "Same Transaction"—*a.* GENERALLY.—There is a uniformity of judicial decisions in the con-

by virtue of a contract or by operation of law.

"9. Upon claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

"But it must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other, and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint that they do not require different places of trial." § 484 *New York* Code Civ. Proc.

"I. Upon contract, express or implied.

"II. For injuries, with or without force, to person and property, or either, including a conversion of property to the defendant's use.

"III. For injuries to character.

"IV. Upon claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

"V. Upon claims to recover personal property specifically, with or without damages for the withholding thereof.

"VI. Claims arising by virtue of a contract or by operation of law in favor of or against a party in some representative or fiduciary capacity.

"VII. Upon claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action." *Connecticut* Practice Act, § 875; *Kansas*, § 83 Code Civ. Proc.; *Minnesota*, § 4739 St. 1891; *Missouri*, § 2040 Rev. Sts. (1889); *Nebraska*, § 87 Code Civ. Proc.; *North Carolina*, § 267 Code Civ. Proc.; *North Dakota*, § 136 Code Civ. Proc.; *South Dakota*, § 136 Code Civ. Proc.; *Ohio*, § 5019 Rev. Sts., except, in addition, that claims for the partition of real property may be united; *Oklahoma*, § 83 Code Civ. Proc.; *South Carolina*, § 188 Code Civ. Proc.; *Wisconsin*, § 2647 An. Sts.; *Wyoming*, § 2408 Rev. Sts.

"I. Contracts, express or implied.

"II. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

"III. Claims to recover specific personal property, with or without damages for the withholding thereof.

"IV. Claims against a trustee by virtue of a contract or by operation of law.

"V. Injuries to character.

"VI. Injuries to person.

"VII. Injuries to property." *California*, Code Civ. Proc. § 427; *Idaho*, § 4169 Rev. Sts. 1887; *Montana*, § 84 Code Civ. Proc.; *Oregon*, § 91 Code Civ. Proc.; *Washington*, § 214 Code Civ. Proc.

"I. Claims arising out of contract, express or implied.

"II. Claims for the recovery of specific real property and the rents, profits, and damages for withholding the same.

"III. Claims for the recovery of specific personal property and damages for the taking or withholding the same.

"IV. Claims for partition of real or personal property, or both.

"V. Claims arising from injuries to character.

"VI. Claims arising from injuries to person and property.

"VII. Claims against a trustee by virtue of a contract or by operation of law." Digest of Statutes *Arkansas* (1884), § 5014. *Kentucky* has same, except VII, § 83 Code.

"All claims arising *ex contractu* between the same parties may be joined in the same action, and all claims arising *ex delicto* may in like manner be joined. The defendant may also set up, as a defence, all claims against the plaintiff of a similar nature with the plaintiff's demand." § 3261 Code of *Georgia* (1882).

"Only such causes of action may be joined as are capable of the same character of relief. But actions *ex contractu* shall not be joined with actions *ex delicto*. In actions *ex delicto* there shall not be joined actions to recover for injuries to the person, to property, or to character; but they shall be sued for separately." Rev. Sts. *Arizona* (1887), § 670.

struction of all the various Code provisions relative to the joinder of causes of action, and very little contrariety of opinion exists in their application, except in the single case of causes of action arising out of the "same transaction." In the construction of this provision great doubt and division have arisen, and courts have frequently reached diametrically opposite conclusions in regard to the meaning of the word "transaction," and also with reference to its application to various states of facts. But before there is any need to apply this Code provision the courts are frequently called upon to determine whether only one or more than one cause of action has arisen out of the same transaction. Of course if only one cause of action has arisen, there can be no

"All actions on contracts, express or implied, for the payment of money, whether under seal or not, may be united in the same action." § 2672 Civil Code *Alabama* (1886).

"Counts in trespass and in trespass on the case may be joined when they relate to the same subject-matter." § 2673 Civil Code *Alabama* (1886).

"Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition; but the court, to prevent confusion therein, may direct all or any portion of the issues joined therein to be tried separately, and may determine the order thereof." Rev. Code *Iowa* (1888), § 2630.

"I. Money demands on contract.

"II. Injuries to property.

"III. Injuries to person or character.

"IV. Claims to recover the possession of personal property, with or without damages for the withholding thereof, and for injuries to the property withheld.

"V. Claims to recover the possession of real property, with or without damages, rents, and profits for the withholding thereof, and for waste or damage done to the land; to make partition of and to determine and quiet the title to real property.

"VI. Claims to enforce the specific performance of contracts, and to avoid contracts for fraud or mistakes.

"VII. Claims to foreclose mortgages; to enforce or discharge specific liens; to recover personal judgments upon the debt secured by such mortgage or lien; to subject to sale real property upon demands against decedents' estates, when such property has passed to heirs, devisees, or their assigns; to marshal assets; and to substitute one person to the rights of another; and all other causes of action arising out of a contract or a duty, and not falling within either of the foregoing classes.

"VIII. When the plaintiff desires to recover the possession of title papers or other instruments of writing, or correct any mistakes therein, a separate action may be brought therefor; or the possession of such title papers or other instruments of writing may be recovered, or mistakes corrected, in any other action, when such recovery or correction would be essential to a complete remedy.

"IX. When the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes. When several causes of action are united, belonging to any of the foregoing classes, the court may order separate trials, for the furtherance of justice." *Indiana* Statutes, Revision 1894, art. 3, Civ. Proc.

In *Colorado* the following causes of action may be united: (1) Actions for the recovery of real property, with damages, rents, profits, etc.; (2) Actions for the recovery of personal property, with damages, etc.; (3) Actions for damages, whether upon contract or for injuries to property, person, or character. *Colorado* Code Civ. Proc., § 71 (1883, § 73); Bliss Code Pl. (2d ed.) § 112.

question of joinder or misjoinder, and there is no necessity for the application or construction of the Code provision.[1]

b. SINGLE CAUSE OF ACTION—**Inconsistent Causes of Action.**—Inconsistent causes of action cannot grow out of the same transaction.[2]

Two Kinds of Relief.—A transaction, though, may give rise to two kinds of relief, it being at the option of the plaintiff to pursue either, but not both.[3]

1. **Single Contract.**—In suing upon a single contract, although for different items, and for consequential damages, no question can arise as to the application of the Code provision. Such causes of action are single. Roehring *v.* Huebschmann, 34 Wis. 185; Fisk *v.* Tank, 12 Wis. 276.

Balance Due on Settlement and on Itemized Account.—A petition which alleges that defendant is indebted to plaintiff "to balance due as per settlement," and also on an open itemized account, states two separate causes of action. Eisenhouer *v.* Estein, 37 Kan. 281.

Closely Connected Facts.—Generally, it may be said that where facts are closely connected, so that if under equity practice a bill setting them up would not be multifarious, then the transaction gives rise to one cause of action only; and if certain facts of the transaction, which are demurrable, are set up as a separate cause of action, this does not constitute a misjoinder, as the court may proceed to give judgment on the facts of the transaction which make the cause of action.

Recovery of Damages and Cancellation of Receipt.—A complaint praying for the recovery of damages for personal injuries, and also for the cancellation of a receipt fraudulently obtained from the plaintiff, releasing the defendant from liability for such injuries, states only one cause of action. Whetstone *v.* Beloit Straw Board Co., 76 Wis. 613.

Promise to Marry and Give Sum of Money.—Where the defendant promised plaintiff that if she would marry him he would give her a sum of money, his refusal to carry out his promise to marry and pay the money is only one cause of action. Dalton *v.* Barchand, 2 Clev. Rep. (Ohio) 57.

Demurrable Amendment.—Where to a petition against several defendants an amendment is filed setting out new matter intended as another and different cause of action against one only of the defendants, and such new matter is not sufficient to constitute a cause of action, there is no misjoinder of causes of action, but such amendment should be disregarded. Hawkins *v.* Furnace Co., 40 Ohio St. 507.

2. Smith *v.* Hallock, 8 How. Pr. (N. Y. Supreme Ct.) 73; Lewis *v.* Acker, 11 How. Pr. (N. Y. Supreme Ct.) 163.

Inconsistent Counts.—It is a misjoinder of causes of action to sue in one count to compel a corporation to transfer stock and permit the holder to have the rights of a stockholder, and in another count to allege that the stock is spurious and an overissue, and claiming damages for its issue. Cincinnati, etc., R. Co. *v.* Third Nat. Bank, 1 Ohio Cir. Ct. 199. See Citizens' Nat. Bank *v.* New Orleans, etc., R. Co., 9 Cinc. L. Bull. (Ohio) 355, 16 Cinc. L. Bull. (Ohio) 399.

Recovery of Money Bet and for Fraud.—The first count alleged that the plaintiff bet money with the defendant upon the event of a horse-race, and lost it. The second alleged that he was induced to make the bet by false representations respecting the horse that won the race, made by the defendant and others with whom the defendant conspired to defraud the plaintiff. *Held*, that as the first cause of action was on contract and the second in tort, although arising out of the same transaction, they could not be united. Raynor *v.* Brennan, 40 Hun (N. Y.) 60.

3. "The law may give more than one kind of relief for a single wrong—that is, for one cause of action. A doubt as to whether in such case there is not more than one cause of action has arisen where there is really but one wrong—as, the non-payment of a debt—but where the plaintiff's remedy is twofold—that is, he may bring one or another kind of action—and the facts constituting a cause of action in adopt-

Person and Property Injured by Same Negligent Act.—A negligent act which causes damage to both the person and the property of the plaintiff gives rise to but one cause of action.[1]

Adjacent Landowners Claiming Damages in Solido.—Where a dam causes a diversion of water, and thereby causes damage to several adjacent landowners, this is such a transaction that the landowners may join in one action for injuries to their land, and claim damages *in solido*.[2]

ing one remedy differ from those which entitle him to relief in the other. As, in enforcing a contract secured by mortgage, or suing upon a promissory note given for the purchase-money of land, in pursuing one remedy, it is sufficient to aver and prove the contract; while, in seeking the other, the mortgage or the consideration of the note must be also averred and proved. And yet there is but one right—the right to the money; and one wrong—the refusal to pay it." Bliss Code Pl. (2d ed.) § 114.

One Count Waiver of Other Count.—Causes of action are improperly joined where the first constitutes a waiver of an element on which the second depends; to wit, the first, being for money had and received, necessarily waiving the wrongful conversion which the second must allege, being an action of trover. Dodge *v.* Glendenning (Supreme Ct.), 10 N. Y. St. Rep. 8.

1. Injury to Property and Person by Same Negligent Act.—Where an injury has resulted both to the person and the property of another from an act of negligence on the part of the defendant, both causes of action may be joined in the same complaint. Howe *v.* Peckham, 10 Barb. (N.Y.) 656. The above is the head-note of the case, but it is misleading. The court distinctly decided that there was only one cause of action, and the fact that the plaintiff purported to set out two did not vitiate. The facts of the case were, that a person in a wagon was negligently run into by another vehicle, resulting in damage to both his person and his wagon.

Where a person is driving a horse and wagon, and is negligently run into by the railroad cars, both the driver and the horse being injured, there are two causes of action growing out of the same transaction, which may be united. Rosenberg *v.* Staten Island R. Co. (C. Pl.), 14 N. Y. Supp. 476. But a doubt is raised as to whether there are two causes of action. See remarks of Pryor, J., *passim*. And see Brunsden *v.* Humphrey, 14 Q. B. Div. 141, where it was held that where a cab-driver was negligently run into by another, and his person and cab both injured, he had two causes of action, one for the injury to his cab and one for the injury to his person.

Illinois.—In *Illinois*, a common-law state, it has been held that one who has received an injury to his person and his property by the same negligent act may declare for damages as to both injuries in one count, or he may declare for each separately in different counts. Chicago West Div. R. Co. *v.* Ingraham. 131 Ill. 659, where a man in a buggy was run over by a street car.

Maryland.—In *Maryland*, also a common-law state, it is held that where different and separate injuries have resulted from the same act or cause, the injuries or damages may be united and counted upon in the same count. Baltimore, etc., R. Co. *v.* Ritchie, 31 Md. 191.

2. Hellam *v.* Switzer, 24 S. Car. 39, where it was held the cause of action is single.

Action by Several Owners to Restrain Diversion of Water and for Damages.—The plaintiffs were owners in severalty of certain distinct parcels of land, and the action was brought to restrain the defendant from depriving them of water carried by various ditches to their respective lands, and to recover damages sustained by reason of past diversion of water. *Held*, that the cause of action for damages was several as to each of the plaintiffs, and that it could not be joined with the cause of action for an injunction, which was common to all. Barham *v.* Hostetter, 67 Cal. 272.

c. MEANING OF THE TERM "TRANSACTION."—No satisfactory definition has been given of the term "transaction," as used in the Codes. In fact, it seems to have been chosen on account of the very wide scope of its meaning, enabling courts to interpret it in a manner which shall be found most convenient and best calculated to promote the ends of justice. By the use of this term it was not intended to overturn all distinctions in actions and rules of pleading, but it is probable that the first subdivision of section 167 of the *New York* Code was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions, relating to the subject-matter of the action, which it would be desirable to settle in a single controversy.[1]

1. "If these actions may be united it must be by virtue of the first subdivision of section 167 of the Code. From the nature of the two actions they do not come under either of the other subdivisions. The first subdivision reads as follows: 'The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they shall arise out of: 1st. The same transaction or transactions connected with the same subject of action.' This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented. To invent a rule for determining what the 'same transaction' means, and when a cause of action shall be deemed to 'arise out' of it, and what the 'same subject of action' means, and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution to these questions. . . . There is certainly ample scope for construction, but it is sometimes difficult to determine what interpretation will best promote the ends of justice. It is probable that the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject-matter of the action, which it would be desirable to settle in a single controversy. The clause was not intended to overturn all distinctions in actions and rules of pleadings, and this court has held that an action of trespass, in breaking into a house and opening a trunk, could not be joined with an action on a covenant in a lease for quiet enjoyment, although the act which rendered the defendant liable in both actions was the same. Keep *v.* Kaufman, 56 N. Y. 332. In this case it is attempted to unite an action on a statute for a penalty with an action on contract. The natures of the two actions are essentially different, although the object to be attained is the same. The facts to establish the liability are entirely unlike. The measure of liability is different; the defenses are different. The rights of the defendant may be seriously prejudiced. Suppose a general verdict is obtained, from whom would the defendant seek contribution, from his co-trustees or from his co-stockholders? Can it be said that these causes of action arose out of the same transaction? If so, what was the transaction? Was it the formation of the company? That created no liability nor cause of action. Was it the debt of the plaintiff? That created no liability against the trustees, nor does such liability arise out of it. Was it the failure to file a certificate that the stock was not paid in? If so, there is no connection between that and the transaction which created the liability against the defendant as trustee. An omission to record a certificate that the stock was paid is not, in any sense, the same transaction as the neglect of trustees to file a report of the financial condition of the company. Without attempting to define the terms of the last clause, I do not think that there is any such connection between the trans-

d. DAMAGE TO LAND AND PERSONAL INJURY.—Where the same act or transaction has occasioned damage to land and also a personal injury, these two causes of action may be united.[1]

e. INJURIES TO REAL PROPERTY AND OTHER CAUSES OF ACTION.—Causes of action for injuries to real property and other causes of action have been held joinable as arising out of the same transaction.[2]

actions, out of which the causes of action arose in this case, and the 'subject of action' as to justify uniting the two causes of action.

"The causes of action are independent of each other; the 'transactions' are different, and there is no legal affinity between them. The language of the last clause is more applicable to equitable actions where the controversy is in respect to specific property, real or personal. It is difficult to define in this case the subject of action.' The object of the action is to recover the debt; but is the debt the subject of action? In some sense it perhaps may be so regarded, while in another the subject of action may be regarded the penalty or forfeiture. If the former, there is no natural connection between it and the transaction creating the liability. If the latter, it has no connection with the transaction against defendant as a stockholder. The language of the last clause, it seems to me, has no application to this case, and I am confident it was never intended by it to force a connection between such distinct and independent things. It may be convenient for the plaintiff to combine the two causes of action, but looking at the rights of both parties and the rules of law, we cannot think that the Code was designed to authorize their union in one complaint." Per Church, Ch. J., in Wiles *v.* Suydam, 64 N. Y. 177–179. See also the language of Comstock, J., in New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 604; Ashe, J., in Young *v.* Young, 81 N. Car. 95; Sutherland, J., in Adams *v.* Bissell, 28 Barb. (N. Y.) 386; Johnson, J., in Anderson *v.* Hill, 53 Barb. (N. Y.) 245.

1. A plaintiff having a cause of action which entitles him to an injunction restraining the unlawful maintenance and operation of a railroad in a street in front of his premises, by reason of its continuous interference with his rights of property, may unite with a demand for such equitable relief and for damages, because of such interference, a claim for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway. Lamming *v.* Galusha, 135 N. Y. 239. But see Taylor *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 299.

2. Trespass on Land and Conversion of Personal Property.—Where defendants entered upon land occupied by plaintiff, deprived him of possession, and destroyed and converted certain personal property thereon, these causes of action arose out of the same transaction. Polley *v.* Wilkisson, 5 Civ. Pro. Rep. (B'klyn City Ct.) 135.

Damage to Land and for Construction of Bridge.—An action to recover damages for the construction of a railroad across a bay between plaintiff's farm and the Hudson River, and one to compel the construction of such a bridge as is required by law over such bay, were held properly joined. Getty *v.* Hudson River R. Co., 6 How. Pr. (N. Y. Supreme Ct.) 269.

Damage to Land.—Where a person builds a dam and thereby causes a stream of water to rise so as to overflow another's land to his damage, such other person has at least two causes of action: first, one for the injuries already caused; second, an equitable cause of action to restrain by injunction the further maintenance of the dam. And these two causes of action may be united in the same petition, for both arise out of "the same transaction or transactions connected with the same subject of action." Akin *v.* Davis, 11 Kan. 580.

To Restrain Construction of Telephone Line and for Removal from Street.—An action to restrain the completion of a telephone line may be joined with one to remove the incomplete line, as a nuisance, and to restore the street to a condition *in statu quo*, as both arise out of the same transaction. People *v.* Metropolitan R. Co., 31 Hun (N. Y.) 598.

f. EQUITABLE REMEDIES ASKED TOUCHING LAND.—Where a transaction has given rise to a cause of action for the setting aside of a deed of land, or for the conveyance of land, or for the cancellation of an instrument, or for all the relief which a bill in equity might pray for under the chancery practice, all these matters may be joined. All remedies which a bill in equity might formerly have prayed for touching land may now be sought in the same action.[1]

Damage to Land and on Bond.—A complaint alleging a cause of action against an elevated railroad company for damages for the construction and operation of its road in the street adjoining plaintiff's premises, and also a cause of action on a bond given by the company with sureties to pay all damages assessed, is bad for misjoinder; as it attempts to unite a cause of action for a tort with one on contract. Hart *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 391.

1. **For Execution of New Deed and Possession of Land.**—A sheriff executed and delivered to the plaintiff a deed for certain lands sold under execution, of which the plaintiff had become the purchaser. This deed from the sheriff was lost before registration, whereupon the plaintiff brought an action against the sheriff and the party in possession, seeking to compel the execution of another deed and to recover possession of the land. *Held*, that as the two causes of action grew out of the same transaction, they could be joined. McMillan *v.* Edwards, 75 N. Car. 80; Jennings *v.* Reeves, 101 N. Car. 447.

To Recover Debt and to Set Aside a Conveyance in Fraud of Creditor.—An action upon a debt, and another to declare void certain conveyances alleged to have been made by the debtor in fraud of the complaining creditor, are joinable as arising out of the same transaction. Dawson Bank *v.* Harris, 84 N. Car. 206.

To Set Aside Decree; to Annul Deeds Executed in Pursuance Thereof; to Recover Possession of the Land; and for Injunction Against Waste.—The following causes of action may be joined: 1. To impeach and set aside a decree for fraud and imposition; 2. To annul deeds executed by a commissioner to purchasers of land sold under the decree; 3. To recover possession of the land and to have an account of the rents and profits; 4. And for an injunction against waste. England *v.* Garner, 86 N. Car. 366.

Moneys Wrongfully Invested in Land and for a Reconveyance of the Land from Purchasers.—A complaint which alleges that plaintiff entrusted defendant with moneys and property for which he has refused to account, and that defendant has fraudulently conveyed without consideration lands bought with such moneys, some to B. and some to C., and which seeks a reconveyance of such lands from B. and C., and judgment against A. for the amount found due from him on an accounting: *Held*, not multifarious. Blake *v.* Van Tilborg, 21 Wis. 672.

Action by Receiver for Restitution of the Property of the Judgment Debtor, and to Set Aside Conveyances Void for Usury.—In an action brought by the receiver of a judgment debtor, the subject of such action being the restitution of the property of the judgment debtor, the plaintiff may unite in his complaint all the different claims which he has against the defendant upon that subject of action, and set forth therein different transactions out of which his right to restitution flows; although to reach that result, in some instances, it will be necessary to set aside transfers void for usury. Palen *v.* Bushnell, 46 Barb. (N. Y.) 24.

Action to Quiet Title and for Money.—An action was begun, by one holding a tax title to land, to quiet the title to the same against the original owner, and, on service by publication only, he obtained a judgment. Within three years the judgment was properly vacated on the application of the defendant under the provisions of § 77 of the Code. When the defendant was let in to defend he filed an answer setting up, first, a general denial; second, facts showing the plaintiff's title in the land to be invalid; and third, an allegation that after the judgment was first rendered and before it was vacated, the plaintiff sold

g. COURTS INCLINED TO SEGREGATE REAL PROPERTY CASES.—The courts seem to show a disposition to segregate all cases involving land, and deeds and leases of land, from other matters; they give the term "transaction" a limited and narrow meaning when these matters are in issue.[1]

h. ASSAULT AND BATTERY AND SLANDER.—If slanderous words are spoken at the time of an assault and battery, then the two causes of action may be united.[2]

the land and appropriated the proceeds; and he prayed for a recovery of the value of the land. *Held*, that the right to the relief prayed for in the third count of the answer was properly joined with the other defenses. Flint *v.* Dulany, 37 Kan. 332.

Payment of Purchase Money and Cancellation of Mortgage.—The following was held to be one transaction: The plaintiff agreed to convey to defendant a certain piece of land. The defendant paid part of the purchase money and gave his note for the balance. When the plaintiff gave the conveyance there was a mortgage against the property, which the plaintiff agreed to pay within a reasonable time after the defendant had paid the purchase money. When the purchase note fell due it was not paid, but the defendant offered to pay and did pay part, but required security for the same against the mortgage, and an extension of time on the note. The plaintiff thereupon, to secure the defendant against the mortgage, gave him his note secured by mortgage on other real estate. *Held*, that the plaintiff, upon discharging his mortgage, might in one action ask for the balance due on the purchase money, the delivery to him of his note, and the discharge of the mortgage given to secure the same. Montgomery *v.* McEwen, 7 Minn. 351.

To Declare a Trust in Land and for Balance of Money Due.—Plaintiff alleged that he gave to defendant one hundred dollars for the purpose of entering a tract of land, to contain eighty acres at $1.25 per acre; that the land was to be entered in the name of the plaintiff; that, in pursuance of said arrangement, said defendant did enter with plaintiff's money a tract of eighty acres, but that the entry was made in the name of the defendant contrary to the agreement, and was made for ten dollars, leaving a balance of ninety dollars due plaintiff. Plaintiff was allowed to join a claim for the money with a claim to declare a trust in his favor in the land. Callaghan *v.* McMahan, 33 Mo. 111.

Action to Declare a Trust, to Recover Purchase Money, and for Possession.—An action to declare one defendant a trustee of land, and an action to recover judgment of other defendants for purchase money of same, and an action to recover possession of the land with damages for withholding it, may be united. Young *v.* Young, 81 N. Car. 91. See also King *v.* Farmer, 88 N. Car. 22; Bedsole *v.* Monroe, 5 Ired. Eq. (N. Car.) 313; Heggie *v.* Hill, 95 N. Car. 303; Parish *v.* Sloan, 3 Ired. Eq. (N. Car.), 607; Watson *v.* Cox, 1 Ired. Eq. (N. Car.) 389; Hancock *v.* Wooten, 107 N. Car. 9.

Foreclosing Mortgage on one Tract of Land and for Possession of Another Tract.—An action to foreclose a mortgage upon one tract of land cannot be united with an action to recover the possession of another tract; they do not arise out of the same transaction. Edgerton *v.* Powell, 72 N. Car. 64.

1. Keep *v.* Kaufman, 56 N. Y. 332, where it was held that a cause of action for the breach by the landlord of a covenant of quiet enjoyment contained in the lease could not be joined with a cause of action for the landlord's unlawfully entering the apartments leased and injuring the lessee's property therein. See opinion of Rapallo, J., *passim*.

For Recovery of Possession of Land and Damages for Forcible Evicton.—A claim for damages for a personal tort cannot be united with a demand properly cognizable in a court of equity, in the same action, as, for instance, a complaint praying for the recovery of the possession of land, and damages for the detention of the land and for forcible eviction and expulsion from it, and for the value of improvements erected upon it by plaintiff. Mayo *v.* Madden, 4 Cal. 27.

2. Brewer *v.* Temple, 15 How. Pr. (N. Y. Supreme Ct.) 286. But see

i. FALSE IMPRISONMENT AND SLANDER.—A cause of action for false imprisonment may be joined with a cause of action for slander, where both arise out of the same transaction.[1]

j. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.—Causes of action which may be joined may grow out of false imprisonment and malicious prosecution.[2]

k. WARRANTY AND FRAUD.—A fraud practised and a warranty made may be so related in time that they constitute the same transaction, and the cause of action for breach of the warranty may be joined with that for the fraud.[3]

l. PERSON AND PROPERTY INJURED BY SAME NEGLIGENT ACT.—Where the same negligent act injures both another's person and property the causes of action may be joined.[4]

m. MULTIFARIOUSNESS.—Sometimes the doctrine of multifariousness in equity practice is invoked to determine whether causes of action grow out of the "same transaction." If all the causes

the opinion of Harris, J., at p. 287, where he says that slander spoken at the time of an assault and battery really constitutes a part of the *res gestæ*, and that there is only one cause of action, not two. He holds that, however numerous the blows or various the injuries, the whole matter constitutes but a single cause of action. *Contra*, Perroteau *v.* Johnson, 4 N. Y. Month. L. Bull. 25; Anderson *v.* Hill, 53 Barb. (N. Y.) 238. At common law they could not be united, because the remedy for one was case, and for the other, trespass. Dragoo *v.* Levi, 2 Duv. (Ky.) 520.

1. Harris *v.* Avery, 5 Kan. 146. The facts of this case were that defendant met plaintiff, and, in the presence of several other persons, called him a thief; said he had a stolen horse—took the horse from him and kept it four or five days; arrested plaintiff and confined him in the county jail four or five days. See also Watts *v.* Hilton, 3 Hun (N. Y.) 606, where libel and false imprisonment were joined.

2. Barr *v.* Shaw, 10 Hun (N. Y.) 580; Haight *v.* Webster, 18 N. Y. Wkly. Dig. 108. See Watson *v.* Hazzard, 3 Code Rep. (N. Y.) 218, where slander and malicious prosecution were joined. *Contra*, Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y. C. Pl.) 353.

3. Humphrey *v.* Merriam, 37 Minn. 502.

An action for deceit in the sale of a horse may be joined with one for breach of warranty in the sale of the same horse. Ashe *v.* Gray, 90 N. Car. 137; Ashe *v.* Gray, 88 N. Car. 190. See also Scott *v.* Brown, 3 Jones (N. Car.) 541, 67 Am. Dec. 256; Bullinger *v.* Marshall, 70 N. Car. 526; Froelich *v.* Southern Express Co., 67 N. Car. 1. In Sweet *v.* Ingerson, 12 How. Pr. (N. Y. Supreme Ct.) 331, it was held that a count in assumpsit on an alleged warranty of a horse, and a count for fraud in concealing the defects of the same horse, were inconsistent and could not be joined. See also Seymour *v.* Lorillard, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 90.

Fraud and Money Had and Received.—To a count in deceit, the plaintiff may join one for money had and received arising out of the same transaction. Woodbury *v.* Deloss, 65 Barb. (N. Y.) 501. A cause of action for fraud and deceit in inducing the plaintiff, a bank, to purchase the notes of an insolvent firm upon false representations that it was prosperous cannot be united with a cause of action for money had and received, where the allegations are that such insolvent firm had given to the defendant money with which to pay the firm notes which were held by the plaintiff, and that the defendant had not done so, but had converted the money to his own use. They do not arise out of the same transaction. American Nat. Bank *v.* Grace, 64 Hun (N. Y.) 22.

4. Howe *v.* Peckham, 10 Barb. (N. Y.) 656; Rosenberg *v.* Staten Island R. Co. (C. Pl.), 14 N. Y. Supp. 476. See *b.* SINGLE CAUSE OF ACTION, *supra*.

of action could have been embraced in an equity bill without making it multifarious, then the matters may be joined under the Codes, as having arisen out of the same transaction.[1]

n. TRANSACTION MUST GIVE CAUSES OF ACTION IN SAME RIGHT.—Two causes of action arising out of the same transaction cannot be joined unless the plaintiff sues in the same right, either in a representative or in an individual capacity.[2]

o. CALIFORNIA.—*California* has no provision in her Code allowing a joinder of causes of action growing out of the "same transaction," but this omission is supplied by judicial construction, which allows such joinder.[3]

p. MISCELLANEOUS.—In the note will be found a collection of miscellaneous cases where it was held that the causes of action either did or did not arise out of the same transaction, and were either properly or improperly joined.[4]

1. Lamming *v.* Galusha, 135 N. Y. 239, 244; Douglas County *v.* Walbridge, 38 Wis. 179; Clark *v.* Covenant Mut. L. Ins. Co., 52 Mo. 272; Mayberry *v.* McClurg, 51 Mo. 256; Gray *v.* Dougherty, 25 Cal. 266; Wilson *v.* Castro, 31 Cal. 420. See also Flynn *v.* Bailey, 50 Barb. (N. Y.) 73, where it was held that it must appear by proper statement that the causes of action arose out of the same transaction; a mere general allegation that they so arose is not sufficient.

2. A claim in favor of the plaintiff individually cannot be joined with one held by him in his representative character as executor of a third person, though arising out of the same transaction. Hall *v.* Fisher, 20 Barb. (N. Y.) 441; Lucas *v.* New York Cent. R. Co., 21 Barb. (N. Y.) 245.

Action as Executrix and as Devisee.—A plaintiff may unite a cause of action as executrix with one as devisee, where both accrued under a contract made by the testator with the defendant, growing out of the same matter. The plaintiff was allowed to sustain her action as devisee against the defendant for the rent of a farm leased to the defendant by the testator, which had accrued subsequent to the testator's death; and also to sustain her action as executrix against the defendant for breaches of covenants in the lease, to repair the buildings. Armstrong *v.* Hall, 17 How. Pr. (N. Y. Supreme Ct.) 76.

3. Jones *v.* Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142. The following is the head-note of the case: "All matters arising from and constituting part of the same transaction may be litigated in the same action. Every action, under our system, may be termed an action on the case, and any ground of relief which can be regarded as part of the case may be included in the action. Under our system, a cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction. Thus, in an action for breach of a contract to convey plaintiff from San Francisco to San Juan del Sur, in Nicaragua, plaintiff may recover not only the direct pecuniary loss resulting from the breach of the contract, but also damages for any fraudulent or oppressive conduct on the part of defendants producing great bodily or mental suffering."

4. **Harboring Wife, Conversion, etc.**—The plaintiff may unite in the same complaint, as causes of action arising out of the same transaction: (1) The harboring and maintaining his wife; (2) The conversion of certain personal property to which the plaintiff is entitled *jure mariti;* (3) Inducing the wife, while harbored and maintained, to execute to defendant a deed for land, under which he had received the rents; and (4) Converting to defendant's own use certain mules and farming utensils set out in a marriage settlement executed by plaintiff and his wife. Hamlin *v.* Tucker, 72 N. Car. 502.

Unlawful Acts by County Treasurer and his Deputy.—A county treasurer un-

3. Penalties.—Under the Codes of practice actions to recover

lawfully seized and sold the property of the plaintiff, by virtue of his office of county treasurer, on a warrant for the collection of taxes; and the deputy of the treasurer also unlawfully seized and sold the property of the plaintiff on a warrant for the collection of taxes. The two causes of action were allowed to be joined. Freeman *v.* Webb, 21 Neb. 160.

Breach of Contract and Injuries to Property.—Separate causes of action arising out of breach of contract and injuries to property, the subject of the contract, entrusted to another to enable him to perform it, may be joined. Badger *v.* Benedict, 1 Hilt. (N. Y.) 414.

Proceedings by the Committee of the Property of an Incompetent.—A complaint by the committee of the property of an incompetent, for the purpose of ascertaining the extent of the latter's interest in the property, and the validity and extent of the liens thereon held by various creditors, is not demurrable as improperly joining causes of action. Holmes *v.* Abbott (Supreme Ct.), 6 N. Y. Supp. 943.

Moneys Due on Settlement and for Money Paid.—A settlement between plaintiff and defendant, and a promise by the latter to pay the amount thus found to be due to the former; and a cause of action based upon the payment by the plaintiff, after the said settlement, of moneys for the use of the defendant, *held*, a proper joinder. Brown *v.* Chadwick, 32 Mo. App. 615.

Action to Quiet Title to Bonds, for their Registration, etc.—A complaint alleged that the plaintiffs were pledgees of certain bonds, for full value and before maturity; that the executors of an estate served notice on the makers that the bonds belonged to their testator's estate, from which they had been wrongfully abstracted by the pledgor; and that by reason of the notice the maker refused to recognize the pledgees' interest; and prayed that the pledgees' title be quieted, that the maker be required to register the bonds in the name of the pledgees, and that the executors be declared to have no title. The complaint was held good, as all the causes of action grew out of one transaction. Newcombe *v.* Chicago, etc., R. Co. (Supreme Ct.), 8 N. Y. Supp. 366.

Action against Stockholder.—A complaint setting forth facts sufficient, and seeking to charge defendant, as a stockholder of a manufacturing corporation organized under the general laws (chap. 40, Laws of 1848), with a debt of the corporation, because of a failure to make and record the certificate required by said act, and also alleging the requisite facts, and seeking to charge him, as trustee, with the debt, because of failure to file an annual report, contains two causes of action, one upon contract, and one upon a statute for a penalty, which cannot be joined. Wiles *v.* Suydam, 64 N. Y. 173.

Action by Consignees against Carrier.—Consignees of goods and holders of the bill of lading, who have made advances upon it, have an interest or property in the goods, which will entitle them to bring an action against the carrier for the loss, waste, or wrongful conversion thereof. Such a cause of action may be joined with a claim to recover back a sum overpaid by the plaintiffs to the defendants on account of the freight of the goods. Adams *v.* Bissell, 28 Barb. (N. Y.) 382.

To Set Aside Award and for Money Due.—A complaint demanded (1) A certain sum alleged to be the balance due to the plaintiffs upon a building contract; (2) Payment for extra work and materials; (3) Damages sustained by reason of having been hindered and delayed by the defendants in the completion of the work; (4) That a certain award, made by the arbiter mutually chosen, in relation to certain disputes growing out of the contract should be set aside as obtained by fraud. All these were allowed to be joined as arising out of the same transaction. See *v.* Partridge, 2 Duer (N. Y.) 463.

For Reformation of Insurance Policy and for its Enforcement.—An action in equity to reform a policy of insurance can be joined with one at law for recovery upon the reformed policy. They arise out of the same transaction. McHovey *v.* German Ins. Co., 44 Mo. App. 426.

To Set Aside Release and for Recovery of Damages.—Under the Code a count in equity to set aside a release of damages for personal injuries can be joined with one at law for the recovery of the damages. They arise out of

penalties given by statute and by express contract are causes of

the same transaction. Blair *v.* Chicago, etc., R. Co., 89 Mo. 383.

Cancellation of Spurious Certificates of Stock.—Causes of action for the cancellation of spurious certificates of stock in a corporation may be joined in one action. New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592.

Action to Recover for Duress of Ancestor in Making Will and for False Representations in Securing Waiver to Probate of Will.—A joinder in one complaint of a cause of action arising from duress and restraint exercised over plaintiff's ancestor in inducing him to execute a will, and a cause of action arising from false representations made to plaintiff, by reason of which plaintiff waived all objections to the probate of such will, is proper. Hay *v.* Hay, 13 Hun (N. Y.) 315.

Action to Recover as Surviving Partner, as Assignee of a Claim, and for the Breach of an Arbitration Agreement.—Plaintiff sued as surviving partner for work and labor done, and also as assignee of a third party; there was also a count to the effect that the defendant had consented to submit the above claims to arbitration, but that after divers hearings he had revoked the submission, for which damages were claimed. *Held*, that all these causes of action arose out of the same transaction. Kent *v.* Crouse (Supreme Ct.), 5 N. Y. St. Rep. 141.

Action for Money Paid on Repudiated Contract.—An action to recover moneys paid upon a contract repudiated by plaintiff on the ground of fraud may be united with one to recover moneys paid on the ground that defendant has refused to perform and has repudiated the contract on his part. Freer *v.* Denton, 61 N. Y. 492.

Two Street Assessments.—Two causes of action for enforcing liens for two street assessments, made in San Francisco, on the same lot at different times and on different contracts, and for improving the same street, cannot be joined in the same suit. Dyer *v.* Barstow, 50 Cal. 652.

Action Against Trustee for Unauthorized Acts and One on Bond.—A cause of action against the trustee of an insolvent savings bank to recover the damages occasioned by unauthorized and illegal investments made by him cannot be joined with a cause of action upon a bond given by him to assist in making up a deficiency in the assets of the bank. French *v.* Salter, 17 Hun (N. Y.) 546.

Attacking a Judgment and Asking Declaration of Trust.—A petition contained two counts, one alleging that certain shares of stock owned by the plaintiff were purchased at judicial sale by the defendant under a parol agreement that defendant should hold the shares in trust and reconvey the same upon payment of a debt due him from plaintiff; and the other alleging want of jurisdiction in the court making such sale, but that defendant, under color thereof, procured the transfer of the shares on the books of the company, and received dividends thereon in trust for plaintiff. *Held*, not bad for misjoinder. Williams *v.* Lowe, 4 Neb. 382.

Two Wrongs Causing One Injury.—The petition asked damages for horses killed by defendant's train, and counted upon two distinct wrongful acts as causes of the killing: (1) neglect to repair a fence; (2) negligence in running its train. *Held*, that the addition of a tort to a separate and distinct act in violation of contract does not deprive the injured party of the right to complain at the same time of both wrongs. Pittsburg, C. & St. L. R. Co. *v.* Hedges, 41 Ohio St. 233.

Bond Given Not to Make Illegal Acts Public.—Illegal acts were done during the continuance of a partnership, and a bond was given by the executors of a deceased partner, with one of the defendants, as security to the surviving partners not to make the wrong public; also, a sum of money was paid to that defendant by this plaintiff out of the estate of the decedent as his security that the executors would keep the bond a good cause of action against all the defendants. *Held*, that the defendant to whom the money had been paid could not be compelled to return it unless the bond was cancelled, and that in an action for that purpose the surviving partners must be brought in. Zimmerman *v.* Kunkel (Supreme Ct.), 6 N. Y. St. Rep. 768.

For Conversion of Property and Proceeds of Sale.—A cause of action for the wrongful seizure and conversion of personal property, and a cause of action to recover the proceeds of the

action arising on contract, and may be joined. They may also be joined with other actions on contract.[1]

4. Judgments.—Causes of action on judgments are causes of action on contract within the meaning of the Codes, and all such causes of action may be joined with each other or with any other cause of action on contract.[2]

5. Injuries to Character.—All the Codes allow causes of action for injuries to character to be joined.[3]

sale in the hands of the defendants, cannot be joined. Teall *v.* Syracuse, 32 Hun (N. Y.) 332.

Kansas.—Where an action was brought before a justice of the peace under art. 13, ch. 81, Comp. Laws of 1885, and there was joined therewith a claim for damages growing out of the same transaction, *held*, that the proceeding under the Forcible Entry and Detainer Act is a summary one, and cannot be joined with other causes of action, although such other causes of action may arise out of the same transaction. Ow *v.* Wickham, 38 Kan. 225.

North Carolina.—The plaintiff may, but is not compelled to, join separate causes of action arising out of the same transaction. Gregory *v.* Hobbs, 93 N. Car. 1.

1. Cincinnati, etc., R. Co. *v.* Cook, 37 Ohio St. 265; State *v.* Roberts, 101 N. Car. 774; Doughty *v.* Atlantic, etc., R. Co., 78 N. Car. 22.

Action Against Attorney.—Actions brought to recover notes placed in the hands of an attorney for collection, and the statutory penalty of 10 per cent, are joinable. Bougher *v.* Scobey, 16 Ind. 151.

Against Trustee for Failure to Release After Payment.—In an action by the grantor in a deed of trust against the trustee and holder of the notes, for failure to make a release after the debt had been paid, claims for damages may be united with claims for a penalty. Scott *v.* Robards, 67 Mo. 289.

Against Sheriff.—A suit to recover damages, and also the penalty against a sheriff for a failure to execute and return process, may be joined. Pearkes *v.* Freer, 9 Cal. 642.

Tort and Penalty.—An action to recover damages caused by the roadbed erected by defendant ponding back water onto plaintiff's land cannot be joined with one to recover damages for an alleged breach of duty on the part of defendant in not putting up sufficient cattle-guards as required by the Code, § 1975, whereby cattle trespassed on plaintiff's lands. The first is an action for tort; the other for breach of a statutory duty. Hodges *v.* Wilmington, etc., R. Co., 105 N. Car. 170.

California.—The plaintiff cannot unite two or more causes of action for penalties incurred by a toll-gatherer for demanding and receiving too much toll, even if they are separately stated. Brown *v.* Rice, 51 Cal. 489. Under § 2743 of the Political Code, as amended in 1883, a cause of action to abate a nuisance caused by the obstruction of a public highway, and a cause of action to recover the penalty of ten dollars a day for every day the nuisance remained after notice to remove it, may be united in the same action. Bailey *v.* Dale, 71 Cal. 34.

2. Moore *v.* Nowell, 94 N. Car. 265; Childs *v.* Harris Mfg. Co., 68 Wis. 231.

Action to Revive a Decree and One for a Personal Judgment.—An action to revive a decree, and an action for a personal judgment on the original decree, may be joined. Moore *v.* Ogden, 35 Ohio St. 434.

Judgments Against Partnership in Different Names.—A firm in Wyoming did business by the name of J. W. D. & Associates, and also as D. S. & Co. *Held*, in an action against a member of the firm upon a judgment against J. W. D. & Associates, and one against D. S. & Co., that the judgments could be joined in one action. Ruth *v.* Lowrey, 10 Neb. 260.

3. **Libel, Slander, and Malicious Prosecution.**—Causes of action for libel, slander, and malicious prosecution may be joined. They are all injuries to character. Martin *v.* Mattison, 8 Abb. Pr. (N. Y. Supreme Ct.) 3. See also Shore *v.* Smith, 15 Ohio St. 173, where a cause of action for slander

6. Causes of Action Ex Delicto and Ex Contractu.—*a.* GENERALLY. —Causes of action arising *ex delicto* cannot be joined, under the Codes, with those arising *ex contractu*, unless they arise out of the same transaction.[1]

b. COMPLAINT TO BE DRAWN UPON DEFINITE THEORY.—It

and one for malicious prosecution were allowed to be joined; they were held injuries to character.

Slander at Different Times.—Slanderous words spoken at different times constitute separate causes of action, and should be separately stated. Swinney *v.* Nave, 22 Ind. 178. See also Alpin *v.* Morton, 21 Ohio St. 536. But the entire conversation in which slanderous words are published constitutes but one cause of action. Cracraft *v.* Cockran, 16 Iowa 302.

Different Articles.—See Fleischmann *v.* Bennett, 87 N. Y. 231, where the complaint set forth six different alleged libelous articles published at different times. *Held*, that each constituted a separate cause of action.

Libel and Slander.—A count in libel may be joined with one in slander. Noonan *v.* Orton, 32 Wis. 106.

Slander and False Charge before Grand Jury.—Slander of the plaintiff, and a false and malicious charge against him made before a grand jury, are injuries to character, and may be joined. Hull *v.* Vreeland, 18 Abb. Pr. (N. Y. Supreme Ct.) 182.

1. Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582; Tompkins *v.* White, 8 How. Pr. (N. Y. Supreme Ct.) 520; Keep *v.* Kauffman, 36 N. Y. Super. Ct. 141; Butt *v.* Cameron, 53 Barb. (N. Y.) 642; Colwell *v.* New York, etc., R. Co., 9 How. Pr. (N. Y. Supreme Ct.) 311; Booth *v.* Farmers, etc., Nat. Bank, 65 Barb. (N. Y.) 457; Hall *v.* Fisher, 20 Barb. (N. Y.) 441; Ehle *v.* Haller, 6 Bosw. (N. Y.) 661; Alger *v.* Scoville, 6 How. Pr. (N. Y. Supreme Ct.) 131; Landau *v.* Levy, 1 Abb. Pr. (N. Y. Super. Ct.) 376; Sumner *v.* Tuck, 10 Mo. App. 269; Bishop *v.* Chicago, etc., R. Co., 67 Wis. 610; Lane *v.* Cameron, 38 Wis. 603; Kewaunee County *v.* Decker, 30 Wis. 624. See Siebern *v.* Meyer (Ohio C. Pl.), 26 Wkly. L. Bull. 147; Nimocks *v.* Inks, 17 Ohio 596.

Implied Contract.—A cause of action in tort cannot be united with one on implied contract, even though arising out of same transaction. Hunter *v.* Powell, 15 How. Pr. (N. Y. Supreme Ct.) 223.

Contract and Fraud.—A cause of action in contract against one defendant cannot be united with a cause of action in fraud against both. North Carolina Land Co. *v.* Beatty, 69 N. Car. 329.

Iowa.—In *Iowa* causes of action *ex delicto* may be joined with those *ex contractu*. Rev. Sts. § 2844; Turner *v.* First Nat. Bank, 26 Iowa 562; Jack *v.* Des Moines, etc., R. C., 49 Iowa 627. But they must have same venue; see cases *supra*.

Texas.—In the system of practice which obtains in *Texas* the parties are required to settle all their controversies in a single suit if practicable. Causes of action *ex contractu* and *ex delicto* are joinable. International, etc., R. Co. *v.* Donalson, 2 Tex. App. Cas. 238; Chevallier *v.* Rusk, Dall. (Tex.) 611; Pitts *v.* Ennis, 1 Tex. 604; Francis *v.* Northcote, 6 Tex. 185; Haggerty *v.* Scott, 10 Tex. 525; Henderson *v.* Morrill, 12 Tex. 3; Ponton *v.* Bellows, 22 Tex. 681; W. & W. Con. Rep. § 1246; Craddock *v.* Goodwin, 54 Tex. 578.

For Possession of Property, etc.—The plaintiff may join claims for possession of personal property, for exemplary damages, and for reasonable compensation for trouble and expense in seeking the property. Cox *v.* Lloyd, 1 Tex. App. Cas. § 123.

Conversion and Overcharge in Freight. —The following claims may by joined: (1) For the conversion of a bale of cotton; (2 Overcharge of freight on nine bales of cotton; (3) Damage done to three buggies in transporting same; (4) Discrimination in freight on one hundred and fifty bales of cotton delivered for transportion. Houston, etc., R. Co. *v.* Stewart, 1 Tex. App. Cas. § 1246.

Alabama.—The joinder of counts *ex contractu* with counts *ex delicto* is unaffected by statutory provisions, and is good ground for demurrer to the entire complaint. Whilden *v.* M. & P. Bank, 64 Ala. And see Munter *v.* Rogers, 50 Ala. 283.

Georgia.—A claim arising *ex delicto* cannot be set off against a suit on a draft. Smith *v.* Printup, 59 Ga. 610,

is often difficult to determine from the allegations of a complaint whether an action *ex contractu* is joined with one *ex delicto*. Where a tort is committed, it is often optional with the plaintiff to waive the tort and sue on the implied contract, and join with this any other cause of action on contract.[1] A complaint must proceed upon a definite theory, the cause must be tried upon the theory constructed by the pleadings, and such a judgment as the theory selected warrants must be rendered, and no other or different one.[2]

c. CASES INVOLVING CONVERSION OF PROPERTY.—The courts apply a rather strict rule in cases of the conversion of property, holding that this is a cause of action *ex delicto* which cannot be joined with one *ex contractu*. The complaint is usually construed as proceeding for the tort, and not on the implied contract.[3]

1. Logan *v.* Wallis, 71 N. Car. 416; Shirley *v.* Waco Tap R. Co., 78 Tex. 131.

2. A complaint seeking a recovery against some of the defendants upon a money demand for goods sold and delivered, and auxiliary equitable relief against other defendants as fraudulent judgment plaintiffs and vendees, does not entitle the plaintiff to a judgment for damages against all the defendants. Feder *v.* Field, 117 Ind. 386.

Evidence only Adduced to One Paragraph.—If the evidence is only adduced to one of two paragraphs of the complaint, and the case is tried upon the theory set forth in such paragraph, it is immaterial that other paragraphs are improperly joined with such paragraph. Carter *v.* Lacy, 3 Ind. App. 54.

Suing on One Cause and Recovering on Another.—Under the Code one cannot sue on one cause of action and recover on another. He cannot sue for an injury and recover on a contract, express or implied, or *vice versa*. Sumner *v.* Rogers, 90 Mo. 324.

3. **Action for Accounting and Settlement of Accounts, with Action against Sureties for Converting Property.**—A cause of action against the board of county commissioners of a county in favor of one who had been treasurer thereof, for an accounting and settlement of his accounts as such treasurer, cannot be joined with a cause of action in his favor, against the sureties on his official bond, for wrongfully converting property deeded by him in trust for the protection of said sureties from loss as sureties on said official bond. Rizer *v.* Davis County, 48 Kan. 389.

Recovery from Bondsmen of Constable for Illegal Levy and against Constable for Conversion.—Where a deputy constable levies an execution upon property belonging to a person other than the execution debtor, and such person then commences an action for damages for the wrong against the constable and his sureties and the said deputy, and in his petition in one count sets forth a cause of action against the constable and his sureties on the constable's bond, and also a cause of action against the constable and his deputy for the tort committed by the deputy, *held*, that the two causes of action were improperly joined. Hoye *v.* Raymond, 25 Kan. 665.

Tort and Money Had and Received.—A claim arising out of an alleged tort cannot be joined in the same action with a claim for money had and received, the rule of the Code being that plaintiff may join all causes of action of like nature; causes *ex delicto* cannot be joined with causes *ex contractu*. Teem *v.* Ellijay, 89 Ga. 154; Croghan *v.* New York Underwriters' Agency, 53 Ga. 112.

Conversion by Carrier and Breach of Contract to Carry.—A cause of action for damages for negligence in not taking proper care of a sum of money delivered to him to be kept, which he agreed to take care of, but which he lost through gross carelessness, and failed to redeliver upon demand, is a cause of action for breach of contract, and cannot be joined with a cause of action for the conversion of the money to the use of the defendant. Stark *v.* Wellman, 96 Cal. 400.

d. MISCELLANEOUS.—In the note will be found a collection of cases which, while affirming the general principle that tort and contract cannot be joined, involve questions of construction, whether the cause of action sounds in tort or on contract, and whether there has been a proper or an improper joinder.[1]

Claim against Trustee for Surplus on Foreclosure and for Conversion.—A claim against a trustee for surplus on foreclosure cannot be united with one for conversion of the property sold. Pettit *v.* King, Seld. Notes (N. Y.) 222.

Breach of Contract to Sell Goods and Trover.—A cause of action for a breach of contract to sell and deliver a quantity of goods cannot be joined with one in trover. Bennett *v.* Taintor, 8 Law Rep. 553.

Claim against Trustee cannot be Joined with one for Conversion of Note.—A claim against the defendant as trustee cannot be joined with one for taking possession of, collecting, and converting the proceeds of a note belonging to plaintiff. Jasper *v.* Hazen, 2 N. Dak. 401.

Conversion and Accounting.—A cause of action for the conversion of personal property cannot be joined with a claim for an accounting between principal and agent. Thompson *v.* St. Nicholas Bank, 61 How. Pr. (N. Y. Supreme Ct.) 163.

Sale of Real Estate and Conversion.—A cause of action arising out of a breach of contract on a sale of real estate cannot be joined with one arising out of a wrongful conversion of personal property. McDonald *v.* Kountze, 58 How. Pr. (N. Y. Supreme Ct.) 152.

Recovery of Personal Property and Conversion.—A plaintiff cannot so frame his complaint as that, if he fails to recover the possession of his personal property, he can recover damages for the conversion. Maxwell *v.* Farnam, 7 How. Pr. (N. Y. Supreme Ct.) 236.

Fraudulent Taking of Money and for Lien on Land in which it was Invested.—It seems that a cause of action for the fraudulent taking of plaintiff's money and appropriating the same to the purchase of real estate, and taking the title to the same in the name of the defendant's wife, and praying for a judgment and that a lien be declared on the real estate, may be joined with a cause of action for a judgment for the money so appropriated. File *v.* Springel, 132 Ind. 312.

Petition Omitting Allegations of Conversion.—A petition in an action upon a promissory note, reciting the consideration of the note and the disposition of property for which it was given, but not alleging that there was a "wrongful conversion" of the property, is not subject to objection by demurrer on the ground that "an action on a promissory note and an action of trover are improperly joined." Lash *v.* Christie, 4 Neb. 262.

1. **For Value of Stock Received and for Breach of Trust.**—Causes of action in tort and in contract cannot be joined; as, an action for specific performance of a contract, one for the value of stock received under a resolution of a board of directors, and one for breach of trust in no wise connected with the other causes of action, cannot be joined. Hannahs *v.* Hammond (Supreme Ct.), 19 N. Y. Supp. 883.

Contract and Injury to Property.—A cause of action founded upon a contract cannot be united in the same count with a cause of action founded upon an injury to property. Ederlin *v.* Judge, 36 Mo. 350; Jamison *v.* Copher, 35 Mo. 483; Hoagland *v.* Hannibal, etc., R. Co., 39 Mo. 451.

Trespass and Injunction.—A cause of action for damages for a trespass, and a cause of action for an injunction to restrain further or additional trespass threatened to be committed upon the same property, may be joined. Jacob *v.* Lorenz, 98 Cal. 332.

Fraud and Breach of Covenant.—A cause of action for costs incurred in having to bring suit against the defendant for specific performance of an agreement to reconvey certain premises, a cause of action based upon alleged fraud, malice, and oppression of the defendant, and a cause of action arising from the breach of the defendant's written covenant of warranty of property conveyed to the plaintiff, cannot be united. Cosgrove *v.* Fisk, 90 Cal. 75.

To Set Aside Conveyance for Fraud and for Accounting under Assignment.—A suit to set aside, on the ground of fraud, a conveyance by a debtor of land not included in his assignment for the

7. Causes of Action Arising Ex Contractu.—All causes of action

benefit of creditors, should not be joined with a suit for an accounting under the assignment. Hatcher *v.* Winters, 71 Mo. 30.

To Set Aside Bond Wrongfully Extorted, and to Recover Trust Money.—Actions to set aside a bond wrongfully extorted, and to recover trust money deposited with the surety thereon without authority, may be joined. Zimmerman *v.* Kinkle, 108 N. Y. 282.

Exemption from Imprisonment.—Where the plaintiff unites in his suit causes of action upon contract and in tort, and a general verdict and judgment are rendered in his favor, it seems that the defendant is exempted by the Non-imprisonment Act from imprisonment upon the execution. Miller *v.* Scherder, 2 N. Y. 262.

For Reconveyance and for Damages in Fraudulent Sale.—The vendor of land cannot unite in the same action a claim against the broker for damages for having fraudulently sold the land, with a claim against the purchaser for a reconveyance or accounting. Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192.

Against Partner for an Account and Appropriation to Firm Debts.—In a suit against a partner for an account, the plaintiff may join a demand for the appropriation of the firm assets to the partnership debts. Davis *v.* Grove, 2 Robt. (N. Y.) 136; Wade *v.* Rusher, 4 Bosw. (N. Y.) 537.

Negligence in the Performance of a Contract may Constitute an Action Ex Delicto.—A count in a complaint, setting out a contract for the carriage of horses and payment of the freight thereon, and alleging that the defendant so negligently and carelessly carried said horses that one of them was killed, states a cause of action *ex delicto*, although the amount paid for freight is included in the sum for which judgment is asked, and such cause of action may be joined with one for neglecting to fence a railroad, by reason whereof an ox of plaintiff was killed. Rideout *v.* Milwaukee, etc., R. Co., 81 Wis. 237.

Statute Making Directors Personally Liable for Debts.—There is no misjoinder of causes of action where a single action is brought upon a note and upon an account, against a debtor corporation, and also against its directors, who are made by the act of incorporation jointly and severally liable for the debts of the corporation. Sullivan *v.* Sullivan, 14 S. Car. 494. See also a very learned and elaborate opinion on the subject of multifariousness by the Hon. John A. Inglis, printed as a footnote to the case of Suber *v.* Allen, 13 S. Car. 317.

Damages for not Delivering Cattle and for Injury while being Carried.—A petition for not safely delivering cattle, and also for damages in having put the cattle in a yard infected with a cattle disease, whereby they became infected, states but one cause of action. Baldwin *v.* Railway Co., 1 Clev. Rep. (Ohio) 178.

Breach of Covenant in a Lease and Trespass.—An action for a breach of a covenant in a lease cannot be joined with one for trespass on the demised premises. Week *v.* Keteltas, 10 Civ. Pro. Rep. (N. Y. C. Pl.) 43.

Negligence and Rent.—A cause of action for negligence cannot be joined with one upon contract for rent. Compton *v.* Hughes, 38 Hun (N. Y.) 377.

Rescission of Contract and Accounting.—A claim for the rescission of a contract on the ground of fraud cannot be joined with one for an account under it. Van Liew *v.* Johnson, 4 Hun (N. Y.) 415.

Against Trustee for Conversion and as Trustee of the Proceeds of Property.—A claim against the defendant as trustee of the proceeds of property cannot be joined with one for the wrongful conversion of it. Pettit *v.* King, Seld. Notes (N. Y.) 222.

Against Sheriff and Bondsmen.—If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action. Ghiradelli *v.* Bourland, 32 Cal. 585.

Contract and Neglect of Duty.—Damages for breaches of contracts and for neglect of duty cannot be united in the same complaint. Loup *v.* California, etc., R. Co., 63 Cal. 99. See also Sheldon *v.* Steamship Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193.

Indiana.—Under section 280 Rev. Sts. 1881 a paragraph of complaint declaring upon a guardian's bond and asking judgment may be joined with other

arising *ex contractu*, whether on sealed instruments or on simple contracts, or on both, may, under the Codes, be joined.[1]

paragraphs also declaring on the bond and attacking conveyances made by the surety as fraudulent, with a prayer that they be set aside. Bowen *v.* State, 121 Ind. 235.

Missouri.—A count for a breach of warranty in a sale is not inconsistent with one for damages caused by a fraudulent misrepresentation in the same sale; nor is the joinder thereof contrary to section 6137 of the Rev. Sts. of 1889, which prohibits the joinder, in justices' courts, of a cause of action founded upon a contract with one founded upon trespass to the person or to real or personal property. Spangler *v.* Kite, 47 Mo. App. 230.

1. Sutton *v.* McMillan, 72 N. Car. 102; Keller *v.* Hicks, 22 Cal. 457, 83 Am. Dec. 78; Waterman *v.* Waterman, 81 Wis. 17; Remy *v.* Olds, 88 Cal. 537; Cowan *v.* Abbott, 92 Cal. 100; Clark *v.* Ryan, 95 Ala. 406; Buford *v.* Funk, 4 Greene (Iowa) 493; Bowman *v.* Holladay, 3 Oregon 182; Dabams *v.* Sears, 13 Oregon 47; Cohen *v.* Ottenheimer, 13 Oregon 220; Powell *v.* Dayton, etc., R. Co., 13 Oregon 446; Stevens *v.* Able, 15 Kan. 584; Schilling *v.* Black, 49 Kan. 552; Hoye *v.* Raymond, 25 Kan. 665; Parmerter *v.* Baker (Supreme Ct.), 8 N. Y. Supp. 69; State *v.* Schneider, 35 Mo. 533; Wright *v.* Baldwin, 51 Mo. 269; Aycock *v.* Austin, 87 Ga. 566; Gabel *v.* Hammerwell, 44 Ala. 336; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614.

Two Claims, One Held under Assignment.—A cause of action for work and labor performed by the plaintiff for the defendant, and a cause of action for work and labor performed for the defendant by an assignor of the plaintiff, may be united in the same complaint. Fraser *v.* Oakdale Lumber, etc., Co., 73 Cal. 187.

On Note to Plaintiff and on Assigned Note, the Assignor Being a Necessary Party to the Latter Claim.—A count on a note made by defendant to plaintiff may be united with a count on a non-negotiable note made by defendant to a third person, and by him assigned to plaintiff, although the assignor is a necessary defendant and is not affected by the first count. Myers *v.* Miller, 2 West L. Month. (Ohio) 420.

Account Divided by Agreement.—Where, by agreement, an account for goods sold on the same day was divided into four distinct parts, due on different days, the creditor had a right of action on each as it fell due, and if he waited until all had fallen due, he might sue on them separately or unite them, and he was not compelled to unite them so as to prevent the jurisdiction of a justice's court. Parris *v.* Hightower, 76 Ga. 631.

Against Railroad as Carrier and Warehouseman.—A cause of action against a railroad company *as carrier* for loss of goods, and against same company *as warehouseman* for other goods destroyed by fire, need not be joined. Kronshage *v.* Chicago, etc., R. Co., 45 Wis. 500.

As Surviving Partner and Individually.—The surviving partner in a law firm can sue for the amount due for services rendered by the firm before the dissolution of the firm by the death of one of its members, and can join in the same action a claim for what is due him individually for services rendered under the same contract after the death of his partner. O'Brien *v.* Gilleland, 79 Tex. 602; Stachely *v.* Peirce, 28 Tex. 328.

Upon Two Official Bonds.—A complaint in an action upon two official bonds given for separate terms of office, against a clerk and a single surety to both bonds, alleging misapplication of funds paid into the clerk's office during the two terms, is not demurrable for misjoinder of causes of action. Syme *v.* Bunting, 86 N. Car. 175.

Bonds of Officer with Different Sureties.—One S. was elected treasurer of a school district, and executed a bond to the district with two sureties conditioned as required by law. Afterward, and during the same term of office, he executed and delivered to the district an additional bond with new sureties. In an action against the principal and sureties on both bonds for a default of the treasurer, occurring after the execution of the second bond, *held*, that they were properly joined. Holeran *v.* School District No. 17, 10 Neb. 406.

Account and Note Indorsed as Collateral Security.—A cause of action upon a

8. Divorce Proceedings.—Divorce proceedings are in the nature of special proceedings, and it seems to be the policy of the courts to confine all matters arising therein within a limited range, and the joining of other matters is discouraged.[1]

9. Injuries to Property.—Actions for injuries to property may be united. But the Codes generally segregate the two kinds of property, and only allow a joinder of causes of action arising from either injuries to personal property or injuries to real property, but not from both. A cause of action for an injury to personal property cannot be joined with one for an injury to real property.[2]

note may be joined with one upon an account. Thorpe *v.* Dickey, 51 Iowa 676. But such causes of action cannot be joined where the parties to the note are not all parties to the account, even though the note was indorsed as collateral security for the account. Thorpe *v.* Dickey, 51 Iowa 676.

Assessments.—If several tracts of swamp land, of the same owner, be separately assessed under one assessment, the assessments on the several tracts may be recovered in one action. People *v.* Hagar, 52 Cal. 171. And two assessments for reclamation purposes in a swamp-land district, made on the same land at different times, may be recovered in the same action. Swamp Land Co. *v.* Feck, 60 Cal. 403.

Against Partners.—A cause of action against a partnership cannot be united with a cause of action against the same partnership, where a new member is taken in who is only liable on one cause of action. Benton *v.* Winner, 69 Hun (N. Y.) 494.

Account not Due.—When the plaintiff's petition states three separate demands, the first two on promissory notes past due, and the third on an account not due, there is a misjoinder of causes of action. Wurlitzer *v.* Suppe, 38 Kan. 31.

Two Bonds.—A complaint in which are joined two causes of action, the one upon a clerk's bond, and the other upon a bond of an administrator, is a misjoinder. Street *v.* Tuck, 84 N. Car. 605.

Against Two Insurance Companies, One on Reinsurance Policy.—A cause of action against an insurance company on an original policy cannot be joined with a suit against another company on a reinsurance policy. Lee *v.* Fraternal Mut. Ins. Co., 1 Handy (Ohio) 233.

1. **Equitable Relief.**—Equitable relief cannot be prayed for in a divorce case. Dunbar *v.* Dunbar, 1 Clev. Rep. (Ohio) 148.

For Absolute Divorce and for Annulment of Separation Deed.—A cause of action for an absolute divorce cannot be united with one for the annulment of the deed of separation. Galusha *v.* Galusha, 138 N. Y. 281.

To Annul Marriage and to Quiet Title.—The plaintiff cannot unite a cause of action to annul a marriage by reason of a former marriage of the plaintiff to one who is still alive, with a cause of action to quiet her title to her separate property, in which the defendant falsely claims an interest. Uhl *v.* Uhl, 52 Cal. 250.

For Divorce and to Set Aside Conveyances.—In an action for divorce and alimony it is not an improper joinder of causes of action to seek at the same time to set aside certain fraudulent conveyances on which an award of alimony is dependent. Prouty *v.* Prouty, 4 Wash. 174.

2. See Code provisions, *supra*, § 1, CODE STATES.

What is an Injury to Personal Property.—A cause of action for the conversion of personal property may be united with one for false and fraudulent representations, inducing plaintiff to execute a bond and a mortgage on his real estate, to secure its payment in favor of a third person, for whom defendant delivered them for a consideration—this under the Code allowing causes of action for injuries to personal property to be joined. De Silver *v.* Holden, 50 N. Y. Super. Ct. 236. Causes of action for deceit in the sale of a canal-boat and horses by the defendant to the plaintiff, and for taking certain personal property of the plaintiff's from such canal-boat,

10. Actions to Recover Real Property.—The plaintiff may unite in the same complaint two or more causes of action where they

and converting the same, may be united, as they are both for injuries to property. Cleveland *v.* Barrows, 59 Barb. (N. Y.) 364.

Cutting Wood.—A cause of action for cutting and removing timber, and one for removing firewood already cut, and converting it, followed by averments of injury to the inheritance and reversionary interest of the plaintiff, may be united, as the causes of action arise out of "injuries with or without force to property." Rodgers *v.* Rodgers, 11 Barb. (N. Y.) 595.

Action for Deceit and for Waste.—Deceit in the sale of a horse is an injury to property without force, within the meaning of subd. 3, sec. 2647, Rev. Sts., and a cause of action therefor may be united with a cause of action for an injury to realty by waste. Gilbert *v.* Loberg, 83 Wis. 189.

Injuries to Real Estate.—The complaint set forth two causes of action, one for a wrongful entry upon plaintiff's lands under water and wrongfully carrying away fish therefrom, the other for a like entry on plaintiff's land and catching and killing muskrats thereon. *Held*, that as both causes of action were for injuries to real estate, they were properly united. Whatling *v.* Nash, 41 Hun (N. Y.) 579.

Breach of Duty in Neglecting to Build Crossing.—An action to recover damages caused by an embankment erected by defendant upon its land, which turned the waters of a stream and caused them to flow over plaintiff's premises, cannot be joined with one to recover damages for a breach of duty in neglecting to erect and maintain a farm crossing. The first cause of action is for injuries to real property, while the second is "upon contract." Thomas *v.* Utica, etc., R. Co., 97 N. Y. 245

Injury to Property and Person.—A cause of action for injury to the property of two persons in partnership cannot be joined with one for injuries from the same wrong to the person of one partner. Taylor *v.* Manhattan R. Co., 53 Hun (N. Y.) 305. A claim for injuries to the person cannot be united with one for injuries to property. McCarty *v.* Fremont, 23 Cal. 196.

Damage to Building and Trespass.—A claim for damages done to a brick building by the construction of a railroad track within three feet of its front wall, and a claim for damages for trespass by defendant upon plaintiff's land, cannot be joined in the same count. Dougherty *v.* Wabash, etc., R. Co., 19 Mo. App. 419.

Condemnation of Land and Damages for Trespass.—An action against a railroad company for a trespass to land in building its road thereon, without license or condemnation of the land, cannot be joined with a proceeding by the company to condemn land under ch. 119 of 1872. Blesch *v.* Chicago, etc., R. Co., 44 Wis. 593.

Separate Dams Erected.—Where two persons each severally built dams across a river, one across the north channel, and the other across the south channel, which caused an overflow, *held*, that there was a separate cause of action against each defendant, and that the two causes of action could not be joined in the same complaint. Lull *v.* Fox, etc., Imp. Co., 19 Wis. 111. See also Arimond *v.* Green Bay, etc., Canal Co., 31 Wis. 316.

Injury to Real Property and Slander of Title.—An action for slander of title cannot be united with one for an injury to real property. Dodge *v.* Colby, 108 N. Y. 445.

Riparian Owners Restraining Diversion of Water.—In an action by riparian owners to restrain the diversion of water from their lands, an allegation that the defendant entered upon the land of one of the plaintiffs and dug up and removed rocks and soil therefrom does not state a cause of action, so as to create an improper joinder, where such allegation is made merely to show the means employed in diverting the water, and no damages are claimed on account of such entry. Grand Rapids Water Co. *v.* Bensley, 75 Wis. 399.

Damages for Diverting Water and Injunction.—If the several owners of a stream join as plaintiffs in an action for damages for diverting the waters of the stream, and for an injunction to restrain the defendants from the further diversion thereof, the owners having no joint or common interest, neither one having any interest in the land, water, or ditch of the other, the

are brought to recover real property, with or without damage for the withholding thereof.[1]

complaint is demurrable, both for a misjoinder of parties plaintiff and for a misjoinder of causes of action. Foreman *v.* Boyle, 88 Cal. 290.

Lowering Waters of Lake.—An action to recover damages for the lowering of the waters of a lake may be joined with one for an injunction to prevent the continuance of the acts causing them. Cedar Lake Hotel Co. *v.* Cedar Creek Hydraulic Co., 79 Wis. 297.

Laying Railroad Track.—An action to restrain the laying of a railroad track in a street in front of plaintiff's premises cannot be joined with one asking damages for a track already laid there and an injunction to prevent further use of the street by defendant till such damages are paid, under § 2630 of the Code, which allows two causes to be joined "where each may be prosecuted by the same kind of proceedings." Bowman *v.* Chicago R. Co. (Iowa, 1892), 53 N. W. Rep. 327.

Temporary and Permanent Damages.—If a railroad company in building its roadbed extends a permanent approach thereto in front of plaintiff's lot, destroying egress and ingress therefrom to the street, and at the same time floods plaintiff's lot by means of an improper culvert under its embankment on the south of said lot, plaintiff can recover for both the temporary and the permanent damages in the same action. Wallace *v.* Kansas City R. Co., 47 Mo. App. 491.

Damages for Trespass and Waste, and Injunction.—A claim for damages against a county for trespass and waste cannot be joined with one for an injunction to restrain further acts of waste. McCann *v.* Sierra County, 7 Cal. 123.

Quare Clausum Fregit and Negligence.—Where there was a joinder of an action to recover for injuries to personal property, and an action *quare clausum fregit*, and one for negligence, the court refused to arrest the judgment. Henshaw *v.* Noble, 7 Ohio St. 226.

Trespass and Profits.—To a count in trespass for entering upon the plaintiff's land and taking and carrying away his wheat, cotton, etc., a count may be added by way of amendment, for taking and carrying away the proceeds and profits of the same land for the same time. Oglesby *v.* Stodghill, 23 Ga. 590.

Indiana.—*For Injury and Possession.*—Under the fourth clause of section 278 Rev. Sts. 1881, a paragraph of complaint to recover damages for conversion may be joined with a paragraph to recover possession of the same property. Baals *v.* Stewart, 109 Ind. 371.

Missouri.—Several causes of action for injury to person or property, whether real or personal, direct or consequential, and whether the damages are given by statute or by common law, single or double, may be included in the same petition. Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202. In an action to recover damages to plaintiff's crops by the overflow of his lands caused by the diversion of the channel of a watercourse, each annual overflow is a separate cause of action, but all may be joined in the same action. Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576; Otis *v.* Mechanics Bank, 35 Mo. 128; Offield *v.* Wabash, etc., R. Co., 22 Mo. App. 607.

1. Hubbell *v.* Lerch, 58 N. Y. 237; Vandevoort *v.* Gould, 36 N. Y. 639; Langsdale *v.* Woollen, 120 Ind. 16; Sullivan *v.* Davis, 4 Cal. 291; Brown *v.* Quartz Min. Co., 15 Cal. 152; Armstrong *v.* Hinds, 8 Minn. 254; Merrill *v.* Dearing, 22 Minn. 376; Fletcher *v.* Brown, 35 Neb. 660; Harrall *v.* Gray, 12 Neb. 543; McKinney *v.* McKinney, 8 Ohio St. 429.

Rent and Damages.—Plaintiff may join in the same action a claim to recover rent of real estate under an implied contract and one for the recovery of damages for the wrongful occupation of the same real estate. Foster *v.* Hinson, 76 Iowa 714.

Trespass and Ejectment.—Trespass and ejectment, and trespass *quare clausum fregit* in respect of the same premises, cannot be joined. Budd *v.* Bingham, 18 Barb. (N. Y.) 494.

Recovery of Land and for Change of Road.—A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint with a claim for consequential damages arising from the change of a road, by which a tavern-keeper

11. Partition.—Some of the Codes allow partition to be joined with other matters. Thus an action to correct a deed may be joined with one for partition.[1] So an action to declare a resulting trust in land, and for partition of the same, may be joined.[2]

may have been injured in his business. Bowles *v.* Sacramento Turnpike, etc., Co., 5 Cal. 224.

Ejectment and Chancery Relief.—A complaint which joins an action of trespass *quare clausum fregit*, ejectment, and prayer for relief in chancery is bad. Bigelow *v.* Gove, 7 Cal. 133. But see Weaver *v.* Conger, 10 Cal. 233, where a claim to recover damages for the diversion of water from a flume, and one for an injunction, were allowed to be joined.

Cancellation of Deeds, Ejectment, and to Quiet Title.—Causes of action for cancellation of deeds, ejectment, and to quiet title are not joinable. Tompkins *v.* Sprout, 55 Cal. 31.

Conveyance of Land, and Rents.—A petition for the conveyance of land and possession thereof, and for the rents and profits, is not multifarious. Duvall *v.* Tinsley, 54 Mo. 93; Kelly *v.* Hurt, 61 Mo. 463.

Separate Parcels.—A claim for damages for withholding one parcel of land is improperly united with a claim to recover the possession of another parcel, with damages for the withholding thereof. Holmes *v.* Williams, 16 Minn. 164.

Recovery of One Parcel and Trespass on Another Parcel.—Claims for the recovery of real property and for trespass on other lands cannot be joined. Hulce *v.* Thompson, 9 How. Pr. (N. Y. Supreme Ct.) 113; Furlong *v.* Cooney, 72 Cal. 322. And see Loveland *v.* Garner, 71 Cal. 541.

Counterclaim. — Causes of action which cannot be joined in the complaint cannot be joined in a counterclaim, and as a demand for waste is not incident to the recovery of the possession of the real estate, it was not properly joined in the counterclaim. Woodruff *v.* Garner, 27 Ind. 4.

Forcible Entry and Detainer, and Damages for Holding Over.—Forcible entry and detainer cannot be joined with a claim for damages for holding over as a tenant, contrary to the terms of the lease. Polack *v.* Shafer, 46 Cal. 270.

Forcible Entry and Detainer, and Waste.—Damages for waste cannot be joined with forcible entry and detainer. Warburton *v.* Doble, 38 Cal: 622.

Land in Different Counties.—Where one cause of action relates to land in one county, and another cause of action to land in another county, there is a misjoinder. Hackett *v.* Carter, 38 Wis. 394. And see Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146.

Forfeiture of Lease and for Rent Due.—An action for forfeiture of lease and one for rent due cannot be joined. Owens *v.* Hickman, 2 Disney (Ohio), 471; Countee *v.* Armstrong, 10 Cin. L. Bull. (Ohio) 339.

Real Action and Injunction.—A real action is joinable with an injunction to restrain waste or trespass. Merced Min. Co. *v.* Fremont, 7 Cal. 317, 68 Am. Dec. 262; Hicks *v.* Davis, 4 Cal. 67; Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Curtis *v.* Sutter, 15 Cal. 259.

Proceedings to Acquire Right of Way.—Under section 1244 of the Code of Civil Procedure, a proceeding by a railroad corporation to acquire a right of way across the right of way of another railroad company, and a proceeding to acquire a right of way over lands which the defendant owns in fee, may be united. California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59.

Cancellation and Possession. — Under the Code a cause of action for the cancellation of a deed to real property may be united with an action for possession of the same property when both causes of action affect all the parties in the same character and capacity, and are directly connected with the subject-matter of litigation. Stock Growers' Bank *v.* Newton, 13 Colo. 245.

Kentucky.—It is optional for the plaintiff to join claims for the recovery of specific real property, and for the rents, profits, and damages for withholding the same. § 111 of the Civil Code is permissive, not mandatory. Burr *v.* Woodrow, 1 Bush (Ky.) 602.

1. Dameron *v.* Jamison, 4 Mo. App. 299.

2. Buchannan *v.* Buchannan (S. Car., 1893), 17 S. E. Rep. 218. And see Field *v.* Hurst, 9 S. Car. 277.

Likewise an action to enforce partition is joinable with one to enforce a trust.[1] And partition may be joined with an action to quiet title.[2] Partition and claims for rents and profits may be joined.[3] An action for the recovery of real property may be joined with one seeking partition.[4]

12. **Foreclosure.**—Where a mortgage or instrument is foreclosed, the courts show a disposition to give full relief in the same action, and other matters may be joined therein.[5]

1. Pixley *v.* Bent, 59 Cal. 522.
2. Schissel *v.* Dickson, 129 Ind. 139.
3. Perry *v.* Richardson, 27 Ohio St. 110; Finch *v.* Baskerville, 85 N. Car. 205.
4. Galton *v.* Tolly, 22 Kan. 678; Seibert *v.* Baxter, 36 Kan. 189; Scarborough *v.* Smith, 18 Kan. 399; Scantlin *v.* Allison, 32 Kan. 379; Durein *v.* Pontious, 34 Kan. 353; Black *v.* Drake, 28 Kan. 482; Hall *v.* Sanders, 25 Kan. 548.

Partition and Distribution.—An action for partition of land among the remaindermen in fee, after the death of the life-tenant, and for an account and distribution of the estate of such life-tenant, is a misjoinder of causes of action. Shanks *v.* Mills, 25 S. Car. 358. See also Lowry *v.* Jackson, 27 S. Car. 318.

Partition and Creditor's Bill.—A creditor's bill and one for partition cannot be united. Dewey *v.* Ward, 12 How. Pr. (N. Y. Supreme Ct.) 419.

Separate Conveyances by Tenant in Common Preclude one Action of Partition.—Where one tenant in common has made separate conveyances of the entire right, in various parcels of the land held in common, so that each purchaser's title and possession is separate and distinct, the other tenant in common cannot sustain a joint suit for partition against such purchasers, but must bring a separate suit against each. Prentiss' Case, 7 Ohio 131.

Partition and Correcting Distribution Decree.—A count to correct a mistake by which one distributee had obtained more than his share of the decedent's estate, also one to have deeds of partition made according to the agreement which had been made by the heirs, is a proper joinder. Whitney *v.* Whitney, 5 Dana (Ky.) 329.

5. **Mortgage on Several Tracts.**—A bill to obtain payment of a debt secured by mortgage is not multifarious because it covers several tracts sold to various purchasers and makes them all parties. Muskingum Bank *v.* Carpenter, Wright (Ohio) 729.

Tax Deeds.—Under statutory provisions for the foreclosure of tax deeds, several distinct parcels of land, conveyed under a tax sale by different deeds, when they are the property of one or of several joint owners, may be joined in one action to foreclose the tax title. Byington *v.* Woods, 13 Iowa 17.

Land Contract.—An action to recover the balance due on a land contract, and to subject the land to sale for the payment thereof, may be joined. Linsley *v.* Logan, 33 Ohio St. 396. And see Karr *v.* Neach, 5 Am. L. Bull. (Ohio) 648.

Foreclosure and Debt.—Foreclosure of mortgage may be united with a demand for the amount of the debt and for possession of property conveyed by the deed. Martin *v.* McNeely, 101 N. Car. 634.

Deed Declared Mortgage and Foreclosure, and Cancellation of Other Deed.—An action to have deed declared to be a mortgage, and to have the same foreclosed, may be joined with an action to cancel another deed to same land. Moon *v.* McKnight, 54 Wis. 551.

Foreclosing Land Contract and Setting Aside Attachment.—In an action to foreclose a land contract given by the plaintiffs to one of the defendants, the complaint alleged that the other defendant had by a false affidavit obtained an attachment of the land, and that the defendants were colluding together by means of such attachment to retain possession of the land without performing said land contract. The prayer was that the attachment be set aside and the contract foreclosed. *Held*, that there was no improper joinder of causes of action. Ramash *v.* Scheuer, 81 Wis. 269.

Foreclosure and Personal Judgment.—The foreclosure of a mortgage and a personal judgment may be asked in the same action. Campbell *v.* Nichol-

13. Torts.—All the Codes, with more or less detail, classify the torts that are joinable, as, for instance, injuries to person, to character, to personal property, and to real property, and this classification seems to have in a great measure reduced the number of cases which otherwise might have arisen. But there are cases which hardly seem to come under any of the above classifications, in which it has been held that matters were either joinable or not joinable.[1]

son (Tex. App., 1892), 18 S. W. Rep. 135. See also McCormick *v.* Blum, 4 Tex Civ. App. 9.

Note and Mortgage.—An action on a note may be joined with one to foreclose a mortgage securing it. Turner *v.* Frost, 3 West. L. Month. (Ohio) 213; Burdell *v.* Reeder, 2 Cin. Super. C. (Ohio) 94; King *v.* Safford, 19 Ohio St. 587.

Avoiding Contract of Purchase and Foreclosure.—An action to avoid a contract of purchase with foreclosure of mortgage for purchase money is a misjoinder. Camden *v.* Vail, 34 Cal. 382.

Foreclosure and Setting Aside Trust Deed.—An action of foreclosure cannot be joined with an action to set aside a trust deed under which the mortgagor claims. Helck *v.* Reinheimer, 23 N. Y. Wkly. Dig. 473.

1. **Tort and Injunction.**—A cause of action in tort and one for an injunction to protect the subject-matter in litigation are joinable. Gates *v.* Kieff, 7 Cal. 124; Marius *v.* Bicknell, 10 Cal. 217; Weaver *v.* Conger, 10 Cal. 233; Jungerman *v.* Bovee, 19 Cal. 354; More *v.* Massini, 32 Cal. 590; Yolo County *v.* Sacramento, 36 Cal. 193.

Mining Claim and Damages.—In an action for injuries to a mining claim, a claim for damages by reason of the breaking-away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages for preventing plaintiff from working his claim. Fraler *v.* Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562.

Value of Property Destroyed.—A cause of action for the value of property destroyed may be united with claims for damages. Tendesen *v.* Marshall, 3 Cal. 440.

Trover for Horse and Case for Fraud Inducing its Sale.—A count in trover for the conversion of a horse and buggy may be joined with a count in case for fraud and deceit, whereby defendant induced plaintiff to sell him the horse and buggy for a worthless note of a third person. Henry *v.* Allen, 93 Ala. 197. And see Wilkinson *v.* Moseley, 30 Ala. 562; Dixon *v.* Barclay, 22 Ala. 370.

Action for Libel not Amendable to Trespass.—An action for libel is not amendable by adding a count for trespass to the person. Ransone *v.* Christian, 56 Ga. 351.

Joint Tort.—An averment by the plaintiff of a joint tort by the defendants does not show a misjoinder of causes of action. Barnes *v.* Ennenga, 53 Iowa 497.

Slander Spoken of Several.—A joint action for slander cannot be maintained. If the same slanderous words be at the same time spoken of several parties, each must seek a separate remedy. Hinkle *v.* Davenport, 38 Iowa 355.

Negligence of Fellow-Servant and Vice-Principal.—An action for the negligence of a fellow-servant may be united with one for the negligence of a vice-principal, provided they are not blended in the same count. McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 302.

Several Trespasses.—In an action in tort several distinct trespasses may be joined in the same action. Wilson *v.* Johnson, 1 Greene (Iowa) 147.

Separate Tort Feasors.—Two causes of action against separate tort feasors may be joined. Trowbridge *v.* Forepaugh, 14 Minn. 133.

Common-Law and Statutory Negligence.—A common-law action for negligence cannot be joined in the same count with one for statutory negligence. Kendrick *v.* Chicago, etc., R. Co., 81 Mo. 521.

Stolen Stock and its Deposit.—An action against parties who had loaned money on stock stolen from the plaintiff cannot be joined with an action against a bank with whom the thief had depos-

14. **Mechanic's Lien.**—There have been some cases in construction of the Codes in reference to the joinder of actions for foreclosing mechanic's liens and on other claims. They generally allow a joinder of the foreclosure with one for personal judgment.[1]

15. **Replevin.**—Replevin sounds in tort, and cannot be joined with an action upon contract.[2]

ited the borrowed money. Sanford *v.* Fourth Nat. Bank, 60 Hun (N. Y.) 484.

Erection of Nuisance by One, Continuance of it by Another.—An action for the erection of a nuisance by one defendant and an action for its continuance by another cannot be joined. Hess *v.* Buffalo R. Co., 29 Barb. (N. Y.) 391.

Slander by Husband and Wife.—Slander by both husband and wife cannot be sued for in the same action. Malone *v.* Stilwell, 15 Abb. Pr. (N. Y. C. Pl.) 421.

Two Torts, One Assigned.—An action by an assignee of the claim, in his own name, for damages to premises by overflow may be joined with one for damages to the same premises accruing subsequently to his ownership. Hall *v.* Cincinnati, etc., R. Co., 1 Disney (Ohio) 58.

Malfeasance in Office and Devastavit.—A cause of action against a clerk of the superior court for damages resulting from malfeasance in accepting an insufficient bond from an administrator cannot be joined with a cause of action against such administor and his sureties for a *devastavit*. Mitchell *v.* Mitchell, 96 N. Car. 14.

1. Clippenger *v.* Ross, 3 West. L. Month. (Ohio) 648.

Material Furnished to Owner and Contractor.—A mechanic, in an action to enforce a lien for work and material on a building, may unite a cause of action for work and material furnished to a contractor with a cause of action for work and material furnished at the request of the owner. Quale *v.* Moon, 48 Cal. 478.

Failure to Establish Lien.—A plaintiff proceeding *in rem* for the enforcement of a mechanic's lien may also count upon the personal liability of the defendant, and recover *in personam*, though he may fail to establish the alleged lien. Bingman *v.* McGuire, 32 Ark. 733. See also Arkansas R. Co. *v.* McKay, 30 Ark. 682.

Owner and Agent.—A cause of action to foreclose a mechanic's lien against the owner cannot be joined with one on contract against a person who stands in relation to the owner as agent and not as contractor. Gothard *v.* Lavelle, 4 N. Y. Month. L. Bull. 30.

Lien and Money Due after Filing of Lien.—In an action to foreclose a mechanic's lien it is improper to join a claim for labor and material for which payment became due after the filing of the lien. Schillinger Fire Proof Cement, etc., Co. *v.* Arnott (Supreme Ct.), 14 N. Y. Supp. 326.

Lien Against One and Personal Demand Against Another.—A complaint sought a judgment for damages against A., B., and C., the enforcement of a mechanic's lien for the amount of such damages against property of which the legal title was in C., and a judgment that C. convey said property to A. *Quære*, whether there was not a misjoinder of causes of action. Charboneau *v.* Henni, 24 Wis. 250.

Herder's Liens.—In an action of claim and delivery, defendants having separate and distinct liens on the cattle sought to be recovered, arising out of separate contracts, cannot join setting up such liens to defeat the plaintiff's right to the possession. Underwood *v.* Birdsell, 6 Mont. 142.

New York.—The provision of the Code authorizing the joinder of causes of action, legal and equitable, by implication prohibits the union of a cause of action for the enforcement of a lien with one for the collection of a debt, except in the case of a mortgage secured by bond or other obligation of the mortgagor or a third person. Burroughs *v.* Tostevan, 75 N. Y. 567.

2. Furniss *v.* Brown, 8 How. Pr. (N. Y. Supreme Ct.) 59; Corbin *v.* Bouve, 1 Cinn. Super. Ct. (Ohio) 259. But an action upon an undertaking in the nature of replevin bail is an action for a money demand on contract. Roberts *v.* Nodevift, 8 Ind. 339.

16. Forcible Entry and Detainer.—Two actions in forcible entry and detainer cannot be joined.[1]

17. Certiorari.—Certiorari proceedings cannot be joined.[2]

18. Mandamus.—Mandamus may be joined to another proceeding as an auxiliary remedy.[3]

19. Full Relief—*a.* GENERALLY.—The equitable principle of complete relief is often referred to in the Code States to justify the joinder of various matters. This is in accordance with the equity principle that when a court of chancery has acquired jurisdiction it will proceed and give full relief.[4] In the note will be

1. McGuire *v.* Cook, 13 Ark. 448.

2. Galveston, etc., R. Co. *v.* Ware, 2 Tex. App. Cas. 357.

3. **Action Against County.**—In an action against a county a cause of action for a debt may be joined with a writ of mandamus to enforce it. Custer County *v.* Yellowstone County, 6 Mont. 46.

Separate Proceedings.—Where a board of county commissioners refuse to consider and canvass the petition of the resident taxpayers of a township for elections to submit propositions to subscribe to capital stock of a railroad to the voters, each township must bring its own writ of mandamus against the board, and two or more townships cannot be joined in the same proceedings. State *v.* Reno County, 38 Kan. 317.

4. *Minnesota.*—Ham *v.* Johnson, 51 Minn. 105; Nichols *v.* Randall, 5 Minn. 304; Kraemer *v.* Duestermann, 37 Minn. 469; Fish *v.* Berkey, 10 Minn. 199; Palmer *v.* Tyler, 15 Minn. 106.

Iowa.—Sweetzer *v.* Harwick, 67 Iowa 488; Reed *v.* Howe, 28 Iowa 250; Sands *v.* Wood, 1 Iowa 263; Kramer *v.* Rebman, 9 Iowa 114; Breckinridge *v.* Brown, 9 Iowa 396; Stapleton *v.* King, 40 Iowa 278; Cogswell *v.* Murphy, 46 Iowa 44; Des Moines *v.* Stephenson, 19 Iowa 507; Dorothy *v.* Hicks, 63 Iowa 240.

Indiana.—Smith *v.* Kyler, 74 Ind. 575; Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610; Hunter *v.* McCoy, 14 Ind. 528; Miller *v.* Kolb, 47 Ind. 220; Rigsbee *v.* Trees, 21 Ind. 227; Monroe *v.* Skelton, 36 Ind. 302; Jaseph *v.* Peoples' Sav. Bank (Ind. 1889), 22 N. E. Rep. 980; Conger *v.* Parker, 29 Ind. 380; Love *v.* Mikals, 11 Ind. 227; Fritz *v.* Fritz, 23 Ind. 388.

Connecticut.—Butler *v.* Barnes, 60 Conn. 170.

Colorado.—First Nat. Bank *v.* Hunnel, 14 Colo. 260.

California.—Burt *v.* Wilson, 28 Cal. 632, 87 Am. Dec. 142; Wilson *v.* Castro, 31 Cal. 420; Pfister *v.* Dascey, 65 Cal. 403; Weaver *v.* Conger, 10 Cal. 233; Carpenter *v.* Oakland, 30 Cal. 439; Morenhout *v.* Hignera, 32 Cal. 289; More *v.* Massini, 32 Cal. 590; Garr *v.* Redman, 6 Cal. 574; Stone *v.* Fouse, 3 Cal. 292; Grandona *v.* Lovdal, 70 Cal. 161; Reynolds *v.* Lincoln, 71 Cal. 183; Hutchinson *v.* Ainsworth, 63 Cal. 286; Farwell *v.* Jackson, 28 Cal. 105; Eastman *v.* Turman, 24 Cal. 379.

Missouri.—Linden *v.* Rowe, 51 Mo. 571; Ware *v.* Johnson, 55 Mo. 500; Holloway *v.* Holloway, 99 Mo. 305.

Nebraska.—Stewart *v.* Carter, 4 Neb. 564; Wilcox *v.* Saunders, 11 Neb. 569.

Ohio.—Warner *v.* Callender, 20 Ohio St. 190; Roberts *v.* Glenn, 1 Clev. Rep. (Ohio) 46; Stone *v.* Becker, 2 Clev. Rep. (Ohio) 346; Columbus, etc., Co. *v.* Steinfeld, 42 Ohio St. 449; Globe Ins. Co. *v.* Boyle, 21 Ohio St. 120; Hathway *v.* Springfield, etc., R. Co., 2 West. L. Month. (Ohio) 481.

Wisconsin.—Stroebe *v.* Fehl, 22 Wis. 337; Horn *v.* Ludington, 32 Wis. 73.

Texas.—Finch *v.* State, 71 Tex. 52.

New York.—Stanton *v.* Missouri Pac. R. Co. (Supreme Ct.), 2 N. Y. Supp. 298; Marx *v.* Tailer, 12 Civ. Pro. Rep. (N. Y. Supreme Ct.) 226; Woodard *v.* Holland Med. Co. (Super. Ct.), 39 N. Y. St. Rep. 44; Hinds *v.* Tweddle, 7 How. Pr. (N. Y. Supreme Ct.) 278; Jeroliman *v.* Cohen, 1 Duer (N. Y.) 629; De Witt *v.* McDonald, 58 How. Pr. (N. Y. Supreme Ct.) 411; Freer *v.* Denton, 61 N. Y. 492; Smith *v.* Rathburn, 22 Hun (N. Y.) 150; Krawer *v.* Reynolds, 99 N. Y. 245; Morrissey *v.* Leddy, 11 Civ. Pro. Rep. (N. Y. Supreme Ct.) 438; Genesee County Bank *v.* Bank of Batavia, 43 Hun (N. Y.) 295; Farmers', etc., Nat. Bank *v.* Rogers, 15 Civ. Pro. Rep. (N. Y. Super. Ct.) 250; Bateman *v.* Forty-second St., etc., R. Co. (C. Pl.), 5 N. Y. Supp. 13; Parmer-

found a collection of cases where the plaintiff was either allowed full relief, or where it was held that the matters were not properly joined.[1]

ter *v.* Baker, 24 Abb. N. Cas. (N. Y. Supreme Ct.), 104; Pilwisky *v.* Cattaberry (C. Pl.), 30 N. Y. St. Rep. 857; Palen *v.* Lent, 5 Bosw. (N. Y.) 713; Warth *v.* Radde, 28 How. Pr. (N. Y. Supreme Ct.) 230; Smith *v.* Gœrtner, 40 How. Pr. (N. Y. Supreme Ct.) 185; Rodgers *v.* Rodgers, 11 Barb. (N. Y.) 595; Barnes *v.* Smith, 1 Robt. (N. Y.) 699; Coster *v.* New York, etc., R. Co., 6 Duer (N. Y.) 143; Schnitzer *v.* Tyrell, 23 N. Y. Wkly. Dig. 476; Barnard *v.* Brown, 17 N. Y. Supp. 313, 63 Hun (N. Y.) 625; Selye *v.* Zimmer (Supreme Ct.), 15 N. Y. Supp. 881; Good *v.* Daland, 121 N. Y. 1; Lehnen *v.* Purvis (Supreme Ct.) 9 N. Y. 910; U. S. Life Ins. Co. *v.* Jordan, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 330; Gray *v.* Rothschild, 112 N. Y. 668; Krower *v.* Reynolds, 99 N. Y. 245; Tuers *v.* Tuers, 100 N. Y. 196; Cahoon *v.* Bank of Utica, 7 N. Y. 486.

Kentucky.—Randall *v.* Shropshire, 4 Metc. (Ky.) 327; McKee *v.* Pope, 18 B. Mon. (Ky.) 436; Hobbs *v.* Middleton, 1 J. J. Marsh. (Ky.) 178; Sale *v.* Crutchfield, 8 Bush (Ky.) 636; Harris *v.* Campbell, 4 Dana (Ky.) 587; Wilde *v.* Haycraft, 2 Duv. (Ky.) 311; Talbot *v.* Brockman, 1 A. K. Marsh. (Ky.) 555; Jackson *v.* Bourbon, 2 Bibb (Ky.) 292; Walker *v.* Mitchell, 18 B. Mon. (Ky.) 541; Shean *v.* Cunningham, 6 Bush (Ky.) 123; Sheppard *v.* Stephens (Ky., 1887), 2 S. W. Rep. 548.

Kansas.—Bradley *v.* Parkhurst, 20 Kan. 462; Nooner *v.* Short, 20 Kan. 624; Bainter *v.* Fults, 15 Kan. 323; Harsh *v.* Morgan, 1 Kan. 293.

1. **To Enjoin City.**—An action may be maintained to enjoin a city from making a street railroad grant to either of two applicants. Mathers *v.* Cincinnati, 3 Cin. L. Bull. (Ohio) 551.

Action by Assignee.—An action by an assignee to recover the possession of personal property cannot be united in an action to settle and distribute the estate of his assignor. Atchison *v.* Jones (Ky., 1886), 1 S. W. Rep. 406.

Creditor's Bill and Personal Judgment.—An action to recover a money judgment and an action in the nature of a creditor's bill to obtain satisfaction of the judgment cannot be joined. Marion Deposit Bank *v.* McWilliams, 1 West. L. Month. (Ohio) 571.

Multifariousness. — A judgment creditor brought his action against the several parties, their sureties and representatives, who had administered upon the estate of his judgment debtor, deceased, for account, settlement, etc., alleging also that the lands of the deceased were bound by his judgment, and that "plaintiff is informed and believes that one S. claims to be the owner in fee of the land herein described, but the plaintiff denies the validity of said title, if any he have, and alleges the same is illegal and void." *Held*, that complaint was multifarious for misjoinder of the cause of action against S. Suber *v.* Allen, 13 S. Car. 317.

Against Administrator.—A cause of action against an administrator and others growing out of a fraudulent sale of land by the administrator, and a cause of action against the administrator alone for waste committed prior to the sale, cannot be joined. Hoffman *v.* Wheelock, 62 Wis. 434.

Against Owner and Tenant.—An action against the owner of a distillery for the nuisance occasioned thereby cannot be joined with a cause of action against other persons who severally held and ran the distillery as tenants at different periods, under leases. Greene *v.* Nunnemacher, 36 Wis. 50.

Bail Bond and Trust.—A suit on a bail recognizance cannot be joined with a bill to enforce a trust deed, given as indemnity to the sureties. People *v.* Skidmore, 17 Cal. 260.

To Impress a Lien, and Contract.—A cause of action against the representatives of a decedent to impress a lien upon the decedent's real estate cannot be joined with a cause of action under the statute, against the heirs and their grantees upon a contract of the decedent. Hayward *v.* McDonald, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 229.

Illegal Tax.—In an action against a city to recover a tax erroneously assessed on a lot, it is not permissible to join a cause of action against the owner of the lot, who is made a party defendant, to recover his proper proportion of the amount paid by the plaintiff on said lot. Langevin *v.* St. Paul, 49 Minn. 189.

b. LEGAL AND EQUITABLE RELIEF ASKED.—The complaint may embrace both legal and equitable causes of action, and legal and equitable relief may be asked in the same complaint.[1]

For Rent and Enforcement of Lien on Crops.—A landlord cannot maintain a joint action for rent against his tenant, and for conversion against another person, who, with knowledge of his lien rights, has bought the crop and disposed of it. Phillips *v.* Flynn, 71 Mo. 424.

Prior Vendee.—The making a prior vendee of the land a party to an action to foreclose a mortgage, for the purpose of avoiding his title as fraudulent, is a misjoinder of causes of action. Adams *v.* Edgerton, 48 Ark. 419.

In Personam and In Rem.—A cause of action *in personam* at law may be united with a cause of action *in rem* in equity, if both arise out of the same transaction, as for the foreclosure of a mortgage and against the mortgagor on the bond. Thorne *v.* Newly, 59 How. Pr. (N. Y. Supreme Ct.) 120.

Breaches of Covenants in Deeds of Different Lands.—Breaches of the covenants in two deeds of different lands from defendant to plaintiff may be joined. Nichol *v.* Alexander, 28 Wis. 118. See also Welsh *v.* Chicago, etc., R. Co., 34 Wis. 494.

Money Demand and to Set Aside Fraudulent Conveyance.—In an action by a creditor a money demand arising upon a contract cannot be joined with a prayer to set aside a conveyance of real estate on the ground of fraud, and subject it to plaintiff's claim against the grantor. Stevens *v.* Chance, 47 Iowa 602.

On Account, to Have One Adjudged Insane, and to Set Aside Conveyance.—An action at law upon an account, a proceeding to have one adjudged insane, and an action in equity to set aside a conveyance of real estate as void as against creditors, cannot be joined in the same petition, under § 2630 of the Code, permitting the joinder of "causes of action, of whatever kind, where each may be prosecuted by the same kind of proceedings." Faivre *v.* Gillman, 84 Iowa 573.

Rescinding Sale on Ground of Fraud, and on Covenant of Seisin.—An action to rescind a sale of land on the ground of fraud cannot be joined with an action on the covenants of seisin and right to convey contained in the deed, because the former is a disaffirmance, while the latter is an affirmance, of the contract. McLennan *v.* Prentice, 85 Wis. 440.

Correction of Deed and Quieting Title.—An action to correct a deed and to quiet title may be joined. Henderson *v.* Dickey, 50 Mo. 161.

Joinder not Required.—There is no rule that requires a party to join in one suit several and distinct causes of action, although he may under certain circumstances be required to consolidate them. Beck *v.* Deveraux, 9 Neb. 109.

Facts Constituting each Cause of Action.—A petition is bad which classifies and groups together the principal facts constituting 670 separate and distinct causes of action, and alleges such facts in general terms (670 separate and distinct facts being stated in one general allegation) in one general heading to said petition, and does not state the facts constituting each cause of action in a separate count, but simply refers in each count to the facts as stated in said general heading. Such a petition does not nor does any count thereof state facts sufficient, *well pleaded*, to constitute a cause of action. Stewart *v.* Balderston, 10 Kan. 131.

1. Allen *v.* Taylor, 96 N. Car. 37; Phillips *v.* Gorham, 17 N. Y. 270; New York Ice Co. *v.* North Western Ins. Co., 23 N. Y. 357; Lattin *v.* McCarty, 41 N. Y. 107; Sheehan *v.* Hamilton, 42 N. Y. 304; Davis *v.* Morris, 36 N. Y. 569.

Attacking Deed on Both Legal and Equitable Grounds.—In an action to recover the possession of land the plaintiffs may attack a deed under which the defendant claims title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance. Phillips *v.* Gorham, 17 N. Y. 270. See also New York Ice Co. *v.* North Western Ins. Co., 23 N. Y. 357; Lattin *v.* McCarty, 41 N. Y. 107; Cummings *v.* Morris, 25 N. Y. 625; Sternberger *v.* McGowern, 56 N. Y. 12; Beck *v.* Allison, 56 N. Y. 366, 15 Am. Rep. 430.

Restraining Use of Trade-mark and Profits.—An action to restrain the use

20. Causes of Action Must Exist at Time of Commencement of Suit.—The Codes only have reference to joinder of causes of action existing at the commencement of the suit. A cause of action arising subsequently cannot be joined.[1]

21. Must Affect All Parties—*a.* GENERALLY.—All the Codes provide that the causes of action joined must affect all the parties alike.[2]

of a trade-mark may be joined with one for an account as to profits and damages. Leidersdorf *v.* Flint, 50 Wis. 401. See also Leidersdorf *v.* Second Ward Bank, 50 Wis. 406.

1. Taylor *v.* Moran, 4 Metc. (Ky.) 127.

2. Separate and Joint Torts.—It is not permissible to join a cause of action for a separate tort with one for a joint tort. White *v.* Preston (Tex. App. 1891), 15 S. W. Rep. 712.

For Conspiracy and the Usufruct Held by One.—A cause of action for a fraudulent conspiracy cannot be joined with one to obtain a cancellation of a certificate of deposit owned and held by one of the defendants, even though such certificate was obtained as the fruits of the conspiracy. Haskell County Bank *v.* Santa Fé Bank, 51 Kan. 39.

Maker and Guarantor.—The plaintiff may join as defendants the maker and guarantor of a note. Hendrix *v.* Fuller, 7 Kan. 331.

Neither Defendant Interested in Cause Against Other.—A cause of action in favor of the plaintiff and against one defendant cannot be united with another cause of action in favor of the the same plaintiff against another defendant, where neither defendant is interested in the cause of action alleged against the other. Atchison, etc., R. Co. *v.* Sumner County, 51 Kan. 617.

Against Corporation and Bond of Officers.—An action against a mutual life-insurance association and a person holding an insurance certificate in such association, to enforce an attorney's lien for services for the holder of such certificate, cannot be joined with an action on an official bond given by the officers of the association under chapter 131 of the Laws of 1885. Hentig *v.* Southwestern Mut. Ben. Assoc., 45 Kan. 462.

Cause of Action Against One and Cause of Action Against Both Defendants.—A cause of action against one defendant and a cause of action against both defendants cannot be joined. Addicken *v.* Schrubbe, 45 Iowa 315.

Required to Elect.—Where the petition sets forth distinct causes of action against as many different defendants, no one being interested in the actions against the others, on defendants' motion the plaintiff should be required to elect which he will prosecute. St. Joseph's Orphan Soc. *v.* Wolpert, 80 Ky. 86.

Contest of Elections of Judge and School Commissioner.—The contest of an election for county judge and school commissioner is distinct and separate, between different parties, forming separate and distinct causes of action, and cannot be united in one notice, and made a joint action upon which one trial and judgment can be rendered. Vance *v.* Gaylor, 25 Ark. 32.

Against Obligor and Guarantor.—A joint action cannot be maintained against the obligor and a person who signs a guaranty on the back of the obligation; the undertakings are distinct. Preston *v.* Davis, 8 Ark. 167.

Joint and Separate Promises Distinguished.—In an action against two or more persons, founded on a joint promise, a recovery cannot be had on proof of a separate and distinct promise by each. Jackson *v.* Bush, 82 Ala. 396.

Due in Different Rights.—Distinct demands due in different rights cannot be joined. Kennedy *v.* Stallworth, 18 Ala. 263.

For Transfer of Shares.—The plaintiff sued to obtain a transfer to him of certain shares of the stock of a corporation which one of the defendants had acquired from him through fraud. In the same action he sought to recover other shares of the stock, which had been sold to another defendant under an assessment fraudulently levied by the corporation. *Held*, that there was a misjoinder of causes of action. Johnson *v.* Kirby, 65 Cal. 482.

Negligence in Delivery of Telegraph Message.—Telegraph messages were

b. HUSBAND AND WIFE.—As to the joinder of husband and wife in an action, that topic belongs to the subject of "parties," which is not treated of herein; but a few cases will be found collected in the note, where the joinder of causes of action, with reference to husband and wife, was held either proper or improper.[1]

c REPRESENTATIVE CAPACITY.—Likewise, the subject of the bringing of suits by the personal representatives of a decedent is more properly classified under the subject of "parties"; but sometimes, where personal representatives are parties, a case is decided with reference to the joinder of the causes of action rather than to the joinder of the parties.[2]

sent by the son to the father, but owing to negligence in the delivery the father was delayed in reaching Dallas before the burial of another son of whose illness and death he was not advised otherwise. The father and son were joined as plaintiffs against the telegraph company for damages. *Held*, a misjoinder of causes of action. Anderson *v.* Western Union Tel. Co., 84 Tex. 17.

Construction of Public Improvements.—In an action against the city of Henderson for an injury to private property resulting from the carrying out of the laws and ordinances of the city in relation to the construction of public improvements, an amended petition was offered, setting up a cause of action against the municipal officers of the city, in their individual capacity, for the same injury occasioned from their gross negligence and abuse of power, to the filing of which amendment objection was made. *Held*, that as each of the causes of action did not affect all the parties to the action, the amendment could not be filed. Hancock *v.* Johnson, 1 Metc. (Ky.) 242.

Indiana.—Under the Code creditors may unite in a suit to enjoin a debtor from fraudulently disposing of his property, although their claims are several and not in judgment. Field *v.* Holzman, 93 Ind. 205.

1. **Action to Avoid Usurious Securities.**—In an action by a husband and wife to avoid usurious securities given by them upon a loan made to the wife, it is improper to join a cause of action by the wife alone to recover back money paid by her upon the usurious contract. Anderson *v.* Scandia Bank, 53 Minn. 191.

Personal Injuries to Wife.—An action for personal injuries to the wife must be brought in the name of the husband and wife; but an action for consequential injury to the husband, such as the loss of his wife's services, must be brought in the name of the husband alone; and a complaint by the husband and wife, in which such causes of action are joined, is demurrable. Tell *v.* Gibson, 66 Cal. 247; Sheldon *v.* Steamship Uncle Sam, 18 Cal. 534, 79 Am. Dec. 193.

Foreclosure.—A suit on note of husband may be joined with foreclosure against husband and wife. Rollins *v.* Forbes, 10 Cal. 299.

A Cause of Action against Husband.—A cause of action against the husband only cannot be joined with an action prosecuted against the husband and wife jointly, for the purpose of enforcing a liability against her separate estate for articles of comfort and support of the family. May *v.* Smith, 48 Ala. 483.

To Set Aside Conveyance.—A claim to set aside a conveyance of real estate from husband to wife for fraud against creditors may be joined with a claim against the husband arising out of contract. Frank *v.* Kessler, 30 Ind. 8.

Wife Individually and as an Administratrix.—Frink *v.* Taylor, 4 Greene (Iowa) 196.

2. **Against Administrator Personally and Against Estate.**—An action against administrator personally cannot be joined with a claim against the estate. Mesmer *v.* Jenkins, 61 Cal. 152; Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152. See also Mertens *v.* Lowenberg, 69 Mo. 208.

Administrator of Two Estates.—Danaher *v.* Brooklyn, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 286.

Against Different Estates.—Viall *v.* Mott, 37 Barb. (N. Y.) 208.

ADDITIONAL ALLOWANCES OF COSTS.

UNDER THE NEW YORK CODE OF CIVIL PROCEDURE.[1]

By Wm. Seton Gordon.

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I. General Principles.—Costs are the creation of statute. By the common law they were not awardable. The jurisdiction of the English Court of Chancery over costs originated in the stat-

1. It seems that the State of New York is the only jurisdiction in which the practice of making additional allowances of costs prevails, with the exception of Florida. Section 254 of the Code of that state authorizes a further allowance of costs in "difficult and extraordinary" cases. There appears to be but one decision construing this section. In Hart *v.* Bostwick, 14 Fla. 162, it was held that to authorize a further allowance under this provision there must be a case beset by more than the ordinary difficulties and requiring more than ordinary expenditures. Before making the order the court should determine that the case is "difficult and extraordinary," and this being determined, it is within the discretion of the court to make the further allowance. The amount allowed should not exceed a sum necessary to indemnify the prevailing party for his expenses, and cannot exceed five per cent upon the amount involved. An order making a further allowance may be reviewed upon appeal for the purpose of ascertaining whether the case is one in which such allowance may lawfully be made, and whether the sum allowed is within that authorized by law; but the supreme court will not interfere with the exercise of the court's discretion unless the allowance exceeds the amount authorized.

ute 17 Rich. II. chap. 6, and except by virtue of this statute no power to award costs existed in the chancery. Up to the adoption of the Code of Procedure,[1] a discretionary power to award or withhold costs remained in the supreme and superior city courts of the state of New York in regard to all actions theretofore regarded as equitable, limited as to amount by the fee bill then in force. The discretionary power was not disturbed by the Code of Procedure, although the limitation of amount was regulated by the new provisions.[2]

II. **PROVISIONS OF THE CODE.**—Under the Code of Civil Procedure of the State of New York, provision is made for additional allowances of costs beyond the amounts fixed and taxable

1. **Historical Summary.**—The Code of Procedure effected a complete change in the method of allowing and computing costs. It abrogated all former rules and provisions of law upon the subject, and provided for certain sums specified and fixed.

Under the Code as originally stated in 1848, provision was made (sections 263 and 264) for extra allowances to be granted in the discretion of the court. By an amendment (Laws of 1857, chap. 723, sec. 14) passed nine years afterwards, a plaintiff was permitted, upon the recovery of final judgments by him, to tax an additional allowance in certain cases as of right. By a further amendment (Laws of 1862, chapter 428) the recovery of final judgment was declared no longer necessary, and the allowance could be taxed where the action was settled before judgment. These successive amendments brought the requirements of the statute substantially to what they are at present. Upon the adoption of the Code of Civil Procedure in 1880 (Laws of 1880, chap. 245), the former provisions were repealed. See Laws of 1858, chap. 306; Laws of 1859, chap. 428; Laws of 1862, chap. 460, sec. 19; Laws of 1865, chap. 615, sec. 8; Laws of 1870, chap. 741, sec. 12.

2. **Intendment of the Statute.** — The purpose of these provisions of the statute is to secure indemnity to the successful party for the expenses which, in the cases to which it applies, he may incur beyond such expenses as are usually necessary. Burk *v.* Candee, 63 Barb. (N. Y.) 552; People *v.* New York Cent., etc., R. Co., 29 N. Y. 426. The indemnity is for the expenses of the action as a whole, not for the expense of any particular stage of the action. Magnin *v.* Dinsmore, 47 How. Pr. (N. Y. Supreme Ct.), 11; New York F. & M. Ins. Co. *v.* Burrell, 9 How. Pr. (N. Y. Supreme Ct.) 398; Rensselaer *v.* Davis, 55 N. Y. 145; McQuade *v.* New York, etc., R. Co., 5 Duer (N. Y) 613.

Construction.—The practice prevailing for many years in the First Department has been to construe the provisions as to extra allowances liberally; and a fair allowance in an important and substantial litigation has been treated as almost a matter of course. Morrison *v.* Agate, 20 Hun (N. Y.) 24. The rule in the Second District declares that an allowance will be made whenever there has been a trial, and the parties have appeared and litigated the matters in controversy.

In Surrogates' Courts.—General power to award costs was conferred upon surrogates' courts by 2 Rev. Stat. 223, sec. 10. Subsequently, by sec. 9, chapter 359, Laws of 1870, the surrogate of New York county was empowered to make allowances in cases before him in the manner laid down by sections 308 and 309 of the former Code of Procedure. This statute was repealed in 1880. The general provisions of the present Code in respect to the award of costs and allowances have no application to surrogates' courts. In these particulars the special sections of the Code of Civil Procedure relating to these tribunals contain all that affect them. Code Civ. Pr. sec. 2559–2563. The cases of Noyes *v.* Children's Aid Soc., 70 N. Y. 481; Dupuy *v.* Wurtz, 53 How Pr. (N. Y.), 48, 1 Hun (N. Y.) 119; Sequine *v.* Sequine, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 442, were decided under the former Code of Procedure, repealed by chapter 245, Laws of 1880.

under other sections of the Code. These additional allowances are in some cases a matter of right to the litigant, and in others a matter of discretion with the court.[1]

Allowances as a Matter of Right.—Section 3252 of the Code of Civil Procedure provides that where an action is brought to foreclose a mortgage upon real property;[2] or for the partition of real property; or to procure an adjudication upon a will or other instrument[3] in writing; or to compel the determination of a claim to real property;[4] or where, in any action, a warrant of attachment against property has been issued;[5] the plaintiff,[6] if a final judgment is rendered in his favor,[7]

1. But no discretion is given the court to make any allowances other than those authorized by these sections. Hotaling *v.* Marsh, 14 Abb. Pr. (N. Y. Supreme Ct.) 161.

2. **Foreclosure of Mechanic's Lien.**—An action to foreclose a mechanic's lien is not such an action. Hagan *v.* American Baptist, etc., Soc. (C. Pl.), 6 N. Y. St. Rep. 212; Randolph *v.* Foster, 4 Abb. Pr. (N. Y. C. Pl.) 262; Wright *v.* Reusens (Supreme Ct.), 39 N. Y. St. Rep. 802; McCulloch *v.* Dobson (Supreme Ct.), 39 N. Y. St. Rep. 903; People *v.* Adams, 128 N. Y. 129.

3 **Adjudication upon Written Instrument.**—These words refer to a class of cases well known in the former court of chancery, such as suits by a trustee for the judicial construction of the instrument creating the trust; they do not apply to every action upon a written instrument. Gray *v.* Robjohn, 1 Bosw. (N. Y.) 618; Smith *v.* St. Philip's Church, 107 N. Y. 610.

4. Bridges *v.* Miller, 2 Duer (N. Y.) 683; Powers *v.* Barr, 24 Barb. (N. Y.) 142. The corresponding provisions of the former Code were held to refer to special proceedings authorized by 2 R. S. 312. Bridges *v.* Miller, 2 Duer (N. Y.) 683. Those provisions were repealed by laws of 1880, chap. 245, and sections 1638–1650 were substituted. It would appear that these words refer to an action under the last-mentioned sections.

5 **Attachment Cases.**—But inasmuch as the allowance is measured by the value of the property, an actual levy must have been made under the attachment. Fisher *v.* English, 4 N. Y. L. Bull. 37. This value may be shown by the sheriff's return to the writ, with his customary appraisal of value; but unless this appears, affidavits of value should be furnished. Fetchman *v.* Davenport, 8 Civ. Pro. Rep. (N. Y. City Ct.) 220. No allowance will be made if the attachment has been vacated during the pendency of the action. Iselin *v.* Graydon, 26 How. Pr. (N. Y. Super. Ct.) 95; Parsons *v.* Sprague, 19 N. Y. Wkly. Dig. 467. But see Woodward *v.* Grier, 2 Edm. Sel. Cas. (N. Y.) 51. See also Jackson *v.* Figaniere, 15 How. Pr. (N. Y. Supreme Ct.) 224.

6. The allowances by statute are to the plaintiff only; the allowances by the court may be made to any party.

7. **Recovery of Judgment Necessary.**—There must be a recovery of judgment unless the action is settled. Bostwick *v.* Tioga R. Co., 17 How. Pr. (N. Y. Supreme Ct.) 456; Murray *v.* Robinson, 9 Hun (N. Y.) 137; Bryon *v.* Durrie, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 135; Brace *v.* Beattie, 7 Abb. Pr. (N. Y. Supreme Ct.) 445. But see Darling *v.* Brewster, 55 N. Y. 670. An interlocutory judgment on demurrer is not sufficient to warrant an allowance. De Stuckle *v.* Tehuantepec R. Co., 3 Civ. Pro. Rep. (N. Y. Supreme Ct.) 410. Nor is an interlocutory judgment to account. Rudd *v.* Robinson, 54 Hun (N. Y.) 339. To entitle defendant to a commission on the plaintiff's claim, he must recover judgment upon the issue tried, and not recover costs only by reason of a too small recovery of plaintiff. Pinder *v.* Stoothoff, 7 Abb. Pr. N. S. (N. Y. Supreme Ct.) 433; Wilkinson *v.* Tiffany, 4 Abb. Pr. (N. Y. Supreme Ct.) 98. A result of the litigation which entitles the defendant to costs has been held a recovery of judgment for such costs, and may, under proper circumstances, be made the basis of an additional allowance. Board of Comrs. of Pilots *v.* Spofford, 3 Hun (N. Y.) 59; Brady *v.* Durbrow, 2 E. D. Smith (N. Y.) 78.

and he recovers costs,[1] is entitled to recover, in addition to the costs prescribed in the last section, the following percentages, to be estimated upon the amount found to be due upon the mortgage; or the value of property partitioned, affected by the adjudication upon the will or other instrument, or the claim to which is determined; or the value of the property attached, not exceeding the sum recovered, or claimed, as the case may be:

Upon a sum not exceeding two hundred dollars, ten per centum.

Upon an additional sum not exceeding four hundred dollars, five per centum.

Upon an additional sum not exceeding one thousand dollars, two per centum.

Where such an action is settled before judgment,[2] the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement at one half of those rates.

In an action to foreclose a mortgage upon real property where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, as prescribed in section 1637 of this act, the percentages specified in this section must be computed upon the whole sum unpaid upon the mortgage. But if it directs the sale of a part only, as prescribed in section 1636 of this act, they must be computed upon the sum actually due; and if the court thereafter grants an order directing the sale of the remainder or a part thereof, the percentages must be computed upon the amount then due; but the aggregate of the percentages shall not exceed the sum which would have been allowed if the entire sum secured by the mortgage had been due when the final judgment was rendered.

It is not necessary that a trial should have been had; it is enough if a defence has been interposed. Carter *v.* Clark, 2 Sweeney (N. Y.) 189; Mills *v.* Watson, 45 N. Y. Super. Ct. Rep. 591.

1. **The Allowance is Additional only.**—Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 31; Savage *v.* Allen, 2 Thomp. & C. (N. Y.) 474.

In Case of New Trial.—The order granting an allowance is *ipso facto* rendered ineffectual by an order granting a new trial or setting aside the verdict. Hicks *v.* Waltermire, 7 How. Pr. (N. Y. Supreme Ct.) 370; Sleight *v.* Hancox, 4 Abb. Pr. (N. Y. Supreme Ct.) 245. Where a new trial is granted on payment of cost, *held*, that an extra allowance is not part of these costs. McQuade *v.* Lake Erie, etc., R. Co., 11 How. Pr. (N. Y. Super. Ct.) 434. But see Safety Steam Generator Co. *v.* Dickson Mfg. Co., 61 Hun (N. Y.) 335.

No Order Necessary.—Where additional allowances are a matter of right no motion is necessary to secure them. The clerk, upon the application of a party entitled to costs, taxes the additional allowances as of course. Hunt *v.* Middlebrook, 14 How. Pr. (N. Y. Supreme Ct.) 300; Code Civ. Proc. § 3262. The clerk cannot, however, take proof by affidavit of the value of the property, unless fixed by the decision or report, or by the verdict of the jury, this value must be ascertained by the court. Newton *v.* Reid, 24 N. Y. Wkly. Dig. 472. In cases of actual partition, however, it may be ascertained by the commissioners. Code Civ. Proc. § 3262; Newton *v.* Reid, 24 N. Y. Wkly. Dig. 472.

2. See *post*, notes on Discontinuance, Offer of Judgment, and Tender.

Discretionary Allowances.—Section 3253 of the Code of Civil Procedure is as follows: In an action brought to foreclose a mortgage upon real property,[1] or for the partition [2] of real property, or in a difficult and extraordinary case,[3] where a defence [4] has been interposed in any action,[5] the court may also, in its discretion, award to any party [6] a further sum as follows:

1. In an action to foreclose a mortgage, a sum not exceeding two and one half per centum upon the sum due or claimed to be due upon the mortgage, nor the aggregate sum of two hundred dollars.[7]

2. In any other case specified in this section, a sum not exceeding five per centum upon the amount recovered or claimed, or the value of the subject-matter involved. Sec. 3254. But all the sums awarded to the plaintiff, as prescribed in section 3252 of this act, or to a party, or two or more parties on the same side, as prescribed in the last sentence of section 3251 of this act, and in subdivision second of the last section, cannot exceed, in the aggregate, two thousand dollars.

1. **Foreclosure Cases.** — The former Code of Procedure, section 309, was amended by the laws of 1876, chapter 431. Under this amendment it was decided in Bockes *v.* Hathorn, 17 Hun (N. Y.) 87, that 5 per cent could be allowed in an action upon a bond and to foreclose a mortgage where the case was difficult or extraordinary or a defence had been interposed. This holding was overruled in Rosa *v.* Jenkins, 31 Hun (N. Y.) 384, in which the construction adopted by the court of appeals in the case of Hunt *v.* Chapman, 62 N. Y. 333, was restored. The allowance of a greater percentage is, therefore, improper; but the additional allowance may be given although no defence has been put in, and the case is not difficult and ex-extraordinary. O'Neill *v.* Gray, 39 Hun (N. Y.) 566.

An action to foreclose a mortgage on a leasehold estate is not within the restriction as to extra allowances created by subdivision 1 of section 3253 of the code. Huntingdon *v.* Moore, 59 Hun (N. Y.) 351.

2. Weed *v.* Paine, 31 Hun (N. Y.) 10; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 433. Where each party is entitled to costs it may be made to both. Weed *v.* Paine, 31 Hun (N. Y.) 10. If neither succeeds against the other, no extra allowance can be made. Hall *v.* U. S. Reflector Co., 5 N. Y. Month. Bull. 1.

3. See *post*, IV, 6, What is a Difficult and Extraordinary Case.

4. **What Amounts to a Defence.**—A demurrer is a defence. New York R. Co. *v.* Harold, 30 Hun (N. Y.) 466; Victor *v.* Halstead (Supreme Ct.), 38 N. Y. St. Rep. 407. An allowance is proper although the action is discontinued before trial or dismissed at the circuit. Coffin *v.* Coke, 4 Hun (N. Y.) 616; Mills *v.* Watson, 45 N. Y. Super Ct. 591; Moulton *v.* Beecher, 11 Hun (N. Y.) 192; First Nat. Bank *v.* Bush, 47 How. Pr. (N. Y. Supreme Ct.) 78; Krum *v.* Steele, 7 N. Y. Wkly. Dig. 472.

5. **The Action may be Legal or Equitable**, or partly legal and partly equitable. Davis *v.* Glear, 14 How. Pr. (N. Y. Supreme Ct.) 310.

6. **Party must be Successful.**—These words must be construed in accordance with the general principles upon which costs are allowed. The allowance cannot be made to an unsuccessful party. Murray *v.* Robinson, 9 Hun (N. Y.) 137; Brady *v.* Durbrow, 2 E. D. Smith (N. Y.) 78; Noyes *v.* Children's Aid Soc., 70 N. Y. 481. See Provost *v.* Provost, 7 Hun (N. Y.) 81, affirmed 70 N. Y. 140; Betts *v.* Betts, 4 Abb. N. Cas. (N.Y. Supreme Ct.) 317.

7. This allowance cannot be exceeded. An allowance of five per cent is unauthorized notwithstanding the case is difficult and extraordinary. Rosa *v.* Jenkins, 31 Hun (N.Y.) 384; Hunt *v.* Chapman, 62 N. Y. 336; O'Neill *v.* Gray, 39 Hun (N. Y.) 566; Ferris *v.* Hurd, 15 Civ. Pro. Rep. (Buffalo Super. Ct.) 171.

III. THE APPLICATION.—1. When Made.—The application for an additional allowance may be made at the trial,[1] or at Special Term or Chambers.[2]

1. At the Trial.—When the trial is by jury, the application should be made when the verdict is returned; and in any case during the term at which the trial is had. Flint *v.* Richardson, 2 Code Rep. (N. Y.) 80; Van Rensselaer *v.* Kidd, 5 How. Pr. (N. Y. Supreme Ct.) 242. Where the application is made at the trial or at the same term, no notice is necessary, nor need the party against whom it is made be present in court. Mitchell *v.* Hall, 7 How. Pr. (N. Y. Supreme Ct.) 491.

In an Action against Executors the motion cannot be heard until the court has determined plaintiff's right to recover ordinary costs; but the applications for costs and for an additional allowance may be united in one motion. Mersereau *v.* Ryerss, 12 How. Pr. (N. Y. Supreme Ct.) 301.

2. After Trial.—The motion may be made at any time before final judgment is entered and before the adjustment of final costs. Trimm *v.* Marsh, 2 Hun (N. Y.) 383; Martin *v.* McCormick, 3 Sandf. (N. Y.) 755; Clarke *v.* Rochester, 29 How. Pr. (N. Y. Supreme Ct.) 97; People *v.* New York Central R. Co., 30 How. Pr. (N. Y. Supreme Ct.) 148; Powers *v.* Wolcott, 12 How. Pr. (N. Y. Supreme Ct.) 565; Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 341. In foreclosure actions the motion may be made upon the hearing of the motion for final judgment. Walsh *v.* Weidenfeld, 3 Daly (N. Y.) 334. In such a case it is not necessary that a separate motion on affidavits should be made, as the parties are, or might be, before the court on the motion for judgment; and the pleadings and proceedings in the action are all the evidence required to enable the court to determine the question. The court cannot grant an extra allowance after an order has been made directing that the action be discontinued without costs to either party. Harlem Bridge, etc., R. Co. *v.* Westchester, 76 Hun (N. Y.) 286.

After Judgment.—But if judgment be entered without taxing or inserting costs, the right to apply for an additional allowance is not waived. Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y. Super. Ct.) 305. The clerk cannot insert the amount of costs in the judgment until there is a judgment; and there can be no judgment until the paper signed by the judge shall have been entered in the office of the clerk. The adjustment of costs is, therefore, in strictness, a proceeding subsequent to the entry of judgment. 3 Wait's Pract. 370. An additional allowance cannot be granted after the taxation and entry of final costs in a judgment, Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y. Super. Ct.) 308. The application should not be made until the litigation is ended. Powers *v.* Wolcott, 12 How. Pr. (N. Y. Supreme Ct.) 565. And the taxation, if already had, may be set aside to allow an application to be made. Dietz *v.* Farish, 43 N. Y. Super. Ct. 87; Thompson *v.* St. Nicholas, 54 Hun (N. Y.) 393.

But after the entry of judgment an application has been held too late. Rule 44. Jones *v.* Wakefield, 21 N. Y. Wkly. Dig. 287. In this case it was held that the fact that other costs awarded on an application to open a default might be recovered by the applicant did not, in any manner, change the effect of an existing adjustment of the costs. Martin *v.* McCormick, 3 Sandf. (N. Y.) 755; Wolfe *v.* Van Nostrand, 2 N. Y. 570; Osborne *v.* Betts, 8 How. Pr. (N. Y. Supreme Ct.) 31; Jordan *v.* Shoe, etc., Bank, 45 N. Y. Super. Ct. 423; Van Rensselaer *v.* Kidd, 5 How. Pr. (N. Y. Supreme Ct.) 242; Clarke *v.* Rochester, 29 How. Pr. (N. Y. Supreme Ct.) 97. See, however, Beals *v.* Benjamin, 29 How. Pr. (N. Y. Supreme Ct.) 101, where three years had elapsed after the taxation and a settlement had been made upon the basis arrived at by the parties, a motion for additional allowance was held too late. Board of Com'rs of Pilots *v.* Spofford, 3 Hun (N. Y.) 58. The above cases were decided under sec. 308 of the Code of Procedure, the language of which permitted an allowance to the plaintiff "upon the recovery of judgment by him." The words of sec. 3 are: "If a final judgment is rendered in his favor and he recovers costs."

After Tender.—It is too late to move

Notice.—In the former case no formal notice is necessary.[1]

2. To What Court Made.—The application must always be made to the court before which the trial was had or the judgment rendered;[2] and this rule applies as well to equity cases, in all which the judge who tried the case is alone authorized to grant the allowance.[3] Where the case is tried in the First District, the application must be made in that district, although the judge before whom the case was tried resides in another district.[4]

after tender of debt, interest and costs, and an unconditional acceptance of the same. Lockman *v.* Ellis, 58 How. Pr. (N. Y. Supreme Ct.) 100. This was an action of foreclosure. Before trial defendant's tender was accepted and a satisfaction-piece was delivered. No way was or, under the circumstances, could be obtained by plaintiff. But a mere tender, declined by plaintiff, will not preclude an allowance. New York F. & M. Ins. Co. *v.* Burrell, 9 How. Pr. (N. Y. Supreme Ct.) 398.

1. **Necessity for Formal Notice.**—Mitchell *v.* Hall, 7 How. Pr. (N.Y. Supreme Ct.) 490; Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 339. But where the application is not made at the trial it should be made upon notice. Woodruff *v.* New York, etc., R. Co. (Buffalo Super.Ct.), 31 N. Y. St. Rep. 7; Mitchell *v.* Hall, 7 How. Pr. (N. Y. Supreme Ct.) 491; Niver *v.* Rossman, 5 How. Pr. (N. Y. Supreme Ct.) 153; Van Rensselaer *v.* Kidd, 5 How. Pr. (N. Y. Supreme Ct.) 242; Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 341. It has been held, however, that notice is not essential if the order is made by the judge who tried the case, at the same term. Mitchell *v.* Hall, 7 How. Pr. (N. Y. Supreme Ct.) 491; Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 341. When made upon notice, affidavits showing the grounds upon which the application is based should be served.

2. **Application to Trial Court.**—Rule 44; Hun *v.* Salter, 24 Hun (N. Y.) 640; Sackett *v.* Ball, 4 How. Pr. (N. Y. Supreme Ct.) 71. The motion can only be made in the court of original jurisdiction. Wolfe *v.* Van Nostrand, 2 N. Y. 570; People *v.* New York Cent. R. Co., 29 N. Y. 418. In trials before a referee, the motion is subject to the same rules in reference to the place at which it should be made as any other motion. Sprong *v.* Snyder, 6 How. Pr. (N. Y. Supreme Ct.) 11. Where the case is tried at circuit, the application should be made to the circuit at which the case is tried, or to the justice who held the same, and to none other. Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 339; Osborne *v.* Betts, 8 How. Pr. (N. Y. Supreme Ct.) 31. In the First District, the application may be made to a justice in chambers; but elsewhere it must be made to the court. Mann *v.* Tyler, 6 How. Pr. (N. Y. Supreme Ct.) 235; Main *v.* Pope, 16 How. Pr. (N. Y. Supreme Ct.) 271. Where the place of trial was the city and county of New York, an order for additional allowance made at a court held in the city of Rochester was reversed. Bear *v.* American Rapid Tel. Co., 36 Hun (N. Y.) 400.

The Obvious Purpose of the Rule is to require that the question of additional allowance should be determined by the judge who tried the cause, and who from his knowledge of its character must necessarily be most competent to decide upon the propriety and amount of the allowance. Osborne *v.* Betts, 8 How. Pr. (N. Y. Supreme Ct.) 31; Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 340.

In an Equity Case, if an order for an allowance has been made by a judge other than the one who tried the case, it is proper for the former to vacate his order, and direct the motion to be heard before the latter judge. Lothimer *v.* Livermore, 6 Daly (N. Y.) 501. But see Gori *v.* Smith, 3 Abb. Pr. N. S. (N. Y.) 51.

Where Judgment is Taken by Default, the motion may be made at Special Term. Mills *v.* Watson, 45 N. Y. Super. Ct. 591.

3. Lothimer *v.* Livermore, 6 Daly (N. Y.) 501.

4. Hun *v.* Salter, 92 N. Y. 651; Bear *v.* American Rapid Tel. Co., 36 Hun (N. Y.) 400, *reversing* 66 How. Pr.

Review by another Judge.—Nor can another judge review an order allowing additional costs.[1]

Where the trial is before a referee, the application should be made to the Special Term upon notice, as discretionary power to grant an additional allowance cannot be delegated to a referee.[2]

3. Costs of the Motion.—Costs of the motion for additional allowance are not usually given.[3]

4. Appeal from Order Granting or Refusing Additional Allowance.—General Term.—An order directing an additional allowance is a proper subject of appeal to the General Term, because it subjects a party to the payment of a sum of money, and for that reason affects a substantial right.[4]

(N. Y.) 274; Niver *v.* Rossman, 5 How. Pr. (N. Y. Supreme Ct.) 153.

1. Dresser *v.* Jennings, 3 Abb. Pr. (N. Y. Supreme Ct.) 240.

2. **Trial before Referee.**—Main *v.* Pope, 16 How. Pr. (N. Y. Supreme Ct.) 271. It is the general practice for a referee to make an additional allowance by a provision in the conclusions of law in an equity case. Gurney *v.* Union Transfer, etc., Co. (Super. Ct.), 29 N. Y. St. Rep. 278.

Referee's Certificate.—The referee's certificate should be produced upon the application. Main *v.* Pope, 16 How. Pr. (N. Y. Supreme Ct.) 271. The fact that the affidavits of the contending parties frequently contain conflicting statements renders the certificate a great assistance to the court. Fox *v.* Gold, 5 How. Pr. (N. Y. Supreme Ct.) 280. But this certificate is not jurisdictional, and the court may pass upon the motion without it. Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 374. This was also held under the former Code of Procedure, but held, also, that the certificate, if not essential, is yet proper; and it is the better practice not to omit it. Mersereau *v.* Ryerss, 12 How. Pr. (N. Y. Supreme Ct.) 300.

Affidavits.—The certificate alone is not sufficient; the court should be furnished also with an affidavit of facts sufficient to enable it to form an opinion. Gould *v.* Chapin, 4 How. Pr. (N. Y. Supreme Ct.) 185; How *v.* Muir, 4 How. Pr. (N. Y. Supreme Ct.) 252; Gori *v.* Smith, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 51. Where a large amount is claimed the court should require some specific facts to be stated, such as moneys actually expended or liabilities actually incurred, or time and labor consumed by the counsel or the party in the preparation and trial of the cause, how much time was occupied in the trial, whether more than one trial at the circuit, how often it was postponed, whether it was argued more than once at the General Term, whether long accounts were taken upon a reference, etc. People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y. Supreme Ct.) 148. Where the value of the subject-matter involved has not appeared during the trial, it may be determined upon affidavits presented upon the motion for allowance. Lyon *v.* Belchford, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 229.

3. Schwartz *v.* Poughkeepsie Mut. L. Ins. Co., 10 How Pr. (N. Y. Supreme Ct.) 93; Dickson *v.* McElwain, 7 How Pr. (N. Y. Supreme Ct.) 39. But the applicant or his attorney may be ordered to pay costs where the motion is denied and it is clearly apparent that no ground for the application existed. Jordan *v.* Shoe, etc., Bank, 45 N. Y. Super. Ct. 423.

4. **Jurisdiction of General Term.**—Duncan *v.* DeWitt, 7 Hun (N. Y.) 184; People *v.* New York Cent. R. Co., 29 N. Y. 418; Gori *v.* Smith, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 51. It is the duty of the General Term to review such orders upon the merits. Board of Comrs. of Pilots *v.* Spofford, 3 Hun (N. Y.) 60; Adams *v.* Arkenburgh, 106 N. Y. 615. But where the order of the Special Term appears not to be founded upon any misapprehension of the facts, or of the rights of the parties, and its jurisdiction is undoubted, the General Term will not interfere with the discretion exercised. Morss *v.* Hasbrouck, 13 N. Y. Wkly. Dig. 393; Union Bank *v.* Mott, 13 Abb. Pr. (N. Y. Super. Ct.) 247; Riley *v.* Hulbert, 13 N. Y. Wkly. Dig. 101; Hamilton

Court of Appeals.—Although the right to costs is a substantial right, and when claimed under the positive provisions of a statute involves no question of discretion, and is therefore appealable,[1] yet the Court of Appeals cannot review the action of the court below in making an additional allowance where the same does not exceed the maximum limit fixed by the code and no rule of law is violated.[2]

v. Manhattan R. Co. (Super. Ct.), 29 N. Y. St. Rep. 28; Mutual L. Ins. Co. *v.* Cranwell (Supreme Ct.), 32 N. Y. St. Rep. 376; Tradesmen's National Bank *v.* Wetmore (Supreme Ct.), 10 N. Y. St. Rep. 640. The presumption is that the order appealed from is right. Everingham *v.* Vanderbilt, 12 Hun (N. Y.) 75. Where, however, the order is made without any discretion being exercised it is reviewable by the General Term. Abbott *v.* Johnstown, etc., Horse R. Co., 24 Hun (N. Y.) 135. The discretion of the trial court may be reviewed by the General Term, but not by the Court of Appeals. Gorham *v.* Innis, 115 N. Y. 87. An order awarding an allowance beyond the power of the court to grant is appealable, although made on default: the party prejudiced may appeal to the General Term, or may move at Special Term to set aside the order for irregularity. Wilkinson *v.* Tiffany, 4 Abb. Pr. (N. Y. Supreme Ct.) 98; Voorhis *v.* French, 47 N. Y. Super. Ct. 364. But a trifling excess, apparently made through inadvertence, may not justify the interference of the Court of Appeals. Kraushaar *v.* Meyer, 72 N. Y. 602.

Remitting Case Back.—When the principle of allowance has been determined the case will be remitted by the General Term to the judge before whom it was heard, for a hearing upon the merits. Munro *v.* Smith (Supreme Ct.), 25 N. Y. St. Rep. 624. Should the General Term decide that the case is a proper one for an additional allowance, it may order the motion to be remitted to the Special Term to settle the amount. Shiels *v.* Wortmann, 126 N. Y. 650. And similarly the Court of Appeals may remit to the General Term, for further consideration and disposal upon the merits, an order of the latter court made upon technical grounds. Adams *v.* Arkenburgh, 106 N. Y. 615.

Exception not Necessary.—A formal exception is not requisite for the purpose of a review of the order by the General Term. Hanover *v.* Germania F. Ins. Co., 138 N. Y. 252.

1. Sturgis *v.* Spofford, 58 N. Y. 103; People *v.* New York Cent. R. Co., 29 N. Y. 418.

2. **Jurisdiction of Court of Appeals.**—Southwick *v.* Southwick, 49 N. Y. 510; People *v.* Albany, etc., R. Co., 16 Abb. Pr. (N. Y. Supreme Ct.) 465; Comins *v.* Jefferson, 64 N. Y. 626. The Court of Appeals has no jurisdiction to review the discretion of the court below in granting an extra allowance where no rule of law is violated, or in refusing an extra allowance unless such refusal has been based upon a want of authority, thus presenting a question of law. Shiels *v.* Wortmann, 126 N. Y. 650. Upon appeal from the decision of the General Term, however, the Court of Appeals may pass upon the question of the legal right of the court below to make the allowance. Heilman *v.* Lazarus, 12 Abb. N. Cas. (N. Y. Ct. App.) 24; Hanover *v.* Germania F. Ins. Co., 138 N. Y. 252. Or may pass upon the question of the legal right of the court below to refuse the allowance where such refusal is based, not upon the ground of discretion, but of want of jurisdiction in the General Term. Hudson River Tel. Co. *v.* Watervliet, 135 N. Y. 393.

Remitting Case Back.—Where the jurisdiction is established, the motion is remitted back to the court below to be heard on its merits. Adams *v.* Arkenburgh, 106 N. Y. 615.

Merits.—The burden rests upon appellants to show that the allowance is improper. People *v.* Clark, 9 N. Y. 370. Where the amount involved in the controversy does not clearly appear, the appellate court will presume that the allowance was properly computed. Rosa *v.* Jenkins, 31 Hun (N. Y.) 384. The Court of Appeals will not feel bound to reduce the allowance, although in excess of the limit, where no objection is made.

IV. WHERE ALLOWANCE MAY BE GRANTED OR REFUSED.—1. In General.—The allowance being additional only to other costs, a party is not entitled to an additional allowance unless he recovers costs[1] upon the final determination of the action.[2]

The right to the additional allowance is perfect when the verdict is rendered, although the amount may not be determined until afterwards.[3]

An allowance may be granted where the case is dismissed by reason of plaintiff's failure to appear at the trial;[4] or if

Riggs *v.* Cragg, 26 Hun (N. Y.) 89.

Allowance Discretionary.—Where the allowance is a matter of discretion in an equity action, this discretion cannot be reviewed upon a motion, but must be challenged by an exception to the finding and an appeal from the judgment. Woodford *v.* Bucklin, 14 Hun (N. Y.) 444; Rosa *v.* Jenkins, 31 Hun (N. Y.) 386; Couch *v.* Millard, 41 Hun (N. Y.) 212.

Allowance Subsequent to Appeal.—Where a party is defeated at the trial, but succeeds upon an appeal to the Court of Appeals, the Special Term may, after the filing of the remittitur and entry of an order thereon, grant him the costs of the action and an additional allowance. Brown *v.* Farmers' L. & F. Co., 26 Abb. N. Cas. (N. Y. Supreme Ct.) 160. In an early case the contrary was determined on the ground that the granting of such allowance would be adding to the judgment of the Court of Appeals. Parrott *v.* Sawyer, 26 Hun (N. Y.) 466.

1. **Recovery of Ordinary Costs Essential.**—Savage *v.* Allen, 2 Thomp. & C. (N. Y.) 474; Sherburn *v.* Taft (Supreme Ct.), 49 N. Y. St. Rep. 771; Couch *v.* Millard, 41 Hun (N. Y.) 212; Jordan *v.* Hess (Super. Ct.), 54 N. Y. St. Rep. 326. Nor is defendant entitled to an allowance where plaintiff recovers a verdict which does not carry costs. Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 31; Murray *v.* Robinson, 9 Hun (N. Y.) 137. The recovery which entitles a defendant to costs is a recovery on the issue tried. Pinder *v.* Stoothoff, 7 Abb. Pr. N. S. (N. Y. Supreme Ct.) 433.

2. **The Litigation must be Ended.**—Merchants' Exch. Nat. Bank *v.* Commercial Warehouse Co., 35 N. Y. Super. Ct. 214; Troy, etc., R. Co. *v.* Tibbitts, 11 How. Pr. (N. Y. Supreme Ct.) 168; Brace *v.* Beatty, 7 Abb. Pr. (N. Y. Supreme Ct.) 445; Pool *v.* Osborn, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 232. An allowance cannot be made until the amount upon which it is to be computed is fixed and determined. Citizens' Sav. Bank *v.* Bauer, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 340.

3. Cook *v.* New York Floating Dock, 1 Hilt. (N. Y.) 556.

Retrials.—Where a case is retried, the fact that an allowance was denied on the first trial does not prevent an allowance being made on the second, where the facts and circumstances at the second trial are materially different. Fox *v.* Fox, 24 How. Pr. (N. Y. Supreme Ct.) 385. And a party successful upon a new trial involving nothing difficult or extraordinary may have an allowance where the same party succeeded upon the first trial, which was difficult and extraordinary. Howell *v.* Van Siclen, 4 Abb. N. Cas. (N. Y. Ct. App.) 1. Upon a new trial under sec. 3252 a second allowance may be granted, as it is practically the trial of a new case. Wing *v.* De La Rionda, 131 N. Y. 422.

4. **Trial.**—In a difficult and extraordinary case it is only necessary that a defence should be interposed. Under the former Code of Procedure, sec. 309, which permitted allowances where a trial was had, the word "trial," in this connection, was held to include every mode of disposing of issues in a cause, and to cover judgments by default. Rogers *v.* Degen, 4 Bosw. (N. Y.) 669. See also Danenhover *v.* March, 4 Abb. Pr. (N. Y. Supreme Ct.) 254; Mora *v.* Great Western, 10 Bosw. (N. Y.) 622; Mills *v.* Watson, 45 N. Y. Super. Ct. 591.

It is within the power of the court to grant an allowance in a case which has never been brought to trial. Lockwood *v.* Salmon River Paper Co. (Supreme Ct.), 49 N. Y. St. Rep. 303; Moulton *v.* Beecher, 11 Hun (N. Y.) 192.

plaintiff submits to a nonsuit;[1] or on judgment upon a demurrer.[2]

2. Subject-matter must Possess Pecuniary Value.—An allowance cannot be made in any action where no property or right is involved upon which it is possible to place a pecuniary estimate.[3]

Submission upon Statement of Facts.—An allowance may be made where a difficult and extraordinary case has been submitted upon an agreed state of facts. Kingsland *v.* New York, 52 Hun (N. Y.) 98. But see, *contra*, People *v.* Fitchburg R. Co., 133 N. Y. 239. But an allowance cannot be made upon the submission of a controversy without action where the submission provides only for costs and disbursements. Fish *v.* Coster, 28 Hun (N. Y.) 64.

Stipulation as to Costs.—So, also, where defendant stipulated to permit judgment for an amount "with costs," held by Lawrence, J., that these words could not be construed to contemplate or include an additional allowance. Pool *v.* Osborn, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 232. See also Landon *v.* Van Etten, 57 Hun (N. Y.) 122; Penfield *v.* James, 56 N. Y. 659. But see Coates *v.* Goddard, 34 N. Y. Super. Ct. 118, where the contrary was held. See also Safety Steam Generator Co. *v.* Dickson Mfg. Co., 61 Hun (N. Y.) 335; Jermain *v.* Lake Shore, etc., R. Co., 31 Hun (N. Y.) 558.

In Doubtful Cases.—Where the authority to grant is doubtful, the allowance should be refused. Sheehy *v.* Kelly, 33 Hun (N. Y.) 543; Gould *v.* Chapin, 4 How. Pr. (N. Y. Supreme Ct.) 185.

1. **Nonsuit.**—Allaire *v.* Lee, 4 Duer (N. Y.) 609; Woods *v.* Illinois Cent. R. Co., 20 How. Pr. (N. Y. Supreme Ct.) 285; Shiels *v.* Wortman (Supreme Ct.), 39 N. Y. St. Rep. 798.

2. **Demurrer.**—Vietor *v.* Halstead, (Supreme Ct.), 38 N. Y. St. Rep. 407. But no allowance can be granted where a demurrer to the jurisdiction is upheld. Genet *v.* Delaware, etc., Canal Co., 57 Hun (N. Y.) 174. Nor on demurrer where leave to plead over is given. De Stuckle *v.* Tehuantepec R. Co., 30 Hun (N. Y.) 34. See also Small *v.* Ludlow, 1 Hilt. (N. Y.) 307; Lowry *v.* Inman, 37 How. Pr. (N. Y. Super. Ct.) 286; First Nat. Bank *v.* Bush, 47 How. Pr. (N. Y. Supreme Ct.) 78; McDonald *v.* Mallory, 46 N. Y. Super. Ct. 58; Kingsland *v.* New York, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 323.

3. The reason why it is requisite to the granting of an allowance that the subject-matter of the action should possess a money value both capable of being estimated and also shown in evidence is because the power to grant an allowance is limited to five per cent of the (1) claim or (2) recovery or (3) the subject-matter involved; hence it is necessary that such sum, recovery, or amount must be ascertained with sufficient exactness to enable a computation of five per cent to be made. Otherwise the limitation would be inoperative, since it could never be ascertained whether five per cent had been exceeded, and the result would be an unlimited power to grant an allowance. Coates *v.* Goddard, 34 N. Y. Super. Ct. 118.

Injunction Suits.—For this reason the allowance cannot be made in a suit in the nature of a simple injunction bill, and no money or property is sought to be recovered. Hudson River Teleph. Co. *v.* Watervliet Turnpike, etc., Co. (Supreme Ct.), 39 N. Y. St. Rep. 966; Johnson *v.* Shelter Island Grove, etc., Assoc., 122 N. Y. 330; Huntingdon *v.* Moore, 59 Hun (N. Y.) 351; Palmer *v.* DeWitt, 42 How. Pr. (N. Y. Super. Ct.) 466; Gressler *v.* Stuyvesant, 67 Barb. (N. Y.) 81; Diamond Match Co. *v.* Roeber, 35 Hun (N. Y.) 421; Perkins *v.* Whitney (Supreme Ct.), 34 N. Y. St. Rep. 951. But see Williams *v.* Western Union Tel. Co., 1 Civ. Pro. Rep. (N. Y.) 294; People *v.* Albany, etc., R. Co., 5 Lans. (N. Y.) 25; Conaughty *v.* Saratoga County Bank, 92 N. Y. 401; Brown *v.* Gallaudet, 19 Alb. L. J. 281; Gray *v.* Manhattan R. Co., 3 Misc. (N. Y.) 239. Nor in a suit to restrain the foreclosure of a mortgage. Sprong *v.* Snyder, 6 How. Pr. (N. Y. Supreme Ct.) 11. But the fact that an undertaking upon injunction has been given will not prevent the granting an allowance in a proper case. Williams *v.* Western Union Tel. Co., 1 Civ. Pro. Rep. (N. Y.) 294. Nor will the granting of such allowance affect

3. Where Court may Exercise Discretion.—There are many cases in which the court will exercise its discretion in refusing the

the recovery of damages on such undertaking. Howell *v.* Miller, 5 Civ. Pro. Rep. (N. Y. C. Pl.) 164; Froxell *v.* Haynes, 5 Daly (N. Y.) 389.

Other Actions where Subject-matter has no Pecuniary Value. — The allowance cannot be made in an action in the nature of a *quo warranto*. People *v.* Flagg, 25 Barb. (N. Y.) 652; People *v.* Albany, etc., R. Co., 5 Lans. (N. Y.) 25. Nor in actions for specific performance. Weeks *v.* Southwick, 12 How. Pr. (N. Y. Supreme Ct.) 170. But where plaintiff sued for rescission of a contract for sale and return of deposit, and defendant succeeded upon a counterclaim for specific performance, *held*, that the subject-matter was the value of the land, and an allowance was granted defendant. Lahey *v.* Kortright (Super. Ct.), 32 N. Y. St. Rep. 112. An allowance cannot be made in an action to vacate an award for misconduct of an umpire. Hoffmann *v.* De Graaf, 39 Hun (N. Y.) 648. Nor can an action by a vendor to foreclose a land contract. Burkhart *v.* Babcock, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 512. Nor to set aside a voluntary assignment. Osborne *v.* Betts, 8 How. Pr. (N. Y. Supreme Ct.) 31. Nor to set aside a conveyance. Buchanan *v.* Morrell, 13 How. Pr. (N. Y. Super. Ct.) 296; Donovan *v.* Wheeler, 67 Hun (N. Y.) 68. Nor to remove a corporation officer for misconduct. People *v.* Giroux, 29 Hun (N. Y.) 248; Conaughty *v.* Saratoga County Bank, 92 N. Y. 401, *reversing* 28 Hun (N. Y) 373. Nor to remove an assignee and appoint a receiver. Meyer *v.* Rasquin, 20 N. Y. Wkly. Dig. 98. Nor to restrain defendant from increasing the height of a party-wall. Musgrave *v.* Sherwood, 29 Hun (N. Y.) 475. Nor to declare and enforce an easement to which no value is shown to attach. Johnson *v.* Shelter Island Grove, etc., Assoc., 47 Hun (N. Y.) 374, 122 N. Y. 330; Moores *v.* Townshend, 8 St. Rep. (N. Y.) 893. Nor in other cases where the subject-matter of the controversy is a mere right, not directly involving any claim to property, and either has no pecuniary value or its value fails to be shown. Wood *v.* Lary, 47 Hun (N. Y.) 550; Malory *v.* Associated Lace Makers' Co. (Supreme Ct.), 28 N. Y. St. Rep. 735; People *v.* Ulster, etc., R. Co. (Supreme Ct.), 34 N. Y. St. Rep. 983, 128 N. Y. 240; Abell *v.* Bradner (Supreme Ct.), 39 N. Y. St. Rep. 5; Bradley *v.* Walker (Super. Ct.), 44 N. Y. St. Rep. 213; People *v.* Genessee, 95 N. Y. 666; Palmer *v.* DeWitt, 42 How. Pr. (N. Y. Super. Ct.) 466; Spofford *v.* Texas Land Co., 41 N. Y. Super. Ct. 228; People *v.* Rockaway Beach Imp. Co., 28 Hun (N. Y.) 356; Hanover *v.* Germania F. Ins. Co., 138 N. Y. 252; Adams *v.* Sullivan, 42 Hun (N. Y.) 278; Patterson *v.* Burnett, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 115; Knapp *v.* Hammersley, 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 258; Weeks *v.* Silver Islet Consolidated Min., etc., Co. (Super. Ct.), 32 N. Y. St. Rep. 447; Gray *v.* Manhattan R. Co., 3 Misc. (N. Y.) 239; People *v.* New York, etc., Ferry Co., 68 N. Y. 71; Weaver *v.* Ely, 83 N. Y. 89; Voorhies *v.* French, 47 N. Y. Super. Ct. 364; Heilmann *v.* Lazarus, 65 How. Pr. (N. Y. Ct. App.) 95; People *v.* Genessee Valley Canal R. Co., 30 Hun (N. Y) 565, 95 N. Y. 666; Adams *v.* Arkenburgh, 106 N. Y. 615. So also, in actions for accounting, where no definite sum is claimed in the complaint, and the value of plaintiff's alleged interest is not shown, no allowance can be granted. Budd *v.* Smales, N. Y. Daily Reg. 19 March, 1884; Coleman *v.* Chauncey, 7 Robt. (N. Y.) 578. But see Tolan *v.* Car, 12 Daly (N. Y.) 520, where an allowance was computed upon the amount recovered. So also no allowance will be granted in actions for divorce. Bentley *v.* Bentley, 3 N. Y. Month. L. Bull. 76; Pountney *v.* Pountney (Supreme Ct.), 32 N. Y. St. Rep. 334. But this does not apply to a decision in favor of the wife in an action by the husband for nullity of marriage. Griffin *v.* Griffin, 47 N. Y. 134.

Reference to Determine Value.—It is a useful practice for the interlocutory decree in injunction suits to provide for the ascertainment by the referee of the value (if any) of the subject-matter, with a view to determine the propriety and amount of an additional allowance. Munro *v.* Smith (Supreme Ct.), 25 N. Y. St. Rep. 624; Dr. Jaeger Sanitary, etc., Co. *v.* Le Boutillier, 63 Hun (N. Y.) 298.

allowance otherwise claimable where the circumstances are such as would render it inequitable to grant it,[1]

Right to have Determination. — The unsuccessful party against whom the motion is made has a right to require that the court determine the value of the property recovered or claimed in the action. Dresser *v.* Jennings, 3 Abb. Pr. (N. Y. Supreme Ct.) 240.

Interpleader Action.—The assignee of a sheriff's claim for fees having brought suit thereon, other persons interposed a claim to the fund, and were by an order of interpleader substituted as defendants, the money being paid into court. Plaintiff was successful in the action. *Held*, allowance proper, especially as defendants had wholly failed to disclose the nature of their own claim to the fund. Bowery Nat. Bank *v.* Wilson (Supreme Ct.), 1 N. Y. Supp. 473.

Partnership Actions.—In the action to dissolve the partnership and for an accounting, an extra allowance was held properly made to defendant. Adams *v.* Arkenburgh, 106 N. Y. 615, *reversing* Adams *v.* Sullivan, 42 Hun (N. Y.) 278. But the bare fact that the action is brought for an accounting and a division of the firm assets is no ground for an extra allowance. Hinman *v.* Ryder, 44 N. Y. Super Ct. 330. In any case the allowance must be reasonable and not excessive. Hagenbackle *v.* Schultz, 69 Hun (N. Y.) 183. Nor should an extra allowance be made out of assets of the firm in the hands of a receiver where creditors would suffer. Smith *v.* Green, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 163.

Wills.—In an action for the construction of a will brought by executors an allowance may be made. Wetmore *v.* Parker, 52 N. Y. 450; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317. But the allowances to the parties must be limited to five per cent of the subject-matter involved. Fraser *v.* McNaughton, 58 Hun (N. Y.) 30. But in a proceeding to prove an uncontested will an extra allowance cannot be made to the defendant's attorney. Firth *v.* Campbell, 53 Barb. (N. Y.) 325. Nor in a suit for the construction of a will where the court upholds the trust. Provost *v.* Provost, 7 Hun (N. Y.) 81; Downing *v.* Marshall, 37 N. Y. 380. Nor on dismissal of an action to establish a will. Perkins *v.* Whitney (Supreme Ct.), 34 N. Y. St. Rep. 951. The allowance must be limited to five per cent on the subject-matter involved. Fraser *v.* McNaughton, 58 Hun (N. Y.) 30.

1. **Discretion of Court.**—Thus it will not be allowed where it would require to be paid out of a fund upon which creditors not parties to the action have claims, where it would diminish the dividend to be received by them. Smith *v.* Green, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 163; Hurd *v.* Farmers' L. & T. Co., 16 N. Y. Wkly. Dig. 480. But in an action to set aside an assignment for creditors an additional allowance was made, although there was not enough to pay all creditors. Durand *v.* Pierson (Supreme Ct.), 33 N. Y. St. Rep. 207.

Stipulation for Allowance.—The stipulation of attorneys is not sufficient to justify an allowance, if otherwise improper. Bockes *v.* Hathorn, 17 Hun (N. Y.) 87. But the stipulation is sufficient against the client, unless impeached for want of power. People *v.* Westchester County (Supreme Ct.), 39 N. Y. St. Rep. 798; Palen *v.* Starr, 7 Hun (N. Y.) 422; Ferguson *v.* Crawford, 86 N. Y. 609.

Against Parties Acting in Good Faith.—An allowance ought not to be made against a trustee interposing a defence in good faith and for the sake of protecting other interests in his care. Graham *v.* New York L. Ins., etc., Co. 46 Hun (N. Y.) 261. So also in the case of a surety, unless he has misbehaved or acted in bad faith, or is possessed of the means to indemnify himself. Rice *v.* Wright, 3 How. Pr. (N. Y. Supreme Ct.) 405. So also an allowance should not be made against a petitioner in lunacy where his petition is dismissed but it is apparent that he acted in good faith. *Exp.* McAdams, 19 Hun (N. Y.) 292. Nor against a plaintiff in a partition suit brought in good faith for the purpose of testing the right of heirs to a division, the plaintiff being in straitened circumstances. Van Brunt *v.* Van Brunt (Supreme Ct.), 14 N. Y. St. Rep. 887, 111 N. Y. 178. So also where a defence was made in good faith to an action to recover funds in the hands of the city treasurer, and for the purpose of settling controverted rights. Field *v.* New York, 38

or where no merits are disclosed upon the application.[1]

Hun (N. Y.) 590. Nor should it be granted where, in a dower action, plaintiff dies after filing a consent to receive a gross sum, and the action is revived in good faith by executors who are advised that a vested right has descended to them. McKeen *v.* Fish, 33 Hun (N. Y.) 28. Where plaintiff, a receiver in supplementary proceedings, had sued, pursuant to leave obtained of the court, to set aside a conveyance of the judgment debtor's property, in good faith and in ignorance of an unrecorded declaration of trust, although the complaint was dismissed, *held*, in view of all the circumstances, including suspicious and misleading conduct of defendant, no case for an additional allowance. Baldwin *v.* Reardon, 48 N. Y. Super. Ct. 166. Nor will the court impose payment of an allowance as a term of discontinuance in an action brought by a wife for separation. Newton *v.* Newton, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 224.

Hardship.—Nor should an allowance be granted when to compel its payment would be a great hardship to the defeated party. Baldwin *v.* Reardon, 48 N. Y. Super. Ct. 166; Losee *v.* Bullard, 54 How. Pr. (N. Y. Supreme Ct.) 319. In this case it was held that the court may, before granting an allowance in a difficult and extraordinary case, scrutinize the merits of the application. The decision in Lane *v.* Van Orden, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 228, to the effect that to introduce the consideration of hardship to the defeated party would be to import a factor outside the statute, has been disapproved in subsequent cases. Baldwin *v.* Reardon, 48 N. Y. Super. Ct. 166. See also McConnell *v.* Manhattan Constr. Co., 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 310; Burnett *v.* Westfall, 15 How. Pr. (N. Y. Supreme Ct.) 420.

Punishment.—It has been held that the allowance should not be granted for the sole purpose of punishing the defeated party. Anonymous, 12 How. Pr. (N. Y. Supreme Ct.) 317. But conduct on the part of an applicant which does not meet the approval of the court may be considered. Mitchell *v.* Lane, 62 Hun (N. Y.) 253. And an allowance may properly be included with the fine and costs in contempt proceedings. People *v.* Rochester, etc., R. Co., 76 N. Y. 294.

Imposing Terms.—Payment of an allowance cannot be imposed as a condition of amendment before judgment. Merchants' Exch. Nat. Bank *v.* Commercial Warehouse Co., 35 N. Y. Super. Ct. 214. But an additional allowance was granted plaintiff after trial and after delivery of the report of the referee, where defendants applied for leave to file a supplemental answer; and the court may make payment of such allowance a term of the leave. Mabie *v.* Adams, 1 N. Y. Month. L. Bull. 65. But not where a demurrer is overruled and leave to answer given. McDonald *v.* Mallory, 46 N. Y. Super. Ct. 58. See Williams *v.* Kiernan, 4 N. Y. Month. L. Bull. 41.

Action by Wife.—Where, in an action by a wife for a separation, the defendant counterclaims for a divorce, and both parties fail, *held*, that the wife should receive an additional allowance to repay her for the additional expense she was put to by reason of the necessity of meeting the charge of adultery. De Meli *v.* De Meli, 67 How. Pr. (N. Y. Supreme Ct.) 20.

1. Thus the allowance will be refused where plaintiff recovers a sum much less than that claimed. Fish *v.* Forrance, 5 How. Pr. (N. Y. Supreme Ct.) 317; Sands *v.* Sands, 6 How. Pr. (N. Y. Supreme Ct.) 453. Also where defendant comes in and confesses judgment. Davison *v.* Waring, 9 How. Pr. (N. Y. Supreme Ct.) 254. Or where defendant makes a sufficient tender. Pratt *v.* Conkey, 15 How. Pr. (N. Y. Supreme Ct.) 27. But see New York F. & M. Ins. Co. *v.* Burrell, 9 How. Pr. (N. Y. Supreme Ct.) 398; Pratt *v.* Ramsdell, 16 How. Pr. (N. Y. Supreme Ct.) 59. The plaintiff cannot claim an additional allowance where the issue litigated was solely between defendants. Poillon *v.* Cudlipp, 50 How. Pr. (N. Y. Supreme Ct.) 366. The allowance was also refused where plaintiff takes judgment after answer for want of an affidavit of merits. Hall *v.* Parker, 7 N. Y. Leg. Obs. 138. Or on a felonious answer. Hale *v.* Prentice, 1 Code Rep. (N. Y.) 81; Beers *v.* Squire, 1 Code Rep. (N. Y.) 84; Rice *v.* Wright, 3 How. Pr. (N. Y. Supreme Ct.) 405. Where both parties

4. Special Proceedings.—The court has no power to grant allowances in special proceedings.[1]

failed. Hall *v.* U. S. Reflector Co., 5 N. Y. Month. L. Bull. Where defendants unnecessarily severed in their answers. Matthewson *v.* Thompson, 9 How. Pr. (N. Y. Supreme Ct,) 231; Tillman *v.* Powell, 13 How. Pr. (N. Y. Supreme Ct.) 117; Fort *v.* Gooding, 9 Barb. (N. Y.) 388. Where unnecessary actions brought. Sackett *v.* Ball, 4 How. Pr. (N. Y. Supreme Court) 71. And where the cases were neither difficult nor extraordinary. Dexter *v.* Gardner, 5 How. Pr. (N. Y. Supreme Ct.) 417; Adams *v.* Herns, 29 Hun (N. Y.) 280. Also where plaintiff sued *in formâ pauperis* and recovered a substantial amount. Marx *v.* Manhattan R. Co. (Co. Ct.), 3 N. Y. Supp. 113. An extra allowance against executors is governed by the same rules as those governing the question of costs against them. Niblo *v.* Binsse, 31 How. Pr. (N. Y. Supreme Ct.) 476.

Party Joined at his Own Request.—Where, in an action by heirs for partition, the executor of a deceased owner was added as a party at his own request, to obtain an adjudication of his rights as executor, and before the case was noticed for trial the heirs obtained an order to discontinue upon payment to the executor of $10, *held*, no additional allowance could be made. Woerman *v.* Baas (Supreme Ct.), 15 N. Y. Supp. 469.

Recovery on Technical Grounds.—An extra allowance will not be granted in an action to recover back part of the sum paid to a city in payment of an assessment subsequently reduced upon a ground purely technical. Schultze *v.* New York, 11 Civ. Pro. Rep. (N. Y. Supreme Ct.) 54.

1. Matter of Holden, 126 N. Y. 589; Davis *v.* Rensselaer, etc., R. Co., 55 N. Y. 145; Matter of Simpson, 26 Hun (N. Y.) 459; Byrnes *v.* Labagh, 12 Civ. Pro. Rep. (N. Y. Supreme Ct.) 417; Matter of Barnett, 52 How. Pr. (N. Y. Supreme Ct.) 73; Power *v.* Barr, 24 Barb. (N. Y.) 142; Matter of New York, etc., 18 N. Y. Wkly. Dig. 536; Bonyn *v.* New York, 17 N. Y. Wkly. Dig. 471; People *v.* Security L. Ins., etc., Co., 24 Hun (N. Y.) 596.

Distribution in Foreclosure Cases.—Nor in applications for the distribution of surplus money on a foreclosure sale, although the court may allow a suitable sum for costs and disbursements. New York L. Ins., etc., Co. *v.* Vanderbilt, 12 Abb. Pr. (N. Y. Supreme Ct.) 458; Hebrank *v.* Colell, 2 N. Y. Month. L. Bull. 39; Wellington *v.* Ulster Ice Co., 5 N. Y. Wkly. Dig. 104; German *v.* Sharer, 25 Hun (N. Y.) 409; McDermott *v.* Hennessy, 9 Hun (N. Y.) 59; Mowry *v.* Peet, 13 N. Y. Wkly. Dig. 16.

Condemnation Proceedings.—The extra allowance in condemnation proceedings provided for by section 3372, Code Civil Procedure, is intended as an indemnity to the party prevailing for his expenses necessarily or reasonably incurred, to be determined from the proofs submitted on that question. St. Lawrence, etc., R. Co. *v.* DeCamp (Supreme Ct.), 52 N. Y. St. Rep. 10; Matter of Lake Shore, etc., R. Co., 65 Hun (N. Y.) 538. See under former practice, Matter of New York, etc., R. Co., 18 N. Y. Wkly. Dig. 536.

The court has power to award an additional allowance to defendant in condemnation proceedings even though no answer was interposed, provided no offer to purchase was made. Matter of Lake Shore, etc., R. Co., 65 Hun (N. Y.) 538.

Feigned Issues.—An allowance cannot be made upon a trial of an issue in the nature of a feigned issue. Burritt *v.* Silliman, 24 How. Pr. (N. Y. Supreme Ct.) 337.

Mechanics' Liens.—Prior to the Mechanics' Lien Act of 1885 it was held that, under the law as it then stood (Laws of 1875, chapter 379), no authority existed to grant extra allowances. Ruth *v.* Jones, 1 N. Y. Month. L. Bull. 61; Hagan *v.* American Baptist, etc., Soc. (C. Pl.), 6 N. Y. St. Rep. 219; Randolph *v.* Foster, 3 E. D. Smith (N. Y.) 648.

But under the later statute (Laws of 1885, chapter 342), section 7 of which provides that the lien may be enforced in a civil action, it has been held that if the action to foreclose the lien be difficult and extrordinary, an additional allowance may be granted. Lawson *v.* Reilly, 13 Civ. Pro. Rep. (N. Y. C. Pl.) 290; Horgan *v.* McKenzie (C. Pl.), 43 N. Y. St. Rep. 131. The statute fee of $60 under section 3252 Code Civ. Pro. cannot, however, be allowed, as an action to foreclose a mechanics' lien is not properly

5. Where Defendant is Entitled.—The Code provides that in certain cases the defendant, being the prevailing party, is, as well as the plaintiff, entitled to additional allowances.[1]

6. What are Difficult and Extraordinary Cases.—Meaning of the Term.—The term "difficult and extraordinary" implies something more and other than usual, common, and ordinary in respect to the skill and labor required, or in the time occupied in the preparation and trial of a cause, or both;[2] the words of the Code should re-

an action to determine a claim to real property, and is not specially included in the section. Wright *v.* Rensens (Supreme Ct.), 39 N. Y. St. Rep. 802.

1. On Counterclaim.—In an action to rescind an agreement to purchase real property, where the defendant obtains judgment in his favor upon his counterclaim demanding specific performance, the court may grant defendant an allowance based on the value of the property. Lahey *v.* Kortright, 58 N. Y. Super. Ct. 576.

Where plaintiff claimed in an action for breach of covenants contained in a lease, and defendant was allowed two thousand dollars on a counterclaim, being nearly one fifth of plaintiff's claim, it was held that an extra allowance to defendants was properly granted. McCulloch *v.* Dobson (Supreme Ct.), 39 N. Y. St. Rep. 908.

Offer to Allow Judgment.—A defendant is allowed an extra allowance where before issue joined he has served an offer to allow judgment, and the plaintiff has failed to obtain a more favorable recovery. Hirschspring *v.* Bol, 20 Abb. N. Cas. (N. Y. City Ct.) 402. See, under former code, McLees *v.* Avery, 4 How. Pr. (N. Y. Supreme Ct.) 441; Magnin *v.* Dinsmore, 47 How. Pr. (N. Y. Super. Ct.) 11.

So, also, where a defendant recovers a judgment for the costs accruing subsequent to an offer to allow judgment to be taken against him, such judgment may, under proper circumstances, be made the basis for an additional allowance. Board of Comrs. of Pilots *v.* Spofford, 3 Hun (N. Y.) 57. So, also, defendant may, in a proper case, have an allowance where plaintiff recovers less than $50. Brady *v.* Durbrow, 2 E. D. Smith (N. Y.) 78.

Discontinuance.—When there is a discontinuance, a defendant cannot obtain an allowance upon a greater basis than that upon which plaintiff's allowance would have been computed had he succeeded. McConnell *v.* Manhattan Constr. Co., 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 310.

Death of Plaintiff After Verdict.—The right of a defendant, where a judgment is rendered in his favor, to an additional allowance is not affected by the death of one of the plaintiffs after verdict. The right to costs, of which the allowance was part, became absolute the moment the verdict was rendered, and by virtue of its rendition. Arthur *v.* Schriever, 60 N. Y. Super. Ct. 59.

Allowance Refused.—Extra costs will not be given where defendants have unnecessarily severed in their defences. Tillman *v.* Powell, 13 How. Pr. (N. Y. Supreme Ct.) 117. And they may be ordered to pay costs and an allowance. Fort *v.* Gooding, 9 Barb. (N. Y.) 388. Nor will an extra allowance be made where two defendants appear by different attorneys and recover double costs. Matthewson *v.* Thompson, 9 How. Pr. (N. Y. Supreme Ct.) 231.

Where a defendant is a prevailing party against a codefendant, he is not entitled to costs where the plaintiff is so entitled. Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 34. Nor if the only issues which make the case a difficult and extraordinary one are decided in favor of the plaintiff. Board of Comrs. of Pilots *v.* Spofford, 4 Hun (N. Y.) 74. Nor where the plaintiff recovers only nominal damages. Murray *v.* Robinson, 9 Hun (N. Y.) 137; Pinder *v.* Stoothoff, 7 Abb. Pr. N. S. (N. Y. Supreme Ct.) 433.

An extra allowance should not be granted to one whose only interest is an inchoate right of dower in plaintiff's share, nor a second mortgagee. Doremus *v.* Crosby, 66 Hun (N. Y.) 125.

2. Previous to 1859 the power was conferred to order additional allowances of costs when the case was either difficult or extraordinary; but in that year the provision was changed, rendering it necessary that

ceive their ordinary popular meaning.[1]

No General Rule.—No general rule can be laid down to determine what cases are difficult and extraordinary; each case will be decided upon its own merits.[2]

it should be both difficult and extraordinary before any allowance could be made. See Duncan *v.* DeWitt, 7 Hun (N. Y.) 184; also remarks of Barnard, J., in Woods *v.* Illinois, Cent. R. Co., 20 How. Pr. (N. Y. Supreme Ct.) 285.

Under section 308 of the Code of Procedure it was in an early case held that all litigated trials are difficult or extraordinary. Dyckman *v.* McDonald, 5 How. Pr. (N. Y. Supreme Ct.) 121; see also Niver *v.* Rossman, 5 How. Pr. (N. Y. Supreme Ct.) 153. But this construction was disapproved in later cases. Fox *v.* Gould, 5 How. Pr. (N. Y. Supreme Ct.) 278; Sands *v.* Sands, 6 How. Pr. (N. Y. Supreme Ct.) 454; Dexter *v.* Gardner, 5 How. Pr. (N. Y. Supreme Ct.) 417; Howard *v.* Rome, etc., Plank Road Co., 4 How. Pr. (N. Y. Supreme Ct.) 416; Fox *v.* Fox, 22 How. Pr. (N. Y. Supreme Ct.) 454; Gooding *v.* Brown, 35 Hun (N. Y.) 154. See Bostwick *v.* Menck, 40 N. Y. 383; Colton *v.* Morrissy, 6 N. Y. Wkly. Dig. 165.

1. Duncan *v.* DeWitt, 7 Hun (N. Y.) 184.

2. Discretion of the Court.—Schwartz *v.* Poughkeepsie Mut. F. Ins. Co., 10 How. Pr. (N. Y. Supreme Ct.) 93. The discretion of the court is absolute. Morss *v.* Hasbrouck, 13 N. Y. Wkly. Dig. 393; Union Bank *v.* Mott, 13 Abb. Pr. (N. Y. Supreme Ct.) 247. And the determination of what is difficult and extraordinary involves so many considerations addressed to this discretion that an appellate court rarely interferes. Morrison *v.* Agate, 9 N. Y. Wkly. Dig. 286; Tolman *v.* Syracuse, etc., R. Co., 31 Hun (N. Y.) 397. To justify reversal, a clear abuse of this discretion must be shown. Bryon *v.* Durrie, 8 N. Y. Wkly. Dig. 57, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 135. See also People *v.* Albany, etc., R. Co., 16 Abb. Pr. (N. Y. Supreme Ct.) 465; Gooding *v.* Brown, 35 Hun (N. Y.) 153.

Long Trial.—It has been held that the length of time occupied at the trial is not, of itself alone, a proper subject for consideration in determining an extra allowance, more especially if the defeated party in no way contributed to the expenditure of time. Sands *v.* Sands, 6 How. Pr. (N. Y. Supreme Ct.) 453. But the extreme length of a trial may render a case extraordinary. Howard *v.* Rome, etc., Plank Road Co., 4 How. Pr. (N. Y. Supreme Ct.) 416; Fox *v.* Fox, 22 How. Pr. (N. Y. Supreme Ct.) 454; Fort *v.* Gooding, 9 Barb. (N. Y.) 388. See also Dexter *v.* Gardner, 5 How. Pr. (N. Y, Supreme Ct.) 417; Powers *v.* Wolcott, 12 How. Pr. (N. Y. Supreme Ct.) 565. So also may the examination of a large number of expert witnesses in a case where the issues were bitterly contested. McCulloch *v.* Dobson (Supreme Ct.), 39 N. Y. St. Rep. 908.

Amount Involved.—The amount involved may properly be considered; as the fact that a large amount of money depends upon the decision of a case increases the responsibility and anxiety of the attorney, and justifies the employment of eminent counsel. Gooding *v.* Brown, 35 Hun (N. Y.) 153. Thus in an action concerning property of the value of $80,000, the rent thereof being $8000, and the decision involving a vexed question of law, an extra allowance of $500 counsel fees to the prevailing party was held proper, although the trial of the case occupied but little time. Vandeveer *v.* Vanderveer (Supreme Ct.), 1 N. Y. Supp. 897. So, also, where, in an action of contract, plaintiff asked judgment for $33,000 against defendant, but wholly failed to maintain his action, upon a recovery being had against plaintiff an additional allowance was held proper. Ract *v.* Duviard-Dime, 4 N. Y. Supp. 161, 51 Hun (N. Y.) 639. So, also, where two actions, tried together, to restrain the removal by lessees of certain personal property from the demised premises, involved the title to such property, the value of which was shown in one case to be $1000, and in the other $15,000; *held*, that allowances, in addition to costs, of $50 in the former case and $250 in the latter, were proper and reasonable in amount.

7. On Discontinuance.—An additional allowance may be made, after issue joined, upon the discontinuance of the action.[1]

Loeser *v.* Liebmann, 14 N. Y. Supp. 569, 60 Hun (N. Y.) 579.

Joinder of Several Causes of Action.—Where a complaint sets forth nineteen different causes of action, most of them acquired by the plaintiff by assignment from the persons in whose favor they were alleged to exist, and the trial of the action, as well as the preparation of the answer, required the examination of the facts of each of these causes of action, and the trial resulted in the dismissal of the complaint as to three causes of action, and in judgment in favor of the defendant upon seven causes of action (upon which the complaint demanded judgment for $11,422.20), and the dismissal of the complaint as to three other causes of action, and in favor of the plaintiff upon the other causes of action,—*held*, that the case was both difficult and extraordinary, and that allowances of $500 to the defendant and five per cent to the plaintiff upon the amount of his recovery were properly made. Durant *v.* Abendroth, 48 Hun (N. Y.) 16.

Immaterial Considerations.—On the other hand, an allowance cannot be made where the only difficulty in the case is caused by plaintiff claiming more than he is entitled to. Hinman *v.* Ryder, 44 N. Y. Super Ct. 330. Or by a counterclaim as to which plaintiff does not succeed. Lake Erie, etc., R. Co. *v.* Carhart, 39 Hun (N. Y.) 363. Or by charges in the complaint subsequently withdrawn. Hinman *v.* Ryder, 44 N. Y Super Ct. 330. Or by an anticipated appeal. People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y. Supreme Ct.) 148.

1. Stallman *v.* Kimberly (Supreme Ct.) 33 N. Y. St. Rep. 313. But see People *v.* Ulster, etc., R. Co., 128 N. Y. 240. Receiving costs upon the discontinuance of an action does not necessarily prejudice a motion for additional allowance. Moulton *v.* Beecher, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 245.

Before Trial.—It was held under section 309 of the former Code of Procedure that an extra allowance could be granted upon plaintiff's discontinuance before trial. Coffin *v.* Coke, 4 Hun (N. Y.) 616; Moulton *v.* Beecher, 11 Hun (N. Y.) 192; Robins *v.* Gould, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 133; Folsom *v.* Van Wagoner, 7 Lans. (N. Y.) 309, 14 Abb. Pr. N. S. (N. Y.) 44; McDonald *v.* Mallory, 46 N. Y. Super. Ct. 58.

Terms.—*Held*, also, that the court might require payment of such allowance, in a proper case, as a condition of allowing the discontinuance, even where there is an objection to the jurisdiction. Bright *v.* Milwaukee, etc., R. Co., 1 Abb. N. Cas. (N.Y. Supreme Ct.) 14. Or as a term of setting aside a judgment. Ellsworth *v.* Gooding, 8 How. Pr. (N. Y. Supreme Ct.) 1.

Where an application is made for leave to discontinue, the court may fix, in a proper case, the amount of an extra allowance which the plaintiff should pay the defendants as one of the conditions of leave to discontinue being granted. Society of New York Hospital *v.* Coe, 15 Hun (N. Y.) 440.

After plaintiff has obtained leave to discontinue upon payment of the adjustable costs, the defendant may apply for and obtain an order for an increased allowance, which, in order to avail himself of the leave to discontinue, the plaintiff must pay, together with the adjustable costs. Moulton *v.* Beecher, 11 Hun (N. Y.) 192; Society of New York Hospital v. Coe, 15 Hun (N. Y.) 440.

To Plaintiff's Attorney.—Where the parties have come together and have agreed to discontinue upon payment of costs to the plaintiff, the court may require, as a condition of discontinuance, an additional allowance to be paid to the plaintiff's attorney. Brown *v.* Safeguard Ins. Co., 7 Abb. Pr. (N. Y. Supreme Ct.) 345; Bartow *v.* Cleveland, 7 Abb. Pr. (N. Y. Supreme Ct.) 339; Bryon *v.* Durrie, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 135. See also Danenhover *v.* March, 4 Abb. Pr. (N. Y. Supreme Ct.) 254; Folsom *v.* Van Wagner, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 44.

Code of Procedure.—Under the former code it was held that where an attachment suit was settled before trial and before judgment, no additional allowance could be granted. Brace *v.* Beatty, 7 Abb. Pr. (N. Y. Supreme Ct.) 44. But this did not apply to equitable actions. The statute (now appearing as sec. 731 Code Civ. Pro.), while not in

8. Only One Allowance.—An allowance can be granted but once in the action;[1] it cannot be granted upon any interlocutory judgment, where leave to plead over is given.[2]

terms limited to common-law actions, has been so construed. New York F. & M. Ins. Co. *v.* Burrell, 9 How. Pr. (N. Y. Supreme Ct.) 398; Connecticut River Banking Co. *v.* Voorhies, 3 Abb. Pr. (N. Y. Supreme Ct.) 173; Pratt *v.* Ramsdell, 7 Abb. Pr. (N. Y. Supreme Ct.) 340, note. Sect. 385 of the former Code of Procedure was re-enacted as sec. 738 of the present Code of Civ. Pro. without alteration. This section was held to apply to foreclosure actions where an order for a personal deficiency was asked. Bathgate *v.* Haskin, 63 N. Y. 261.

After Discontinuance.—After the making of an order of discontinuance the cause is at an end, and a motion for an extra allowance cannot then be heard. Harlem Bridge, etc., R. Co. *v.* Westchester, 76 Hun (N. Y.) 286.

Tender.—In foreclosure plaintiff is entitled to an additional allowance, notwithstanding a tender of the principal, interest, and costs before hearing. Astor *v.* Palache, 49 How. Pr. (N. Y. C. Pl.) 231; Bartow *v.* Cleveland, 7 Abb. Pr. (N. Y. Supreme Ct.) 339; Connecticut River Banking Co. *v.* Voorhies, 3 Abb. Pr. (N. Y. Supreme Ct.) 173; New York F. & M. Ins. Co. *v.* Burrell, 9 How. Pr. (N. Y. Supreme Ct.) 398. See also Brace *v.* Beatty, 7 Abb. Pr. (N. Y. Supreme Ct.) 445. Notwithstanding tender of costs and notice of discontinuance, the complaint may be subsequently dismissed and an allowance granted to defendant. Moffatt *v.* Ford, 14 Barb. (N. Y.) 577.

Offer to Allow Judgment. — Where plaintiff accepts defendant's offer of judgment for a stated amount and costs, the court has no power to grant an extra allowance. Pool *v.* Osborn (Supreme Ct.), 8 N. Y. Civ. Pro. Rep. 232. Where defendant's offer of judgment was more favorable than plaintiff's actual recovery, an additional allowance may be granted defendant. Landon *v.* Van Etten (Supreme Ct.), 32 N.Y. St. Rep. 439; Hirschspring *v.* Boe, 20 Abb. N. Cas. (N. Y. City Ct.) 402, 13 Civ. Pro. (N. Y.) 125. But see Magnin *v.* Dinsmore, 47 How. Pr. (N. Y. Super. Ct.) 11. See also McLees *v.* Avery, 4 How. Pr. (N. Y. Supreme Ct.) 441; Penfield *v.* James, 56 N. Y. 659; Austin *v.* Hartwig, 49 N. Y. Super. Ct. 259. As to the effect of an offer to allow judgment in foreclosure cases cutting off plaintiff's right to an additional allowance, see Coates *v.* Goddard, 34 N. Y. Super. Ct. 118; Astor *v.* Palache, 49 How. Pr. (N. Y. C. Pl.) 231; Bartow *v.* Cleveland, 7 Abb. Pr. (N. Y. Supreme Ct.) 339; Penfield *v.* James, 56 N. Y. 659; Pratt *v.* Ramsdell, 7 Abb. Pr. (N. Y. Supreme Ct.) 340, note.

1. **Former Code.**—So held under Code of Procedure, sec. 309. Flynn *v.* Equitable L. Assur. Soc., 18 Hun (N. Y.) 212.

2. **Given for the Trial.** — The allowance is given for the trial of the action, not for the appeals. Wolfe *v.* Van Nostrand, 2 N. Y. 570. The case of Eldridge *v.* Strenz, 39 N. Y. Super. Ct. 295, which held that after the Court of Appeals, on appeal from an order granting a new trial, has rendered a judgment absolute, the court below should not grant an allowance, is opposed to the holding in Parrott *v.* Sawyer, 26 Hun (N. Y.) 466. See remarks on these cases in the opinion of Gildersleeve, J., in Monnet *v.* Merz, 30 Abb. N. Cas. (N. Y. Super. Ct.) 282.

Partition Suits.—Where, on a decree for partition and sale, an additional allowance is made, a further allowance cannot be made in the same action upon the making of the subsequent decree confirming the sale and directing the distribution of the proceeds. Brewer *v.* Brewer, 11 Hun (N. Y.) 147, *affirmed* 72 N. Y. 603.

Partnership Suits.—In partnership actions the allowance cannot be made in the interlocutory judgment awarding the reference and appointing a receiver. Spitz *v.* Tousey, 22 N. Y. Wkly. Dig. 446.

Judgment Set Aside.—The allowance being made upon a judgment, if this judgment is set aside all the incidents, of which the allowance is one, are also set aside and vacated. Union Trust Co. *v.* Whiton, 17 Hun (N. Y.) 593. The Code contemplates but one allowance, and that only upon final judgment. De Stuckle *v.* Tehuantepec R. Co., 30 Hun (N. Y.) 34; Monnet *v.*

V. How Allowance Computed.—1. Basis of Allowance.—The amount of the allowance, within the limits prescribed by the statute,[1] is entirely discretionary with the Special Term;[2] the amount of the claim, or recovery, is the limit, not the measure, of the allowance.[3]

The additional allowance may be computed upon the subject-matter of the action[4] or upon the amount re-

Merz, 30 Abb. N. Cas. (N. Y. Super. Ct.) 281; Bank of Mobile *v.* Phœnix Ins. Co., 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 212; Merchants' Exch. Nat. Bank *v.* Commercial Warehouse Co., 35 N. Y. Super. Ct. 214; McDonald *v.* Mallory, 46 N. Y. Super. Ct. 58.

Ejectment.—Upon the second trial of an ejectment granted under section 1525 of the Code the court may grant an extra allowance, although one was granted and paid upon the first trial, and although the two allowances together exceed five per cent of the value of the property in dispute. Wing *v.* De La Rionda (B'klyn City Ct.), 39 N. Y. St. Rep. 119; approved in Bolton *v.* Schriever (Ct. App.), 47 N. Y. St. Rep. 870; on appeal, 131 N. Y. 422. See also Stallman *v.* Kimberly (Supreme Ct.), 33 N. Y. St. Rep. 813; Hoag *v.* Greenwich (Supreme Ct.), 39 N. Y. St. Rep. 975.

1. **Limits of Allowance.**—The allowance to any single plaintiff, or to any number of plaintiffs, cannot exceed $2000; nor can the allowance to any single defendant or to any number of defendants exceed that sum. The limits are $2000 to each side, or $4000 in all. See Noyes *v.* Children's Aid Soc., 3 Abb. N. Cas. (N. Y. Ct. App.), 37, note; Allis *v.* Wheeler, 56 N. Y. 50. The statutory restriction has no application on a motion for favor. New York, etc., R. Co. *v.* Thorne, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 190.

Disbursements not Included.—In computing the extra allowance, the fees paid to the court stenographer are not to be considered; they are a disbursement merely, and not properly costs. Down *v.* McGourkey, 15 Hun (N. Y.) 444, 78 N. Y. 614. So, also, the allowance to a guardian in partition is not included in or limited by the sum of $2000 fixed by section 3254. Weed *v.* Paine, 31 Hun (N. Y.) 10.

Limit in Foreclosure.—In actions to foreclose a mortgage on real property, the allowances are limited to $60 by the statute and $200 by the court. Note to Pool *v.* Osborn, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 232; Weed *v.* Paine, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 305. In no case may the allowances exceed five per cent of the amount claimed. Lane *v.* Van Orden, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 228.

2. Union Bank *v.* Mott, 13 Abb. Pr. (N. Y. Supreme Ct.) 247.

3. People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y. Supreme Ct.) 148. The words "amount of recovery or claim" indicate and mean that the recovery or claim shall be for a sum of money; the word, "subject-matter involved" being used to cover all other cases. Coates *v.* Goddard, 34 N. Y. Super. Ct. 118.

4. **Subject-matter in Actions relating to Land.**—In an action for partition, the value of the whole property, and not the value alone of plaintiff's share, is the subject-matter involved. Doremus *v.* Crosby, 66 Hun (N. Y.) 125. So in trespass to real property, where the question of title is the paramount issue, the allowance may be computed upon the value of the property instead of the amount of damages. The cases recognize a broad distinction between an action of trespass to recover damages based on actual possession and an action which involves the right to the possession of the land: in the latter case the question of title is involved; but not in the former, as title is presumed. Warren *v.* Buckley, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 323. Similarly, in an action to abate a nuisance, the subject-matter involved being the nuisance and the damages caused thereby, the allowance is computed upon the amount of the damages, not upon the value of the property. Rothery *v.* New York Rubber Co., 24 Hun (N. Y.) 172, 90 N. Y. 30. So, also, where, in an action by an abutting owner, the referee found $800 fee damage, *held*, that this amount represented the subject-matter involved. Dode *v.* Manhattan R. Co.,

70 Hun (N. Y.) 376. So in an action to enforce a covenant in the nature of a building restriction, the easement is the subject-matter involved. Lattimer *v.* Livermore, 72 N. Y. 174; Atlantic Dock Co. *v.* Libby, 45 N. Y. 504.

So, in an action by a purchaser to recover back his deposit and expenses of search of title, *held*, that these were the subject-matter involved, and not the land. Moore *v.* Appleby, 36 Hun (N. Y.) 371, 108 N. Y. 237. And in an action by a judgment creditor to set aside a fraudulent conveyance, the additional allowance was computed upon the amount of plaintiff's judgment, and not upon the value of the land. Potter *v.* Farrington, 24 Hun (N. Y.) 551; Hoos *v.* Person, 15 N. Y. Wkly. Dig. 530; Remington Paper Co. *v.* O'Dougherty, 18 N. Y. Wkly. Dig. 190; Baldwin *v.* Reardon, 48 N. Y. Super. Ct. 166. The subject-matter of the action is the primary right sought to be enforced; Christopher St., etc., R. Co. *v.* Twenty-third St. R. Co. (Supreme Ct.), 48 N. Y. St. Rep. 805.

In an action by a taxpayer to restrain a town from carrying out a contract to build a bridge, *held*, that the contract price is the proper basis for an allowance. Barker *v.* Oswegatchie, 62 Hun (N. Y.) 208.

In an action for royalties on production of a dramatic composition, where the complaint alleged a contract to pay fifteen dollars for each performance, and alleged there had been 300 performances, *held*, that this furnished a sufficient basis for calculating an allowance. Carpenter *v.* Shook (Supreme Ct.), 43 N. Y. St. Rep. 226.

Proof of Value.—In an action of ejectment, where there was no proof of the value of the lands in question, it was held that an allowance to the defendant might be computed upon the amount of damages claimed by the plaintiff. Rank *v.* Grote, 50 N. Y. Super. Ct. 275. And where it was sought to restrain the enforcement of a judgment in summary proceedings to regain possession, it was held that the value of the leasehold, and not of the freehold, was the proper basis. Sheehy *v.* Kelly, 33 Hun (N. Y.) 543.

Attachment.—Where an attachment has been vacated upon giving bond, the amount of the additional allowance is properly computed on the amount of the bond which takes the place of the attached property. Hanover Bank *v.* Linneworth, 7 Hun (N. Y.) 234. But if the sheriff has made no return of appraisal of value, it is for the plaintiff to establish by affidavit or otherwise the value of the property attached. Fetchman *v.* Davenport, 8 Civ. Pro. Rep. (N. Y. City Ct.) 220.

Bank Stock.—Where the precise value of bank stock is not shown, the presumption may in some cases be made, for the purpose of computing the allowance, that it is worth par. Smith *v.* Baker, 42 Hun (N. Y.) 504. But the value of bank stock must as a rule be proved. Weeks *v.* Silver Islet Consolidated Min., etc., Co., 32 N. Y. St. Rep. 417.

Trade-mark.—Where, by affidavit, a trade-mark is proved to be worth $50,000 at least, and the profits upon it to be worth $3000 a year, an allowance of $250 was held properly made. Waterman *v.* Shipman (Supreme Ct.), 47 N. Y. St. Rep. 418. But where undefined and unascertained interests, dependent wholly upon the result of previous inquiry, are in question and the main relief is denied, there is nothing upon which an allowance may be based. So *held* in an action to restrain infringement of a trade-mark and for incidental damages from alleged profits, where it was held plaintiff failed in establishing a right to the trade-mark, no sum being therefore recovered or claimed, and the "subject-matter involved," i.e., the trade-mark, having no value, and being, indeed, non-existent. Jaeger *v.* Le Boutillier, 63 Hun (N. Y.) 297. In an action for damages for the infringement of a trade-mark and for an injunction to restrain the use of it, it was held that the allowance should be computed upon the value of the trade-mark, and not merely upon the amount of damages recovered. Munro *v.* Smith, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 275. In this case the uncontradicted testimony of the plaintiff was that the value of the trade-mark was $50,000, and that he had expended that sum in advertising it; and the allowance was computed upon this sum. The case is distinguished from the somewhat similar case of Coates *v.* Goddard, 34 N. Y. Super. Ct. 118, upon the ground that there the trade-mark and its infringement constituted the subject-matter involved, the plain-

covered[1] or claimed;[2] and the amount of a counterclaim may

tiff had not recovered a money judgment, but merely one decreeing an injunction perpetual, and no money value was shown to attach to the trade-mark apart from the article to which it was a trade-mark. The case is not authority for the general proposition that additional allowances may be granted in suits for injunctions to prevent infringements of trade-marks, or in cases where merely equitable rights susceptible of a money value are involved. In Munro *v.* Smith (Supreme Ct.), 25 N. Y. St. Rep. 624, the actual value of the trade-mark was proved by uncontradicted evidence. Christopher St., etc., R. Co. *v.* Twenty-third St. R. Co. (Supreme Ct.), 48 N.Y. St. Rep. 805. See also Collins *v.* Reynolds' Card Mfg. Co., 2 N. Y. Month. L. Bull. 45.

Proper Basis.—The value of the property to be directly affected by the result of the action forms the proper basis for computing the percentage. People *v.* Albany, etc., R. Co., 16 Abb. Pr. (N. Y. Supreme Ct.) 465; Coleman *v.* Chauncey, 7 Robt. (N. Y.) 579. Property or rights having an ascertainable value in money must be directly involved. People *v.* Adams, 128 N. Y. 129; Munro *v.* Smith (Supreme Ct.), 25 N. Y. St. Rep. 624.

1. **Amount Recovered.**—Where the recovery is of a specified sum and interest, the allowance is computed upon the total sum of principal and interest. Clegg *v.* Aikens, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 88; Struthers *v.* Pearce, 51 N. Y. 357. Whether, in the computation, interest should first be added to the verdict is not clear. Sinne *v.* New York, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 252; Bord *v.* New York etc., R. Co., 14 Abb. N. Cas. (N. Y. Supreme Ct.) 496, 6 Civ. Pro. Rep. (N. Y.) 222. In the former case, an action for causing death, it was held that the additional allowance should be computed upon the amount awarded by the jury, but not on that sum *plus* the interest which sec. 1904 Code Civ. Pro. directs the clerk to add. Where the action is for a personal injury, the court may make an extra allowance upon the verdict. Gale *v.* New York Cent. etc., R. Co., 53 How. Pr. (N. Y. Supreme Ct.) 385. If no amount be claimed in either complaint or answer, the allowance should be based upon the amount recovered in the judgment. Tolan *v.* Carr, 12 Daly (N. Y.) 520. Where complaint demanded such sum as may be due plaintiff on an accounting, and no sum is mentioned, *held*, that no data existed for computing an allowance. Coleman *v.* Chauncey, 7 Robt. (N. Y.) 578; People *v.* Albany, etc., R. Co., 16 Abb. Pr. (N. Y. Supreme Ct.) 465. The extra allowance may be computed upon the amount recovered as fee damage in an action against an elevated railroad. Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 370; Hamilton *v.* Manhattan R. Co., 24 Abb. N. Cas. (N. Y. Super. Ct.) 156, 29 N. Y. St. Rep. 28.

2. **Amount Claimed.** — Plaintiff's allowance cannot be based upon the amount of damages claimed. Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 339; Lahey *v.* Kortright, (Super. Ct.) 32 N. Y. St. Rep. 112; DeLancey *v.* Piepgras, 76 Hun (N. Y.) 70. It is only where the defendant recovers judgment that the allowance can be computed upon the amount claimed. Wilkinson *v.* Tiffany, 4 Abb. Pr. (N. Y. Supreme Ct.) 98; Coates *v.* Goddard, 34 N. Y. Super. Ct. 118. Where plaintiff, with his summons, serves a notice of claim naming a specific sum, this is plaintiff's statement of the amount involved, and he cannot be heard to say, upon defendant's motion for an allowance, that the notice is a nullity. Adams *v.* Arkenburgh, 106 N. Y. 615. So where, in ejectment, plaintiff at the trial limited his claim to part only of the premises set out in the complaint, *held*, that defendant's allowance was properly computed upon the value of the entire premises. Burton *v.* Tremper, 27 N. Y. Wkly. Dig. 246. So also where the only evidence of value of the subject-matter was contained in the undertaking issued by the plaintiff, this was held to form the basis of allowance. National Steamship Co. *v.* Sheahan (Ct. App.), 11 N. Y. St. Rep. 891. And where the complaint contained no statement of an amount, but plaintiff's counsel in his opening virtually claimed an amount, the latter was taken as a statement of the subject-matter involved. Rutty *v.* Person, 6 Civ. Pro. Rep. (N. Y. Super. Ct.) 25.

Defendant's Allowance.—And where

also be taken into account.[1]

2. Subject-matter Involved.—The word "involved" in this connection means "affected."[2]

In an action of ejectment the real property is the subject-matter involved;[3] in personal actions, the amount of the personal property.[4]

defendant recovers a balance under a counterclaim, the amount of his extra allowance may be calculated on the plaintiff's claim, not upon the sum recovered only. Vilmar *v.* Schall, 61 N. Y. 564. In an action to enforce certain judgments against real property upon which defendant held a mortgage, *held*, defendant's additional allowance was properly computed upon the amount of plaintiff's claim, although the land was ordered sold. Remington Paper Co. *v.* O'Dougherty, 18 N. Y. Wkly. Dig. 190. See also Potter *v.* Farrington, 24 Hun (N. Y.) 551; Noyes *v.* Children's Aid Soc., 3 Abb. N. Cas. (N. Y. Ct. App.) 36; Sentenis *v.* Ladew, 140 N. Y. 463.

1. **Amount of Counterclaim.**—In an action to recover a sum certain, where the defence was a set-off, the plaintiff was held entitled to an allowance not merely upon the amount of his recovery, but also upon the set-off. Barclay *v.* Culver, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 365; Lissberger *v.* Schoenberg Metal Co., 2 N. Y. City Ct. Rep. 158; Woonsocket Rubber Co. *v.* Rubber Clothing Co., 1 Civ. Pro. Rep. (N. Y.) 350. But no allowance will be made plaintiff upon a counterclaim where the complaint is dismissed. Hammann *v.* Jordan (Super. Ct.), 36 N. Y. St. Rep. 434. Nor where by establishing a counterclaim defendant reduces plaintiff's recovery. New York *v.* Carhart, 39 Hun (N. Y.) 363. Nor where the counterclaim was necessarily defeated by the success of the plaintiff. Barnes *v.* Denslow (Supreme Ct.), 30 N. Y. St. Rep. 315. The court may base the allowance upon the amount both of the recovery and of the counterclaim disallowed. Woonsocket Rubber Co. *v.* Rubber Clothing Co., 62 How. Pr. (N. Y. Supreme Ct.) 180. But see Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 31, where it was held that this could not be done if the counterclaim was defeated upon the same evidence as was necessary to sustain a recovery. The fact that at the trial defendant offers to admit liability should not deprive plaintiff of his additional allowance if otherwise proper. Austin *v.* Hartwig, 49 N. Y. Super. Ct. 256.

2. Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y. Super. Ct.) 305, 1 Civ. Pro. Rep. (N. Y.) 294. The words "subject-matter involved" are not used in the same or a kindred sense with "recovery" or "claim;" they refer to those cases in which the subject-matter involved in the action has a material existence. Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 31.

3. Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 31. Where plaintiff sought the destruction and removal of dock property, in part as a public nuisance and in part as a purpresture, *held*, that the value of the property was the subject-matter involved. People *v.* New York, etc., Ferry Co., 7 Hun (N. Y.) 113. So, where plaintiff sought to have certain deeds of land declared mortgaged, a successful defendant was granted an allowance based upon the whole value of the property covered. Burke *v.* Candee, 63 Barb. (N. Y.) 552; Coleman *v.* Chauncey, 7 Robt. (N. Y.) 578. The primary relief sought, and not relief incidentally claimed, determines the subject-matter of the action. Gray *v.* Robjohn, 1 Bosw. (N. Y.) 618; Smith *v.* St. Philip's Church, 107 N. Y. 610. In partition, the value of the whole property in question is the subject-matter involved. Doremus *v.* Crosby, 66 Hun (N. Y.) 125.

4. Hagenbuckle *v.* Schultz, 69 Hun (N. Y.) 183; Remington Paper Co. *v.* O'Dougherty, 18 N. Y. Wkly. Dig. 190; Ogdensburg *v.* Vermont, 63 N. Y. 176; Sickles *v.* Richardson, 14 Hun (N. Y.) 110; Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y. Super. Ct.) 305; Mingay *v.* Holly Mfg. Co., 99 N. Y. 270.

Counsel's Stipulation.—Counsel may, by stipulation, fix the amount involved in the controversy. Board of Comrs. of Pilots *v.* Spofford, 47 How. Pr. (N. Y. Supreme Ct.) 479.

ADDRESS.

I. IN CHANCERY PRACTICE, 234.
II. UNDER CODE PRACTICE, 236.

I. **IN CHANCERY PRACTICE.**—In chancery practice the address is that technical part of a bill which contains the appropriate description of the court.[1]

Form of Address of Bill.—In England the bill, under the old chancery practice, was addressed to the person or persons who had the actual custody of the great seal at the time the bill was filed.[2]

As the address of the bill determined who was to hear the case, it was a subject of more importance in the early days of chancery practice than now, when the jurisdiction of chancery courts is defined by statute.[3]

1. Story on Eq. Pl. § 26.

That part of a bill which contains the names and description of the persons exhibiting the bill, commonly called in the bill by the title of "your orators and oratrixes," is what is technically known as the "introduction." Story on Eq. Pl. § 26.

This article treats only the subject of "Address" proper, and so much of the subject of "Introduction" as deals with the place of abode of the parties.

2. Daniell on Ch. Pl. & Pr., vol. 1, p. 358. But if the seals were in the queen's own hand the bill was addressed to her. The following is the form given by Daniell: "To the Queen's Most Excellent Majesty in her High Court of Chancery."

Petition.—A petition in chancery was addressed to the Lord Chancellor or to the Master of the Rolls. Daniell on Ch. Pl. & Pr., vol. 2, 1604.

Form used in U. S. Courts.—"Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the U. S. for the district of ——: A. B., of —— and a citizen of the state of ——, brings this his bill against C. D., of —— and a citizen of the state of ——, and thereupon your orator complains and says that." 20 Eq. Rules Sup. Ct. U. S.

New York.—The form under the old chancery practice in New York was: "To the Honorable James Kent, Chancellor of the State of New York." Blake's Chan. Pr. 27.

Tennessee.—The following form is used in Tennessee: "To the Honorable John P. Smith, Chancellor of the First Chancery Division, holding the Chancery Court at Dandridge." Gibson's Suits in Chancery, § 186.

The Bill is addressed to the Officer, not to the man; therefore his name may be omitted entirely and only his official designation as "chancellor" given. Gibson's Suits in Chancery, § 186.

3. **Chancellor a Party.**—When the lord chancellor was a party the bill was addressed to the queen herself. Daniell on Ch. Pl. & Pr., vol 1, 358.

But the queen did not hear the case herself, but always referred it to some judges. The master of the rolls and one of the chief justices sat to decide a case wherein the lord chancellor was a party. Lord Keeper *v.* Wyld, 1 Vern 139.

It seems from a note in Daniell on

Address of Complainants.—The residence or abode of the complainant should be stated in a chancery bill.[1]

Where a bill is filed on behalf of an infant or person of unsound mind the place of abode need not be stated, but the abode of the next friend should be set out.[2]

Remedy for Failure.—There is some doubt as to what is the remedy for a failure to state the address of the complainant in a bill. Some authorities allow a demurrer, while others establish the practice to be a motion for security for costs.[3]

Ch. Pl. & Pr., vol. 1, 358, that there is a record in the English Tower Records of a case where the master of the rolls addressed a bill to the Bishop of Bath and Wells.

1. "It appears to be laid down in all the books upon chancery pleading that the residence or abode of the complainant should be stated in the bill, though by the practice in this state a particular description of his calling or business does not appear to be necessary. The object of setting forth the residence of the complainant is stated to be that the court and the defendant in the suit may know where to resort to compel obedience to any order or process of the court, and particularly for the payment of any costs which may be awarded against such complainant, or to punish him for any improper conduct in the course of the suit." Per the Chancellor in Howe *v.* Harvey, 8 Paige (N. Y.), 74; Griffith *v.* Ricketts, 5 Hare 195; Sibbering *v.* Earl of Balcarras, 1 De G. & S. 683; Albretcht *v.* Sussmann, 2 Ves. & B. 323; Mayer *v.* Tyson, 1 Bland (Md.) 559; 1 Fow. Ex. Prac. 26.

2. Daniell on Ch. Pl. & Pr., vol. 1, 360.

Nor is it necessary to set out the address of a married woman, but the address of the next friend should be stated. The address of a peer or of a corporation need not be stated in the bill. Daniell on Ch. Pl. & Pr., vol. 1, 360.

3. "It seems that a demurrer will lie to a bill which does not state the place of abode of the plaintiff; and that if the bill describes the plaintiff as residing at a wrong place, the fact may be taken advantage of by plea; though a defendant cannot put in such a plea, after a demurrer upon the same ground has been overruled, without leave of court. The modern practice, however, in such cases is not to demur or plead to the bill, but to apply by special motion or summons, on notice to the plaintiff, that he may give security for costs and that in the meantime proceedings in the suit may be stayed. Thus in Simpson *v.* Burton (1 Beav. 556) Lord Langdale, M.R., said: 'There can be no doubt that it is the duty of a plaintiff to state his place of residence truly and accurately at the time he files his bill; and if for the purpose of avoiding access to him he wilfully misrepresents his residence, he will be ordered to give security for costs. I do not think the rule extends to a case where he has done so innocently and from mere error.' It is to be observed that in this case all the plaintiffs were incorrectly described in the bill; but there does not appear to be any decision upon the point where there have been several plaintiffs, one or more of whom are correctly described and the rest not so. It is presumed, however, from analogy to the practice where there are several plaintiffs, one only of whom is resident abroad, that the court would not, in such case, require those plaintiffs who are not properly described to give security." Daniell on Ch. Pl. & Pr., vol. 1, 358.

In Howe *v.* Harvey, 8 Paige (N. Y.) 73, it is doubted whether a demurrer lies for a failure to state the complainant's residence.

In Winnipisiogee Lake Co. *v.* Worster, 29 N. H. 433, it was held that it was optional to use either demurrer or plea in the nature of plea in abatement. In that case the description of the abode of complainant was "Meredith, in the county of Belknap." It was held defective.

In Sheridan *v.* Cameron, 65 Mich. 680, it was held that the rule which requires the prayer for process to identify the parties would not make a bill fatally defective for the want of it if they were otherwise identified.

II. **Under Code Practice.**—**New York Code.**—The Code of New York requires that the summons and the notice of appearance shall contain the addresses of the attorneys.[1]

If the summons omits the address it has been held to be fatally defective, as the Code is mandatory with reference to what the summons shall contain.[2]

Notice of Motion.—The written address of a notice of motion to the party or attorney on whom it should be served is a material part of the notice.[3]

Compelling Attorney to Disclose Address.—The court may, in a proper case, make an order requiring the attorney for the plaintiff to furnish the defendant with the plaintiff's residence and address.[4]

1. N. Y. Code Civ. Proc. §§ 421, 417.

2. Osborn *v.* McCloskey, 55 How. Pr. (N. Y. Supreme Ct.) 345. But see Wiggins *v.* Richmond, 58 How. Pr. (N. Y. Supreme Ct.) 376, where it was held that the omission to state the address was not a jurisdictional defect.

An amended demurrer was attempted to be served by defendant's attorney from Yonkers, N. Y., while the attorney's address was "Stewart Building," New York City. *Held*, that it was irregularly and improperly served. Gray *v.* Smith, 10 N. Y. St. Rep. 866.

Address Printed.—A summons upon which the name and address of the plaintiff's attorney is printed, instead of his written signature, is "subscribed" by him within the meaning of § 417 of the Code of Civil Procedure. New York *v.* Eisler, 10 Daly 396; Barnard *v.* Heydrick, 49 Barb. 62; Mutual Life Co. *v.* Ross, 10 Abb. Pr. (N. Y. Supreme Ct.) 260 note. *Contra.* Farmers' L. & T. Co. *v.* Dickson, 17 How. Pr. (N. Y. Supreme Ct.) 477.

Foreclosure of a Mortgage.—In an action to foreclose a mortgage where the summons was accompanied by a notice of no personal claim, which was served upon the defendant H., whose name appeared in the notice, but not in the summons; the summons also failed to specify the office, post-office address, or street number of the plaintiff's attorney, and no reference thereto was made in the notice. *Held*, that the words of § 417 of the Code of Civil Procedure were not mandatory, and that the omission was not a jurisdictional defect, but could be cured by amendment. Wiggins *v.* Richmond, 58 How. Pr. (N. Y. Supreme Ct.) 376.

3. "The written address or direction of a notice of motion to the party or attorney on whom it should be served is a material part of the notice; for service on one to whom the notice is not addressed may prove ineffectual, especially if it be addressed to others. An error in the address does not vitiate if the notice duly reaches the one intended and the error does not mislead." Abbott's New Prac. & Forms, vol. 1, 158.

4. "The order requiring the disclosure of the residence and address of the plaintiff was made in the reasonable exercise of the discretion and power of the court. The moving affidavit of the defendant disclosed facts tending to show that the action was being prosecuted without the knowledge or desire of the plaintiff, and in that view alone it was proper enough to afford an opportunity for his examination. Besides this, it was the right of the defendant to examine the plaintiff before trial, and to that end to be informed of his whereabouts." Per Dykman, J., in Corbett *v.* Gibson, 18 Hun (N. Y.) 49.

In Corbett *v.* De Comeau, 45 N. Y. Superior Ct. 637, an order was made for the disclosure of plaintiff's address, where the affidavit stated that the defendant wanted to examine plaintiff, and show whether he was a willing party to the action; that he was insane; that the allegations of libel in the complaint were true; to secure his attendance on the trial; and to obtain security for costs.

In the 99 plaintiffs *v.* Vanderbilt, 1 Abb. Pr. (N. Y.) 193, where 99 plaintiffs sued the defendant, an order was made compelling the attorney to disclose the address of the plaintiffs. The court said: "The defendant can

An attorney cannot be compelled to disclose his client's address after the litigation has finally terminated; for the only penalty for refusing the information is to stay the client's proceeding or strike out his plea.[1]

not always be aware who are his opponents. It may happen, and in this case it does, that he may be attacked by a number about whom he knows nothing." Consult also the following common-law cases: Johnson *v.* Birley, 5 B. & A. 540; Worten *v.* Smith, 6 J. B. Moore 1101; McKiernan *v.* Patrick, 4 How. (Miss.) 333; West *v.* Houston, 3 Harr. (Del.) 15.

"The power of the court to require a party to disclose his residence is the subject of some difference of opinion. It is clear that the court may require either party to disclose his address as a condition of being allowed to proceed actively in the cause, and this will usually be effectual with a plaintiff, or a defendant seeking affirmative relief. In an unreported case, Lawrence, J., denied a motion to compel the attorney to give his client's address because the attorney made affidavit that he was unable to do so, his client being absent; but nevertheless stayed all proceedings on the client's part until he should return to the city and submit to examination under the order which it was sought to serve on him." Abbott's New Prac. & Forms, vol. 2, 500, citing Olmstead *v.* Wehle, 18 N. Y. Wkly. Dig. 486.

Attorney Charged with Costs. — It is the duty of an attorney, as an officer of the court, to furnish all information required by the court in order to carry out its process. Where an attorney, in answer to an order directing him to state the whereabouts of the plaintiff, so that an injunction could be served upon him, made a statement of the residence of the plaintiff which was misleading, *held*, that the attorney was properly charged with all the expenses of the reference to ascertain the plaintiff's whereabouts, on the ground of misconduct. Bauer *v.* Betz, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 344. In this case the court said: "It cannot be questioned that the service of the injunction upon the plaintiff was very important to the protection of the defendant's interests, and it was just as much his duty to aid in the administration of justice in that respect as it was to protect his client's interests. As an officer of the court he was bound to deal with it in all respects without reserve, and to obey its orders implicitly unless appealed from and reversed on appeal. If he had stated in his affidavit that his client had resided and he believed continued to reside at the place named in this city, but had been sojourning in Jersey City under an assumed name, and that he had parted from him on the twenty-fifth of January, and then stated what he believed as to his intentions, his conduct would have appeared upon the record in reference to the subject unimpeachable. He suppressed, however, these important facts, and it would seem with the intention of screening his client. In his zeal he may have supposed that this was his duty professionally, but it was a great mistake if he entertained any such view, and the result is, the imposition of costs upon himself and his client in the proceeding which a candid and honorable revelation would not only have avoided but which would have rebounded to his credit as an officer of the court."

Ground of Authority.—The power of the court to compel an attorney to disclose his client's address rests on the same ground as that to disclose his authority. Friedberg *v.* Bates, 3 N. Y. Month. Law Bull. 6.

As to the right to compel an attorney to disclose his authority, see New York *v.* Purdy, 36 Barb. (N. Y.) 266.

1. Walton *v.* Fairchild (City Ct.), 24 N. Y. St. Rep. 314.

ADJOURNMENTS.

By Wm. P. Aiken.

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I. **Definition.**—An adjournment is the suspension of the sessions of a judicial tribunal or other official body until a time certain, or indefinitely where the adjournment is without day.[1]

1. An adjournment is a putting off until another time and place. Whart. Law Lexicon; People *v.* Martin, 5 N. Y. 26; Wilson *v.* Lott, 5 Fla. 303. A continuation of a previous term of court. Van Dyke *v.* State, 22 Ala. 60. A continuance of a session from one day to another. Tramnell *v.* Bradley, 37 Ark. 379.

Adjournment and Continuance Distinguished.—Adjournment, as comprehended in this article, must be distinguished from continuance, which may be defined as the adjournment of a *case* as distinguished from the *tribunal* itself, and is the suspension of a proceeding before the tribunal until a subsequent time. The treatment of this subject will be found in the article Continuances.

Additional Term, Special Term, and Adjourned Term.—In Harris *v.* Gest, 4 Ohio St. 473, Herman, C. J., distinguishes an adjourned term from the "additional term" provided for by section 5 of the Ohio Act of January 31, 1854 (52 Ohio L. 10). In the case of the former the sitting after the adjournment is a prolongation of the regular term, and in contemplation of law there is but one term; but the latter is a distinct term and not a prolongation of the regular term. So special terms provided for by many of the statutes must be distinguished from an adjourned term as it is apparent that the same difference exists between them and the adjourned term as between the additional term of the Ohio statute and the adjourned term.

"**Adjourn.**"—In La Farge *v.* Van Wagenen, 14 How. Pr. (N. Y. Supreme Ct.) 58, Birdseye, J., said: "It is true that the primary signification of the term 'adjourn' is to put off or to defer to another day specified; but it has acquired also the meaning of suspending business for a time—deferring, delaying. Probably, without some limitation, it would, when used with reference to a sale like the present, or any judicial proceeding, properly include the fixing of the time to which the postponement was made."

Adjourn Held Equivalent to Postpone.—In a *New Jersey* statute prescribing the length of time for which a justice may grant adjournments, the term "adjourn" was held equivalent to "postpone," the court by Kirkpatrick, C. J., saying: "If there could be any doubt upon the import of the term 'ad-

II. **Courts of Record.**—1. **Power to Adjourn.**—**Inherent Power.**—As power to adjourn is essential to the completion of business, it is an inherent attribute of judicial tribunals.[1]

Statutes dealing with the subject of adjournments will be construed as confirmatory of the common law where possible; that is, as neither abridging nor extending the inherent power of the courts.[2]

2. **Length of Adjournment.**—It has been intimated that common-law adjournments were only from day to day;[3] but as the common

journ,' it is explained in the subsequent clause of the section where the word postpone is used to signify precisely the same thing. The definition of this word according to Johnson is to put off, to delay. It (the statute) will read according to this definition: The justice may put off, may delay the trial for any time not exceeding fifteen days.'

1. Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106; People *v.* Sullivan, 115 N. Y. 185; Harris *v.* Gest, 4 Ohio St. 469; Cook *v.* Skelton, 20 Ill. 110; 71 Am. Dec. 250; Hawley *v.* Parrott, 10 Conn. 488; Seymour *v.* State, 15 Ind. 288; Read *v.* State, 26 Ga. 275; Revel *v.* State, 26 Ga. 275; People *v.* Northrup, 50 Barb. (N. Y.) 147; Stirling *v.* Wagner (Wyoming, 1892), 31 Pac. Rep. 1032; Robinson *v.* State, 22 Tex. App. 135; *In re* Hunter's Estate, 84 Iowa 388; Murray *v.* State, (Ga., 1893), 17 S. E. Rep. 99.

In Stirling *v.* Wagner (Wyoming, 1892), 31 Pac. Rep. 1040, it is said: "The statute being silent, the inherent power of the court to adjourn to a distant day, without interference with its duties elsewhere, is unfettered, as nothing seems clearer than that, independent of statutory warrant or interference, courts of general jurisdiction have authority to hold adjourned terms."

In re Hunter's Estate, 84 Iowa 388, it is said: "Adjournments of the business of a term of court from day to day and from time to time, as the necessities of the situation seem to demand, is essential to the conduct of business and has the sanction of universal usage. Such a right is not questioned."

No Reason need be Assigned for the Adjournment—The Indiana Statute.—It was provided by the *Indiana* statute of 1855 (Rev. St. *Indiana* 1881, § 1332) "that if any judge of a circuit court shall adjourn the court before having gone through with the business pending, and before the expiration of the time fixed by law, the record must show the reason for the adjournment."

In Casily *v.* State, 32 Ind. 63, it was held that this provision had reference only to final adjournments until the next regular term before the lapse of the time allowed for that term of the court, and that the circuit court had full power to adjourn, before the lapse of time allowed by law for its term, to a day beyond such time, and before the next regular term, and that it was not required to put the reason for such adjournment upon record. *Disapproving* of the decisions in Morgan *v.* State, 12 Ind. 448; Slaughter *v.* Gregory, 16 Ind. 250. Frazier, C. J., in delivering the opinion of the court, said: "When it adjourns finally until the next regular term before the lapse of time allowed for its term, . . . in that case and only in that case it must, if the business be unfinished, put the reason for such adjournment on record. . . . The statute if held directory only will accomplish every good purpose which the legislature had in view, and a vast amount of mischief will be prevented." Casily *v.* State, 32 Ind. 62, was approved in Cass *v.* Krimbill, 39 Ind. 358; and in Harper *v.* State, 42 Ind. 410, where it is said: "The case of Casily *v.* State, 32 Ind. 62, related to an order of adjournment to a day in vacation, and not to an adjournment to the next regular term, and the ruling in that case was, in effect, the overruling of the cases of Shiel *v.* Maffett 17 Ind. 316; Slaughter *v.* Gregory, 16 Ind. 250; and any other cases which hold that in the order of the court adjourning to a day in vacation, the reason for the adjournment must be stated, and we regard them as overruled."

2. People *v.* Sullivan, 115 N. Y. 185; Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106; Smith *v.* Smith, 17 Ind. 75; Seymour *v.* State, 15 Ind. 288.

3. Griffin *v.* Spalding, 6 Vt. 60; Hawley *v.* Parrott, 10 Conn. 486.

law considered the whole term but one day,[1] the existence of any power to adjourn is held to imply discretion as to the extent of the adjournment within the limits expressly set by statute to the court's term.[2] But courts do not look with favor upon long adjournments.[3]

3. Who May Order the Adjournment.—Authority to order an adjournment is a judicial power, and cannot be delegated to a ministerial officer.[4] As courts derive their power to convene from con-

1. Barrett *v.* State, 1 Wis. 180; People *v.* Sullivan, 115 N. Y. 185; Hawley *v.* Parrott, 10 Conn. 486; Cutter *v.* Wadsworth, 7 Conn. 6. The proposition is undisputed. See TERM.

But the true time when a judgment has been rendered or other act done may always be shown where it is material. Barrett *v.* State, 1 Wis. 175; Prescott *v.* Wright, 6 Mass. 20; Com. *v.* Gee, 6 Cush. (Mass.) 174; Hawley *v.* Parrott, 10 Conn. 486; Cutter *v.* Wadsworth, 7 Conn. 6.

"Term" and "Session."—There is a conflict in the cases as to whether the word "term" may mean "session." Pitman *v.* U. S., 45 Fed. Rep. 82, construes a statute providing that an absent judge may adjourn the commencement of any "regular, special, or adjourned term" by written order to include the daily sessions of either three terms. This construction is also adopted in Stefani *v.* State, 124 Ind. 3, where the word "session" is held an equivalent of "term." Lipari *v.* State, 19 Tex. App. 433, holds the contrary, the court saying: "A session signifies the time during the term in which the court sits for the transaction of business, and the session commences when the court convenes for the term and continues until final adjournment either before or at the expiration of the term. The term of court is the time prescribed by law during which it may be in session. The session of the court is its sitting." See TERM.

2. Barrett *v.* State, 1 Wis. 180; Cook *v.* Shelton, 20 Ill., 111; 71 Am. Dec. 250; Stirling *v.* Wagner (Wyoming, 1892), 31 Pac. Rep. 1041; *In re* Hunter's Estate, 84 Iowa 388; Robinson *v.* State, 22 Tex. App. 135; Revel *v.* State, 26 Ga. 276; Seymour *v.* State, 15 Ind. 288; Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106, where the court says: "There being nothing in any act of Congress which prevented the courts of the districts from exercising a power common to all courts, that of adjourning to a distant day, the adjournment on the 16th of May to the fourth Monday of June would be a continuance of the same term unless a special act of Congress, expressly enabling the court of the districts to hold adjourned sessions, may be supposed to vary the law of the case. This act, affirming a pre-existing power, ought not to be construed to vary the continuance of that power unless words are implied which manifest such intention."

Adjournment from Day to Day—Sunday.—As Sunday is not a judicial day, an adjournment from Saturday to Monday does not violate a statute requiring adjournments to be made from "day to day." State *v.* Howard, 82 N. Car. 623. See also State *v.* King, 23 Neb. 540; Thayer *v.* Felt, 4 Pick. (Mass.) 354; State *v.* Howard, 82 N. Car. 623; and see DIES NON.

Louisiana—Statute Limiting the Time of Adjournment.—In Willis *v.* Elam, 28 La. Ann. 857, it was held that the *Louisiana* statute limiting the time of adjournments to one week only applies to one adjournment and does not prohibit the judge from adjourning his court more than once at the same term, although the aggregate of the adjournments may be more than one week.

3. Cook *v.* Shelton, 20 Ill. 110; 71 Am. Dec. 250; Harris *v.* Gest, 4 Ohio St. 469. In the last case the appellate court preferred to consider the term in question an "additional term" rather than an "adjourned term." If it had been held an adjourned term, it would have made the adjournment a very long one. See, however, Fannon *v.* Plummer, 30 Mo. App. 25.

4. Wight *v.* Wallbaum, 39 Ill. 555; People *v.* Clews, 4 Abb. N. Cas. (N. Y. Ct. Sess.) 256. It is held also, in the latter case, that, as power to adjourn a court implies a court to adjourn, no absent judge can, without express statutory authority, adjourn a court while absent.

stitution or statute, a court which does not meet at the time and place prescribed thereby has no power to convene at all.[1] If the court attempts to begin its session at a time or place other than thus prescribed, the whole proceedings at that term will be void, since they do not take place at the term authorized by statute.[2]

Statutory Provisions—Statutes authorizing the sheriff or clerk, or a single judge where a legal quorum is absent, to adjourn the commencement of the term, have been generally adopted. They usually contain a provision that an absent judge may adjourn the commencement of the term, or a subsequent session, by a written or other statutory order to the clerk or some other officer.[3]

1. People *v.* Bradwell, 2 Cow. (N. Y.) 445; Northrup *v.* People, 37 N. Y. 203; Brumley *v.* State, 20 Ark. 78; Dunn *v.* State, 2 Ark. 229; *Ex p.* Osborn, 24 Ark. 479; State *v.* Roberts, 8 Nev. 239; *Ex p.* Jones, 27 Ark. 349; People *v.* Sullivan, 115 N. Y. 185. "The term is appointed to be held under the authority of a statute, and an adjourned term of the court at which cases may be noticed and jurors summoned as if to a new and regular term is of the same nature. In such a case, in the absence of any statute, the failure of any judge to appear upon the day may well be regarded as preventing the convening of a legal court, and as no legal court convened and commenced its term on the day appointed by law, there would of course be no power, in the absence of a statute, in the court to convene the next day any more than the next month or the next year. In such a case there would be no court to convene." People *v.* Sullivan, 115 N. Y. 185.

No Adjournment to Await a Quorum.—In People *v.* Bradwell, 2 Cow. (N. Y.) 445, it was held that a court of oyer and terminer could not be adjourned by a circuit judge, or otherwise, by reason that a number of the county judges sufficient to make a quorum were not present at the day appointed for holding it; and where a quorum did not appear until the third day of the circuit and then opened the oyer and terminer and convicted a criminal, it was held that the proceedings were *coram non judice*.

2. People *v.* Bradwell, 2 Cow. (N. Y.) 445; People *v.* Sullivan, 115 N. Y. 185.

3. *New York* Code Civ. Pro. §§ 35, 36, 41; *Pennsylvania* Bri. Pur. Dig. p. 1360; *Massachusetts* Rev. St. c. 153, §§ 25, 26, 27; *New Hampshire* Rev. St. c. 207, §§ 2, 3, 4; *Maine* Rev. St., c. 77, §§ 48, 50, 72, 77; c. 70, § 2; c. 67, § 2; *Connecticut* Rev. St. §§ 441, 727, 750, 790, 791, 802, 803, 820; *Alabama* Code, §§ 660, 662, 663, 664; *Georgia* Code, §§ 3239, 3240, 3242, 3243, 3244, 4113; *Michigan* Gen. St. (How.) 6407, 6408, 6461; *Minnesota* Rev. St., c. 64, §§ 9, 15; c. 63, §§ 7, 8, 9; *Mississippi* Code, §§ 1400, 2263, 2264; *Ohio* Rev. St. §§ 412, 4969; *Illinois* Rev. St. c. 37, §§ 4, 5, 51, 54, 56; *California* Code Civ. Pro. §§ 46, 48, 74, 135, 139, 140, 617; *Virginia* Code, §§ 3111, 3122, 3123, 3124; *Wisconsin* Ann. St. §§ 2404, 2427, 2449, 2572, 2573, 4049; *Tennessee* Code, §§ 4863, 4969, 4991, 5227, 5260.

When Commencement is Adjourned the Day Adjourned to is the "First Day of the Term."—Where, before the day appointed for the beginning of the term, the commencement of the term is postponed or adjourned to a future day, the date to which it is adjourned becomes the first day of the term; that is to say, that anything appointed to be done upon the first day of the term may be done upon the day to which the commencement of the term is adjourned, i. e., the first day of the adjourned term. Thus, an order that papers shall be filed on the first day of the term is sufficiently fulfilled if the papers are filed on the day to which the commencement of the term is adjourned. Wilson *v.* Lott, 5 Fla. 302. In that case the court by Thompson, J., said: "There is an obvious distinction between the adjournment of the court on the first or any subsequent day of the term, and the adjournment of the term, in anticipation of the appointed time, to another day; in the first place, the term has actually commenced, and the effect of the adjourn-

Liberally Construed.—These statutes have received a liberal construction by the courts, and provisions for entering, filing, and publishing such orders have been generally held directory, unless a party is prejudiced by the failure to obey them.[1]

ment is but a prolongation of the term; in the latter case, the term being postponed by adjournment before it commences, the return day thereof is also adjourned, and it takes its beginning from the time to which it is adjourned."

1. **Provisions Held Directory.**—Where a clerk received the adjournment order, but failed to formally adjourn the court and left the order unrecorded, unpublished, and unposted, as the statute directed, these provisions were held to be directory and the adjournment nevertheless valid. Wise *v.* State, 34 Ga. 348. Where a clerk adjourned an entire week instead of from "day to day," as the Code required, in the absence of the judge, the provision was held directory and the adjournment legal. May *v.* People, 8 Colo. 210. For construction of requirements for calling special term as directory, see Harman *v.* Copenhagen, 89 Va. 836.

A Substantial Compliance Sufficient.—Where statutes grant power to adjourn the regular term, if at its expiration business is unfinished, the court may adjourn before the expiration of the term if it can be seen that business will be then unfinished. Walker *v.* State, 102 Ind. 502; *overruling* Morgan *v.* State, 12 Ind 448, ; and *compare* Wright *v.* State, 5 Ind. 290; 61 Am. Dec. 90.

Notice of Adjournment.—Reasonable notice of an adjournment must always be given, whether the statutes require it or not. Grable *v.* State, 2 Greene (Iowa) 559; Archer *v.* Ross, 3 Ill. 303.

But a two days' notice in a newspaper answers the requirement of a statute requiring publication, but not specifying its duration. Clarke County *v.* State, 61 Ind. 75.

Where the statute required an adjourning order to specify how public notice should be given, and the order actually entered by the clerk failed to so specify, although he gave public notice as the law required, it was held that the failure of the original order to conform to the law did not invalidate the adjournment, and that a correct *nunc pro tunc* order might be entered. Conrad *v.* Johnson, 20 Ind. 421; Cordell *v.* State, 22 Ind. 1; Wood *v.* Franklin, 97 Ind. 117.

Where a statute provided that if the judge was absent the sheriff should adjourn by proclamation and by posting notice in the court-house, and the judge while present directed an order to be entered that if no judge was present at subsequent hour named the sheriff should adjourn the court, it was held that as the adjournment was made by the order of the judge, no proclamation or posting was required. Bressler *v.* People, 117 Ill. 425; and *compare* People *v.* Central Bank, 53 Barb. (N. Y.) 416; State *v.* McGuire, 53 Iowa 165, which are to the effect that if the entry of a customary order of adjournment be required at all, it may be *nunc pro tunc*.

But where neither the statutory order of the judge was entered of record, nor the adjournment proclaimed by the sheriff, the adjourned term was held irregular, as no public notice had been given. Stovall *v.* Emerson, 20 Mo. App. 322.

Statutory Orders of Adjournment by Judges in Court are similarly construed. An order entered three days before the expiration of the term, reciting its inability to complete business at regular term, declaring that an "adjourned term is hereby ordered and appointed" for a certain date, is, when followed by another order of adjournment on the last day of term, reciting that statutory publication of notice of adjournment had been complied with, a sufficient compliance with a statute permitting adjourned term to be held if at the expiration of the regular term business was unfinished. Washer *v.* Allensville, etc., Turnpike Co., 81 Ind. 78. And where "special adjourned terms" of a court might be held by entering an order to that effect, a simple adjourning order to a distant day, without specifying that a "special adjourned term was to be held," was considered sufficient. Davies *v.* State, 39 Ark. 448.

An entry in the minutes, reciting that on Saturday the court adjourned for the term. and directing the clerk to

4. Place of Adjournment.—Where the statute names the specific place for holding court, it cannot be legally held elsewhere, and consequently cannot be adjourned elsewhere.[1]

5. The Consequence of Adjournment.—Distinction Between Adjournment Sine Die and Adjournment to a Day Certain.—An adjournment is either without day or to a day certain. The distinction is vital. An adjournment without day ends the power of the court over the business and record of the term.[3] The adjournment of the term to a day

enter in the journal an adjournment from day to day without fixing a date for reconvention, was held inconsistent with itself, and a final adjournment. *Ex p.* Lilly, 7 S. Car. 372.

Where the entry was, "Ordered, that all cases ready for trial having been disposed of, the daily sessions of the court will be dispensed with, the term of the court not being closed," it was held to keep the term open by daily adjournments of the clerk until the judge saw fit to return and reopen court. De Leon *v.* Barrett, 22 S. Car. 412.

Sheriff Exceeding his Authority.—Where the sheriff was to adjourn from day to day for a week, if the judge was absent, and at the expiration of a week, the term *sine die*, it was held that the judge who attended within the week may vacate an order of the sheriff adjourning the term *sine die* before the last day of the week had arrived. Thomas *v.* Fogarty, 19 Cal. 644. *Compare* People *v.* Sanchez, 24 Cal. 18; Garza *v.* State, 12 Tex. App. 261.

Telegraphic Order.—Where the statute required a written order, and the judge telegraphed the clerk, "I have made and sent you a written order adjourning court until to-morrow morning nine o'clock; adjourn it accordingly," and the clerk adjourned before written order was received, it was held a substantial compliance with the statute. State *v.* Holmes, 56 Iowa 588; 41 Am Rep. 121.

Georgia.—But in Hoye *v.* State, 39 Ga. 723, it was held that a provision that the commencement of the term should not be adjourned by the court in vacation, except for some unavoidable cause, was mandatory, and that an adjournment without sufficient cause would render the term irregular and the proceedings thereat void unless the irregularity be waived by the parties.

In Osgood *v.* State, 63 Ga. 791, it was held that where the regular time for holding two courts in the same circuit conflict, one being appointed for Monday and the other for Tuesday of the same week, the judge may adjourn the latter to another date; such conflict being an "unavoidable cause" under the *Georgia* Code.

In Allen *v.* State, 74 Ga. 773, it was held that a tornado doing great damage was such an "unavoidable cause" within the statute as to authorize the judge to order an adjournment to the commencement of the term; and in that case it was further held that the signature of the judge to the adjournment order was not necessary. *Citing* Cogswell *v.* Schley, 50 Ga. 481. And see Wise *v.* State, 34 Ga. 348, digested *supra* this note.

The clerk of the superior court or his deputy cannot adjourn an adjourned term of the court from day to day for two days, in the absence of the judge, where such absence has not been caused by unavoidable accident. Norrie *v.* McCullough, 74 Ga. 602.

1. Bennett *v.* Cooper, 57 Barb. (N. Y.) 642; Northrup *v.* People, 37 N. Y. 203. But where the statute names a town as a place for holding the court it may be reasonably adjourned anywhere within the limits of that town, Litchfield Bank *v.* Church, 29 Conn. 137.

2. Dryden *v.* Wyllis, 54 Iowa 668; Shaw *v.* McGregor, 8 Cal. 521; Earls *v.* Earls, 27 Kan. 538.

Term Cannot be Reopened after Final Adjournment.—Consequently a term once finally adjourned cannot be reopened by an order made in vacation. International, etc., R. Co. *v.* Smith, 62 Tex. 185; Johnson *v.* Pittsburgh R. Co., 47 Ohio St. 318; Newman *v.* Newton, 14 Fed. Rep. 634; Bank of U. S. *v.* Moss, 6 How. (U. S.) 31; Becker *v.* Sauter, 89 Ill. 596; and see note to Jacques *v.* Bridgeport Horse R. Co., 16 Am. Law Reg. N. S. 660; Carpentier *v.* Hart, 5 Cal. 406.

certain leaves it intact. As no court can create a new term to itself without statutory authority, all adjournments to a future day certain are but prolongations of the terms adjourned.[1]

1. Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106; Cherry Tp. *v.* Marion Tp., 96 Pa. St. 528; People *v.* Central Bank, 53 Barb. (N. Y.) 416; Stefani *v.* State, 124 Ind. 3; Com. *v.* Sessions, 5 Mass. 435; Sawyer *v.* Bryson, 10 Kan. 200; Smith *v.* Smith, 17 Ind. 75; Ulmer *v.* State, 14 Ind. 52; Harris *v.* Gest, 4 Ohio St. 469. "In contemplation of law there is but one term." Davis *v.* Finney, 37 Kan. 65; Springbrook Road, 64 Pa. St. 451; Maynard *v.* Head, 78 Ga. 190; *Ex p.* Casey, 18 Fed. Rep. 86; McDonald *v.* Cash, 45 Mo. App. 66.

A court at an adjourned term may cause the proceedings of the regular term to be entered. Knight *v.* State, 70 Ind. 375; Green *v.* White, 18 Ind. 317.

Action on Appeal Brought at an Adjourned Term.—In *Connecticut*, in the case of Hawley *v.* Parrott, 10 Conn. 486, it was held that an act might be brought originally in the county court adjourned from a regular term to a distant day. The court said: "So far as we have been able to ascertain, these adjourned terms (as they have been denominated) have been attended by nearly, if not all, the incidents of a statute term. Causes have been carried forward to them as from term to term. New juries have been summoned and bills of cost taxed in the same manner as though the term had been prescribed by law." But in Leavenworth *v.* Marshall, 19 Conn. 1, it was held that where a statute required an appeal to be brought at the next term of the appellate court, the appeal could not be taken to an adjourned term of that court. The court cited and relied upon Fellows *v.* Carpenter, Kirby (Conn.) 364, and distinguished Hawley *v.* Parrott, 10 Conn. 486; Brewster *v.* Shelton, 24 Conn. 144; approved Fellows *v.* Carpenter, Kirby (Conn.) 364, saying: "And the reason assigned by the court was that the words of the statute granting appeals to the next county court had reference to the next stated term, and not to an adjourned term, which was but a continuation of a term;" and distinguished Hawley *v.* Parrott, 10 Conn. 486, thus: "In a more recent case this court held that, in view of the long practice which had prevailed in this state, an original suit might be brought to an adjourned term of the court; but the decision was placed entirely upon the ground of such long-continued practice, which could not be disturbed without shaking the foundation of many titles."

So in *Massachusetts* it was held that where an application was to be made at the next term of court, the application could not be made to an adjournment of the same term. Com. *v.* Sessions, 5 Mass. 435.

Adjourned Term and New Special Term.—But care must be taken to distinguish between an "adjourned term" and a new and distinct term. Statutes permitting courts to order a new and additional or special term, for which a new calendar is prepared and a new panel of jurors is drawn, are held to confer on the court the power to create a distinct term, at which it has no power over the record of the old. People *v.* Sullivan, 115 N. Y. 185; Sawyer *v.* Bryson, 10 Kan. 200. And where the court has power to create such new term, it may, where its character is doubtful, be held such, to discourage long adjournments. Harris *v.* Gest, 4 Ohio St. 469.

Statutes frequently provide that courts may *create* special terms. Without judicial construction it is impossible in many cases to say whether such statutes merely confirm the court's inherent power to adjourn its term, or grant it power to create a new one. N. Y. Code Civ. Pro. secs. 34, 280; Conn. R. S. sec. 1617; Ala. Code, secs. 652, 653; Mich. R. S. secs. 6392, 6465, 6627; Iowa Code, sec. 166; Ill. R. S. chap. 37, secs. 44, 45, 46, 47, 48, 49; Ga Code, sec. 3245; Ohio R. S. secs. 410, 450; Miss. Code, secs. 630, 912; Minn. R. S. chap. 63, secs. 9, 10; chap. 64, sec. 15; Va. Code, secs. 3060, 3061, 3062, 3106; Wis. An. St. 2428, 2429, 4049; Tenn. Code, secs. 4708, 4709, 4713.

Where a court had power by statute to decide all matters at an adjourned session with the "same effect" as it might at regular term, it was held a new term for purposes of appearance, and not a prolongation of regular term. Horton *v.* Miller, 38

Existence of Court during Adjournment.—As the term continues until final adjournment, the court exists as well during temporary adjournment as in open session.[1] The duration of adjournment matters not. The power of the court for that term is, in some respects, suspended, but not destroyed. The failure of a court to meet on an adjourned day does not therefore make further session illegal or even irregular,[2] as is the case when the court does not meet on the day set by statute for the beginning of the term.[3] It may meet at any time thereafter, but fair notice must be given to all concerned.[4]

Power over Record of Past Business.—Where the business of the adjourned term must be stated in the order of adjournment, this does not limit the court's power over the record of past business of the term. A judgment previously rendered may be vacated at such adjourned term.[5]

Pa. St. 270; and *compare* Smith *v.* Northern Pac. R. Co. (N. Dak., 1892), 53 N. W. Rep. 173. Code Va. sec. 3062 provides that any civil cause may be tried at a special term which might have been tried at regular term. *Held*, that this authorized the court to act upon the report of a judicial sale, although the statutory period of two regular terms intervened, and that consent of parties was not necessary. Harman *v.* Copenhagen, 89 Va. 836. On the other hand, a statute providing that "special or adjourned terms may be held" has been declared to mean that such special terms are adjourned terms, even although the court, at the time of making the order for the special term, adjourned the regular term *sine die*. Cole County *v.* Dallmeyer, 101 Mo. 175.

General statutes affecting adjournments apply to special and adjourned terms as well as to regular terms. State *v.* Harkins, 100 Mo. 666. *Compare* Anonymous, 5 Mass. 197, where "first day of the term" was held to mean regular, not adjourned, term.

Where adjournment is made to a statutory adjourned term, compliance with the statute is legal notice to all parties and their attorneys having business before the court, and they cannot plead lack of actual notice. Rawson *v.* Powell, 36 Ga. 255.

Presumption as to whether Special or Adjourned Term.—In Harris *v.* Gest, 4 Ohio St. 469, it is held that where the court has power to create such new term, and the adjournment would be a long one, a term would, where its character is doubtful, be held an additional term under the *Ohio* statute, rather than an adjourned term: this to discourage long adjournments. But in Fannon *v.* Plummer, 30 Mo. App. 25, it was held that when a court sitting in session is adjourned to a specified day prior to its next ensuing regular term, the sitting thus adjourned is a continuation of the term adjourned from and not a special or different term.

1. Eastman *v.* Concord, 64 N. H. 264; People *v.* Central Bank, 53 Barb. (N. Y.) 412.

2. People *v.* Sullivan, 115 N. Y. 185; State *v.* Bohan, 19 Kan. 29; Langhorne *v.* Waller, 76 Va. 213; Union Pac. R. Co. *v.* Hand, 7 Kan. 380; Labradie *v.* Dean, 47 Tex. 100, where the court asserts: "The order of adjournment of its session from day to day or to a particular hour is a mere announcement of its proposed or intended order of transacting the business to come before it during the term, but certainly the failure of the court to meet at the hour or on the day to which it had adjourned can in no way affect the term or put an end thereto."

3. See *supra* this title.

4. People *v.* Sullivan, 115 N. Y. 185.

May Meet before the Day to which it Adjourned.—And, conversely, it may meet before the day of adjournment has arrived. A court made an order of adjournment until the 26th of a month. It met on the 22d and vacated the prior order of record, substituting an order for a statutory adjourned term. *Held*, legal. Cole County *v.* Dallmeyer, 101 Mo. 175; Bowen *v.* Stewart, 128 Ind. 508; Wharton *v.* Sims, 88 Ga. 617.

5. Wharton *v.* Sims, 88 Ga. 617.

Instructions, etc., during Recess.—Instructions may be given to the jury and their verdicts received after adjournment for the night, bills of exceptions and petitions filed during recess, and in general all acts which require the existence, but not the open sitting, of the court may be done until final adjournment.[1]

Waiver of Irregularities.—It has been said that in civil cases proceeding to trial without objection is a waiver of any irregularity in the adjournment.[2] In a criminal case there is a difference in

And where statute confers the right to order adjourned term on account of unfinished business, this does not destroy the court's power over the record of the regular term as such adjourned term. It exists unimpaired. Smith *v.* Smith, 17 Ind. 75.

1. State *v.* Knight, 19 Iowa 98; Eastman *v.* Concord, 64 N. H. 264; State *v.* Bohan, 19 Kan. 29. In Barrett *v.* State, 1 Wis. 180, the court said: "The general rule is that the term is to be considered as of one day. These intervals (temporary adjournment), for the purposes aforesaid, cannot suspend the functions of the court altogether. A jury may be out after the court has retired for the night, and yet misconduct of a juror during such interval might be punished as for contempt. Appliances to a grand or petit juror during such interval would be contempt of the court. If the officer having charge of the jury during such recess or adjournment should desert his post or tamper with the jury, he would be punishable a for contempt. It is held by some courts that the publication of its day's proceedings during the evening or night may be a contempt of the authority of the court. These consequences could not be if the ordinary adjournments from day to day operated a cessation of the functions of the court. A grand jury may continue the session and deliberate, administer oaths, examine witnesses, find bills, etc., during such intervals, which they could not do after an adjournment of the term. Indeed, it was the very existence and vitality of the court on the evening in question which authorized the jury in this case to deliberate." Accordingly it was held in the above case that a verdict taken in the court-room after the court had adjourned for the night was valid. See also Shapley *v.* White, 6 N. H. 172, where a judge's instructions delivered to jury after the adjournment of the court, and where neither parties nor their attorneys were present, were held not to invalidate the verdict where right to except to such charge was reserved.

Dakota—Sunday.—Section 388 of the Code of Civil Procedure of Dakota Territory provided that while the jury were absent "the court may adjourn from time to time as to the other business, but it is nevertheless deemed open for other purposes connected with the cause submitted to them." It was held that under this section, where a jury retired to consider their verdict on Saturday, the court might on Sunday give additional instructions to correct a supposed error in the law. People *v.* Odell, 1 Dakota 197.

"If, in any case, this court would go into an inquiry on this subject, it need not do so in this, for the reason that nothing appears on the subject, and we must, in this as in every other case, presume in favor of the action of the criminal court. . . . If the defendant in this case could raise the question as to whether the notice of the adjourned term was given or not, she ought to have made the objection in the criminal court, and cannot raise the question here for the first time, especially as the record is silent on the subject as to whether the notice was given or not." Harper *v.* State, 42 Ind. 405.

A statute declaring that if the judge should not attend three days successively the court should stand adjourned *sine die* does not apply to intervals during which the court has been regularly adjourned. Redwine *v.* State, 15 Ind. 293; Seymour *v.* State, 15 Ind. 288.

2. Hoye *v.* State, 39 Ga. 724. The court said: "When the judge, without any sufficient legal cause, has adjourned the regular term of the court by order in vacation, we hold that he has no power at such adjourned term to compel any party to go to trial before him. If, however, parties to civil

the authorities as to whether the defendant can waive the irregularity of an adjournment by implication.[1]

III. **JUSTICE'S COURTS.**—The peculiar character of the court of justices of the peace, constituted as it is for the quick trial of minor causes, has led to sharp statutory restrictions of their power to adjourn a cause and to allow continuances. As such courts practically never convene for any other purpose than the trial of a simple cause, the question of the legality of the adjournment of the court, as distinct from an adjournment of a case, seldom arises; for this reason it has been thought best to refer a discussion of the statutes and principles governing the adjournment of a justice's court to a future article of this work upon CONTINUANCES.

IV. **REFEREES AND ARBITRATORS.**—Referees and arbitrators have the inherent powers of a judicial tribunal to adjourn from day to day or to a future day certain, provided such day be not beyond the time named in the submissions or appointment, or defined by statute.[2] Unless they meet at the time and place appointed for the first meeting, they do not constitute a judicial tribunal, an adjournment cannot be made, and subsequent proceedings are void unless acquiesced in by parties.[3] When once constituted, failure to meet at an adjourned session does not make a subsequent session irregular.[4] When the time limited for the report or award expires, the power of adjournment is gone.[5] Statutory restrictions do not limit the common-law power in the absence of conflict.[6]

causes make no objections and go to trial, we hold the irregularity is waived, and that they cannot afterwards be heard to object to the judgment on the ground of the illegal acts of the judge in ordering the adjournment. But the rule is different in a criminal case involving the life or liberty of the defendant. He waives nothing by implication or intendment, and unless he expressly waives the objection to the legality of the adjournment with a view to the trial which is to bind him, we hold that he may take advantage of it even after verdict."

1. **Irregularity Held Waived.**—In Henslie *v.* State, 3 Heisk. (Tenn.) 206, it was held that where the defendant went to trial without making any objection as to the irregularity of the term, he could not, after plea of not guilty and trial, object in the appellate court.

In Smurr *v.* State, 105 Ind. 125, it was held that if in a criminal case the accused voluntarily goes to trial without objection to the irregularity of the adjourned term, an objection after conviction will be too late to be of avail.

Irregularity Held Not to be Waived.—In Hoye *v.* State, 39 Ga. 724, it was held that where the adjourned term was irregular, although the defendant went to trial without any objection to the irregularity, unless he expressly waives the objection to the legality of the adjournment, he may take advantage of it even after verdict. See also Finnegan *v.* State, 57 Ga. 427.

2. Vinton *v.* Lindsey, 68 Ga. 291; *Ex p.* Rutter, 3 Hill (N. Y.) 464; Abeel *v.* Hubbell, 52 Mich. 38; Campau *v.* Brown, 48 Mich. 147; Brown *v.* Leavitt, 26 Me. 251; Richardson *v.* Hartsfield, 27 Ga. 528.

3. Harris *v.* Norton, 7 Wend. (N. Y.) 534; Weir *v.* Johnston, 2 S. & R. (Pa.) 459; Stiles *v.* Carlisle, etc., Turnpike Co., 10 S. & R. (Pa.) 289. *Contra*, Small *v.* Deforest, 2 How. Pr. (N. Y.) 176. The learned judge in the last case ignores 7 Wend. (N. Y.) 534.

4. Harrington *v.* Rich, 6 Vt. 666.

5. Browner *v.* Kingsley, 1 Johns. Cas. (N. Y.) 334.

6. *Ex p.* Rutter, 3 Hill (N. Y.) 464.

Supervision by the Court of Referee's Action.—Courts will not interfere with referee's discretionary power of adjournment,[1] and it is not proper to apply to courts unless such discretion is abused.[2] Although the granting or refusal of an adjournment is discretionary with the referee, if injury is occasioned to either side, the court will interfere and set aside the referee's report, or appoint a new referee.[3]

V. Quasi-Judicial Officers.—All quasi-judicial officers or bodies possess an inherent power of adjournment unless restricted by statute.[4] Such an adjournment is the exercise of a discretionary power, and is not the subject of review in an appellate court unless it is an abuse of the corporate functions of the adjourning body and operates to the detriment of those affected by such action.[5] Accordingly an executive council,[6] a board of commissioners for altering boundaries of school districts,[7] a town board,[8] a town meeting,[9] commissioners for condemning land,[10] a court constituted only for the trial of an election case,[11] commissioners for taking depositions,[12] a board of school inspectors,[13] and a board of road-viewers[14] have been held to be able to adjourn from time to time. The presumption of legality of adjournment,[15] and the requirements that the adjournment must be reasonable in itself and attended with reasonable notice, apply to all these and similar bodies.[16]

1. Sutherland, J., in Cooley *v.* Huntington, 16 Abb. Pr. (N. Y. Supreme Ct.) 384, note; Langley *v.* Hickman, 1 Sandf. (N. Y.) 681.

2. *Ex p.* Rutter, 3 Hill (N. Y.) 464; Packer *v.* French, Hill & D. Supp. (N. Y.) 103; Forbes *v.* Frary, 2 Johns. Cas. (N. Y.) 224.

3. Cooley *v.* Huntington, 16 Abb. Pr. (N. Y. Supreme Ct.) 384, note; Forbes *v.* Frary, 2 Johns. Cas. (N. Y.) 224; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 650.

4. Com. *v.* Brown, 28 Kan. 85; Donough *v.* Dewey, 82 Mich. 309.

5. Donough *v.* Dewey, 82 Mich. 309.

6. Com. *v.* Brown, 28 Kan. 85.

7. Donough *v.* Dewey, 82 Mich. 309.

8. Leavenworth, etc., R. Co. *v.* Meyer, 50 Kan. 25.

9. Wisconsin Cent. R. Co. *v.* Ashland County, 81 Wis. 1; Goodel *v.* Baker, 8 Cow. (N. Y.) 288.

It must be for a reasonable cause and to a specified day. People *v.* Township Board, 38 Mich. 615.

10. Memphis, etc., Co. *v.* Parsons Town Co., 26 Kan. 503.

11. Steele *v.* Martin, 6 Kan. 430.

12. Pindar *v.* Barlow, 31 Vt. 529.

13. Passage *v.* Board of School Inspectors, 19 Mich. 330.

14. Butman *v.* Fowler, 17 Ohio 101.

15. **Town Meetings.**—Where a town board had power to adjourn a town meeting if the place of original adjournment was "inconvenient," upon giving notice by proclamation, it was held that the town board were sole judges as to whether a place was so "inconvenient" as to warrant an adjournment; that the provision for notice was directory and actual notice binding; and that, although the record stated that the adjournment was made at "9 A.M." and the adjourned meeting began also at "9 A.M.," it would be presumed that the adjournment was made a few minutes before 9. Wisconsin Cent. R. Co. *v.* Ashland County, 81 Wis. 1.

Presumption as to Notice.—Leavenworth, etc., Co. *v.* Meyer, 50 Kan. 25.

16. **Unreasonable and Irregular Adjournments.**—Memphis, etc., R. Co. *v.* Parsons Town Co., 26 Kan. 503; Bennett *v.* Bennett, 37 W. Va. 396; Pindar *v.* Barlow, 31 Vt. 529; Beach *v.* Workman, 20 N. H. 379; Wixom *v.* Stephens, 17 Mich. 518, 97 Am. Dec. 205; Butman *v.* Fowler, 17 Ohio 101; O'Neil *v.* Tyler (N. Dak., 1892), 53 N. W. Rep. 434.

ADMIRALTY.

By EDWARD G. BENEDICT.

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I. **DEFINITION.**—Admiralty practice as comprehended in this article is the practice of the courts of the United States sitting as Courts of Admiralty.[1]

II. **ADMIRALTY COURTS—1. District Courts.**—The courts having original jurisdiction of suits or causes in admiralty are the United States Courts.[2] On the foundation of the government, this grant of original jurisdiction over all cases of admiralty was given to the United States District Courts for the various judicial districts of the country.[3]

1. **Nature of Admiralty Practice.**—"The Admiralty should be otherwise known than as a court of curious learning, where controversies are determined upon principles and under forms which, to the popular feeling, are unusual, abstruse, or difficult of apprehension. Its process and forms are indeed in many respects different from the common law, the administration of which is most generally familiar to the people of the United States. But one of its main and most characteristic features is that it is, to the extent of its jurisdiction, a court of equity. It entertains pleas of part performance, and decrees an instrument to be good in part and bad in part, as the fact and equity of the case may be. It annuls positive contracts improvidently entered into by its "ward," the seaman, and is not restrained from his protection by the binding sanctity of a seal. It rejects altogether in its pleadings the technical niceties of the common law, and requires only that the substantial merits should be set forth, in forms that are peculiar, indeed, but wholly liberal and unembarrassing. In the construction of contracts it seeks to combine the intention of the parties and actual justice in the result of their controversies." George Ticknor Curtis.

2. **United States Courts are the Courts of Admiralty**, with the exception of the United States Circuit Courts, which have no admiralty jurisdiction since the Act of Congress establishing Circuit Courts of Appeals (26 Sts. at L. p. 826) except in certain cases of disability of the District Judge (Rev Sts. secs. 587, 588), and in admiralty matters involving some crimes of owners and officers of vessels (Rev. Sts. sec. 629; Ben. Adm. § 578). This jurisdiction to the federal courts in civil cases of admiralty is given by U. S. Const. art. III, secs. 1, 2.

3. **District Courts.**—Rev. Sts. sec. 563. See Wayman *v.* Southard, 10 Wheat. (U. S.) 1; Beers *v.* Haughton, 9 Pet. (U. S) 329. These courts are held by one judge, the United States District Judge for that particular District, who, in admiralty causes, is judge of the facts as well as the law. Rev. Sts. secs. 551, 556. There is no right to trial by jury in the admiralty except in cases arising on the great lakes. Rev. Sts. sec. 566; U. S. *v.* Schooner Betsey, 4 Cranch (U. S.) 443; Bigley *v.* The Venture, 21 Fed. Rep. 880.

The District Judge sits alone to hear the entire cause, except that in certain of the Districts the court sometimes calls to its assistance experts in seamanship, to whom are submitted doubtful questions of navigation, and the court applies the rules of law to the statement of the proper rules of navigation as laid down by them. Such experts are commonly called admiralty assessors. They correspond to the Elder Brethren of the Trinity House in the English Admiralty Courts.

2. Circuit Court of Appeals and Supreme Court.—The causes having been heard and decided in the District Courts, then go by appeal to the United States Circuit Courts of Appeals.[1] This court is the final court for admiralty causes; except that in prize causes, and causes involving the jurisdiction of the District Court, the construction or application of the Constitution, and cases of conviction of capital or otherwise infamous crimes, an appeal lies directly from the District Court to the Supreme Court of the States.[2]

III. Different Kinds of Admiralty Suits.—In general, there are two kinds of admiralty suits: the suit *in personam* and the suit *in rem*.[3] The first of these may be a simple suit *in personam*, or a suit *in personam* with a clause of foreign attachment. These suits may in certain cases be joined.[4]

Suit in Personam.—The suit *in personam* is a proceeding against a personal defendant who can be served with process in the district, as in an ordinary action at common law.[5] In such a suit the defendant is not required to furnish security on appearing to defend, except the security for costs, spoken of hereafter.[6]

The Suit in Personam with Clause of Foreign Attachment corresponds to an action at law begun against a non-resident defendant by attachment of his goods and chattels in the district.[7]

1. **Circuit Court of Appeals.**—These are courts established by the Act of March 3, 1891, 26 Sts. at L. p. 826, in each of the *nine* circuits into which the country is divided. Admiralty appeals are heard by three Judges, who may be a Supreme Court Justice sitting with Circuit Judges, or a Circuit Judge sitting with District Judges, or all Circuit or all District Judges. The District Judge who heard the case in the court below is, however, disqualified from sitting on the appeal. The court consists of three judges, but two constitute a quorum, and hence an appeal may be heard by two only. Act of March 1, 1891; 26 Sts. at L. p. 826.

2. Act Cong. March 1, 1891, § 5. These exceptions are, however, rare, and an admiralty case generally goes through the District Court and the Circuit Court of Appeals only.

Certifying Questions to Supreme Court.—In addition to the above, any Circuit Court of Appeals may certify to the Supreme Court any questions or propositions of law concerning which the said Circuit Court of Appeals desires instruction. And the Supreme Court may require, by *certiorari* or otherwise, any case to be certified up to it for its review and determination. Act Cong. Mch. 1, 1891, § 6.

3. See discussion of *in rem* and *in personam* suits in The Merchant, Abb. Ad. 1.

4. **Joinder of Rem and Personam Proceedings.**—See *post*, VIII.

Treating In Rem Proceeding as one In Personam.—It has been held that a court could treat a suit begun *in rem* as one *in personam*, where no injustice would be done thereby. 118 Sticks of Timber, 10 Ben. (U. S.) 86. See Copp *v.* De Castro, etc., Co., 8 Ben. (U. S.) 321. See also The Monte A., 12 Fed. Rep. 331.

5. As to beginning a suit *in personam* by attachment, see X, *post*. Suit *in personam* for repairs to a domestic vessel is within the admiralty jurisdiction. Endener *v.* Greco, 3 Fed. Rep. 411. See The Brothers, 7 Fed. Rep. 878. Also a suit to enforce payment of costs awarded by the decree of an admiralty court of another district. Pennsylvania R. Co. *v.* Gilhooley, 9 Fed. Rep. 618.

6. *Post*, XII, 5.

7. Atkins *v.* Fiber Disintegrating Co., 18 Wall. (U. S.) 272; Manro *v.* Almeida, 10 Wheat. (U. S.) 473.

Suit in Rem.—The third suit is different from any common-law action, except, perhaps, actions for forfeiture, in that the offending vessel, or the debtor cargo, or some *res* or thing, is directly made defendant and proceeded against.[1]

IV. THE LIBEL.—An admiralty suit is commenced by the filing of the complaint, or, as it is called in admiralty, the libel,[2] in the

1. **Maritime Liens as Basis of Suit.**—Ben. Adm. § 362; The Dictator, 7 Asp. Mar. L. Cas. 251; The J. W. French, 13 Fed. Rep. 916; The Guiding Star, 18 Fed. Rep. 263. The existence of a MARITIME LIEN is the basis of the suit *in rem*. Beane *v.* The Mayurka, 2 Curt. (U. S.) 72; and the suit cannot be maintained without it. Vandewater *v.* Steamship Yankee Blade, McAll. (U. S.) 9; The Larch, 2 Curt. (U. S.) 427. Liens will become barred by unreasonable delay in enforcement. The Galloway C. Morris, 2 Abb. (U. S.) 164; The H. B. Foster, 3 Ware (U. S.) 165; Steamboat Buckeye State, Newb. Adm. (U. S.) 111; The D. M. French, 1 Lowell (U. S.) 43; Steamer Nevada, 2 Sawy. (U. S.) 144. A master has no lien on the vessel for wages under the maritime law. The Dubuque, 2 Abb. (U. S.) 20; The Larch, 2 Curt. (U. S.) 427. One who lends money for a vessel's repairs has a lien. Davis *v.* Child, Davies (U. S.) 71. Seamen's wages on an illegal voyage are no lien. Brig Langdon Cheves, 2 Mason (U. S.) 58. Proceedings *in rem* cannot be instituted against an undivided interest of an owner in a vessel. Manhattan F. Ins. Co. *v.* Five Sixteenths of Schooner C. L. Breed, 1 Flip. (U. S.) 655. A part owner cannot put in a claim for wages in opposition to creditors who have liens thereon. Petrie *v.* Steam-tug Coal-Bluff No. 2, 3 Fed. Rep. 531. Proceedings *in rem* can be brought against domestic vessels only when the local law gives a lien. The Asa R. Swift, Newb. Adm. 553; The Alida, Abb. Adm. 165. See Rodd *v.* Heartt, 21 Wall. (U. S.) 558. As to maritime liens generally, see tit. MARITIME LIENS, Am. & Eng. Ency. Law.

2. **Technical Rules of Common-Law Pleading** do not prevail in admiralty, but there must be substantial agreement between pleading and proof. West *v.* Steamer Uncle Sam, McAll. (U.S.) 505; Jenks *v.* Lewis, 1 Ware (U. S.) 51. See The Kendal, 56 Fed. Rep. 237; Hays *v.* Pittsburg, etc., Packet Co., 33 Fed. Rep. 552; Sloop Merchant, Abb. Adm. 51. But the libellant may be allowed to amend. The City of New Orleans, 33 Fed. Rep. 683. See VI, *post*.

The Preferable Form of Suit.—In the two latter classes of suits, the defendant, on obtaining the release of his property, is obliged to give security to pay the claim, if found liable by the court. Hence, such suit is preferable to one *in personam*, unless the defendant is amply able to respond to a judgment.

Where Several Parties are Interested.—As a general rule, when several persons have claims *in rem* of a like nature against a single thing, and all involving one question, all may join in a single libel. The Young Mechanic, 3 Ware (U. S.) 58. A libel may be filed for libellants and all other persons interested. American Ins. Co. *v.* Johnson, B. & H. Adm. 9.

Time of Filing Libel.—Libel prematurely filed may be dismissed. The Martha, B. & H. Adm. 151. In admiralty parties prosecute or defend upon their rights as existing at the institution of the suit, without regard to the state of the parties when the right of action or defense accrued. The Boston, B. & H. Adm. 309. A defendant may waive the fact of a premature filing of the libel. The Edward, B. & H. Adm. 286; The Salem's Cargo, 1 Sprague (U. S.) 389. The objection that a libel is prematurely filed should be taken by exception on return of process. Furniss *v.* Brig Magoun, Olc. Adm. 55.

The Notice of the Pendency of the suit dates from the service of process on the vessel. The Robert Gaskin, 9 Fed. Rep. 62; Ben. Adm. § 372 *et seq*.

Libel Should Show Jurisdiction.—The libel should always show the jurisdiction of the court. Boon *v.* The Hornet, Crabbe (U. S.) 426; Thomas *v.* Lane, 2 Sumn. (U. S.) 1.

Libel of Review, When Lies.—Jackson *v.* Munks, 58 Fed. Rep. 596; Snow *v.* Edwards, 2 Lowell (U. S.) 273; Northwestern Car Co. *v.* Hopkins, 4 Biss. (U. S.) 51.

office of the clerk of the district court of the district in which the defendant, or in which the *res*, or property, can be found.[1]

Form and Contents.—The libel is a pleading in the form of a petition addressed to the judge of the court, setting forth the nature of the action, as, for example, that it is a cause, civil and maritime, of contract, or of tort and damage, or of salvage, etc.;[2] if the libel be *in rem*, that the property is within the district; if *in personam*, the names, occupations, and places of residence of the parties.[3]

The cause of action must then be set forth in distinct articles.[4]

1. Fretz *v.* Bull, 12 How. (U. S.) 466; The Richard Doane, 2 Ben. (U. S.) 111; The Young Mechanic, 3 Ware (U. S.) 58; The R. P. Chase, 3 Ware (U. S.) 294; The Queen, 40 Fed. Rep. 694; The Slavers, 2 Wall. (U. S.) 383. In admiralty, a personal defendant is commonly called the respondent.

Misjoinder of Parties libellant does not prevent decree, when not objected to. Coast Wrecking Co. *v.* Phœnix Ins. Co., 7 Fed. Rep. 236. See The Ping-On *v.* Blethen, 11 Fed. Rep. 607.

Suit by Non-Resident.—A consignee of goods, though but an agent of a non-resident owner, may sue in his own name for the loss of the goods. The Nail City, 22 Fed. Rep. 537.

Owner of Goods Injured by Collision may libel for his own loss and for his insurers, when. The Anchoria, 9 Fed. Rep. 840. When libellant, "on behalf of all entitled," may settle suit for his own interest. McConnochie *v.* Kerr, 9 Fed. Rep. 50.

2. **But a Libel for Salvage**, alleging that it was "a cause of contract, civil and maritime and for extra services rendered," will not prevent the claim. Adams *v.* Bark Island City, 1 Cliff. (U. S.) 210.

3. Fretz *v.* Bull, 12 How. (U. S.) 466; The Queen of the Pacific, 61 Fed. Rep. 213.

4. **Form of Libel**: particularity in pleading.—Brig Joseph Gorham, 7 Law Rep. 135; Schooner Boston, 1 Sumn. (U. S.) 328; Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 262; Whittock *v.* Barque Thales, 20 How. Pr. (N. Y.) 447; Brig Caroline *v.* U. S., 7 Cranch (U. S.) 496; Schooner Anne *v.* U. S., 7 Cranch (U. S.) 570; Orne *v.* Townsend, 4 Mason (U. S.) 541.

A tender should not be alleged in a libel. Mott *v.* Frost, 45 Fed. Rep. 897; Brig Aurora *v.* U. S., 7 Cranch (U. S.) 382. Libel to recover penalty under passenger act need not allege that master has been convicted and fined. The Scotia, 39 Fed. Rep. 429.

Libel for loss of cargo in collision must set forth a sufficient identification of the goods and also the essential elements of any contract of insurance on which rights or liabilities of parties may depend. The Anchoria, 9 Fed. Rep. 840. In a libel of information it is not necessary to allege that the act was done contrary to the form of the statute in such case made and provided. The Idaho, 29 Fed. Rep. 187. When a penalty is demanded against a vessel upon grounds not set forth in the libel, it will be ignored. The Pope Catlin, 31 Fed. Rep. 408. In a suit on a charter-party a copy thereof should be attached to the libel. Card *v.* Hines, 33 Fed. Rep. 189.

A libel of information for an offense created by statute must conclude against the form of the statute, or refer to some statute on which the prosecution may rest. The Nancy, 1 Gall. (U. S.) 67. And it must describe exactly the offense. Schooner Hopper *v.* U. S., 7 Cranch (U. S.) 389. But a libel of information in admiralty need not be expressed with the technical nicety of an indictment at common law. The Samuel, 1 Wheat. (U. S.) 9. See 18,000 Gallons of Distilled Spirits, 5 Ben. (U. S.) 4; Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430; U. S. *v.* Brig Neurea, 19 How. (U. S.) 92; Locke *v.* U. S., 7 Cranch (U. S.) 339; U. S. *v.* Schooner Paryntha Davis, 1 Cliff. (U. S.) 532; Schooner Betsey, 1 Mason (U. S.) 354; U. S. *v.* Schooner Little Charles, 1 Marsh. (U. S.) 347

In a collision libel it is not sufficient to allege that the colliding vessel was negligently handled, but the facts must be given so that the court may see judicially that negligence contributed to the result. The H. P. Baldwin, 2 Abb. (U. S.) 257. On libel for forfeit-

Prayer for Relief.—The libel is closed with a prayer to the court for relief [1]— in a suit *in personam*, that the court will hear the cause, and adjudge the respondent liable; in a suit *in personam* with a clause of foreign attachment, that, if the respondent cannot be found, his goods and chattels or credits and effects may be attached to answer libellant's claim; in a suit *in rem*, that the property may be sold and libellant paid out of the proceeds.[2] Other prayers of course become necessary in special suits, as in suits for possession,[3] or for a sale, or limitation of liability.

Verification.—Libels must be *verified* by the party,[4] if within the United States and within 100 miles of the place of trial; otherwise by an agent or attorney of the party, who should give the grounds of his knowledge of the facts, and the reason why the verification is made by him.[5]

V. Interrogatories—By Libellant.—At the close of the libel the

ure it is necessary to aver an actual seizure of the vessel. The Washington, 4 Blatchf. (U. S.) 101; Tug Oconto, 5 Biss. (U. S.) 460; Schooner Silver Spring, 1 Sprague (U. S.) 551; The Fideliter *v.* U. S., 1 Sawy. (U. S.) 153.

A libel by material-men to enforce a maritime lien should show the foreign nature of the ship; a libel to enforce a lien against a domestic vessel should specify the statute conferring the lien. Propeller Charles Mears, Newb. Adm. 197. Neglect to aver ownership—waiver. Steamship Ville de Paris, 3 Ben. (U. S.) 276. Libel *in personam* for loss of goods must charge the vessel as a common carrier; a libel *in rem* need not so charge. The Pacific, Deady (U. S.) 17.

Declarations in Collision Cases should aver what happened on the one vessel: they may aver a belief as to what happened on the other vessel, but absolute proof as to the latter is not required. The Cambridge, 2 Low. (U. S.) 21. In collision cases a full averment of the facts is necessary. Bark Havre, 1 Ben. (U. S.) 295; Schooner Washington Sturges, 9 N. Y. Leg. Obs. 321; Steamboat Transport, 1 Ben. (U. S.) 86; McWilliams *v.* Steam-tug Vim, 2 Fed. Rep. 874.

1. The H. P. Baldwin, 2 Abb. (U. S.) 257; McWilliams *v.* Steam-tug Vim, 2 Fed. Rep. 874; The L. P. Dayton, 18 Blatch. (U. S.) 411. Under a prayer for general relief an admiralty court may make such decree as is required by the proof, though not precisely stated in the libel. Sonsmith *v.* The J. P. Donaldson, 21 Fed Rep. 671.

2. Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162; Pettingill *v.* Dinsmore, Davies (U. S.) 208; Treadwell *v.* Joseph, 1 Sumn. (U. S.) 390; Schooner Boston, 1 Sumn. (U. S.) 328; McWilliams *v.* Steam-tug Vim, 2 Fed. Rep. 874; The Anchoria, 9 Fed. Rep. 840.

3. A sheriff may sue in admiralty to recover possession of a vessel attached by him, and taken out of his custody and removed to another state. The Bonnie Doon, 36 Fed. Rep. 770.

4. Hutson *v.* Jordan, 1 Ware (U. S.) 386. Pleadings in admiralty may be sworn to before a judge, clerk, U. S. commissioner, or notary public. The seal of a notary public is not essential. Tug E. W. Gorgas, 10 Ben. (U. S.) 460. Each party in admiralty may require the answer of the other under oath. Jay *v.* Almy, 1 Woodb. & M. (U. S.) 262.

5. The personal oath of the libellant to the truth of the facts of the libel may be obtained, if required by respondent, by means of a commission or *dedimus potestatem*. See *post*.

Failure of Libellant to Sign.—Process issued on libel signed by proctors in their firm name is not void. The failure of libellant to sign is a defect amendable, and to be overlooked by the court after judgment. Hardy *v.* Moore, 4 Fed. Rep. 843. Naming libellant by initials is immaterial. *Id.*

The Authority of an Attorney to Verify a libel need not appear in the libel, but may be proved when called in question. Martin *v.* Walker, Abb. Adm. 579. But the modern practice is to give in the affidavit of verification the reason for such verification.

libellant is entitled to propound to the defendant any *interrogatories* which he may desire to have answered concerning the allegations of the libel.[1]

By Defendant.—And in like manner the defendant may, at the foot of the answer, propound interrogatories to the libellant which must be answered under oath.[2]

VI. AMENDMENTS—Matters of Form.—Amendments to pleadings in matters of form are always allowed, as of course, at any time, on motion to the court.[3]

Matters of Substance.—And amendments in matters of substance are commonly allowed to be made, on cause shown; and new counts may in like manner be filed.[4] But in these cases the court may

1. Ben. Adm. § 477.

Inspection of Documents cannot be had by means of interrogatories. Havemeyer, etc., Co. *v.* Compania Transatlantica Espanola, 43 Fed. Rep. 90. See Scobel *v.* Giles, 19 Fed. Rep. 224.

The Defendant is Bound to Answer them specifically on oath at the time of filing his answer; or he may incorporate the answers to the interrogatories generally in his answer. The answers stand, as evidence, like the pleadings only. The Serapis, 37 Fed. Rep. 436.

If defendant fails to answer the interrogatories, the libellant may except to his answer, and the answer may be stricken out, and libellant have judgment by default.

2. **Penalty for Failure to Answer** is the dismissal of the libel, or the compelling of an answer by an attachment, or the taking of the subject-matter of the interrogatories *pro confesso* against the libellant. Ad. Rule 32.

Amendment by Inserting Interrogatories.—If a pleading shall have been filed without interrogatories, which the party afterwards desires to propound, the proper practice is to file an amended pleading, containing the desired interrogatories at the foot thereof. The Edwin Baxter, 32 Fed. Rep. 296.

3. Rev. Sts. sec. 954; Brig Caroline *v.* U. S., 7 Cranch (U. S.) 496; Schooner Adeline, 9 Cranch (U. S.) 244; The Divina Pastora, 4 Wheat. (U. S.) 52; The Mary Ann, 8 Wheat. (U. S.) 380; Schooner Anne *v.* U. S., 7 Cranch (U. S.) 570; The Charles Morgan *v.* Kouns, 115 U. S. 69; The Louisiana, 37 Fed. Rep. 664; The City of New Orleans, 33 Fed. Rep. 683.

Changing Nature of Action.—But an amendment which changes a suit *in rem* to one *in personam* will not be allowed. The General Sedgwick, 29 Fed. Rep. 606; nor an amendment which changes the entire nature of the claim. The Alanson Sumner, 28 Fed. Rep. 670; nor one introducing a new ground of claim where evidence on that point has not been taken and defendant's witnesses are gone. The Keystone, 31 Fed. Rep. 412.

On Appeal. — Amending defective process on appeal. Mason *v.* Ervine, 27 Fed. Rep. 240. It has been held that amendments could be made in the Circuit Court. The Charles Morgan *v.* Kouns, 115 U. S. 69.

Claim of Interest.—A libel may be amended to claim interest after all the issues of the suit, except the amount of damages, have been decided. The J. E. Trudeau, 54 Fed. Rep. 907.

Carrying Claim Back.—It is necessary to amend a libel before evidence can be admitted carrying libellant's claim for wages back of the date named in the original libel. Pinkham *v.* Rutan, 31 Fed. Rep. 496.

Substitution of Claimants.—Substitution of one claimant for another. Rights of sureties. Boden *v.* Demwolf, 56 Fed. Rep. 846.

Supplemental Pleadings. — See 841 Tons of Iron Ore, 15 Fed. Rep. 615; The Tubal Cain, 9 Fed. Rep. 834; Henderson *v.* 300 Tons Iron Ore, 38 Fed. Rep. 36; Thomas *v.* Gray, B. & H. Adm. 493.

4. The Imogene M. Terry, 19 Fed. Rep. 463; Schooner Edwin Post, 6 Fed. Rep. 314. See The Monte A., 12 Fed. Rep. 331; The Corozal, 19 Fed. Rep. 655; The Manhasset, 19 Fed. Rep. 430; The George Taulane, 22 Fed. Rep. 799; The J. E. Trudeau, 54 Fed. Rep. 907. But the court will not allow an amendment which changes the entire

impose terms on the party desiring to amend.[1]

VII. Libellant's Stipulation for Costs.—With the libel must be filed a stipulation for costs, which is an unsealed agreement entered into by the libellant, with sureties, to pay all costs which may be awarded against him in case he fails in his suit.[2]

VIII. Joinder of Rem and Personam Proceedings—Right to Join.—In certain cases the rules of the supreme court permit a libellant to join *rem* and *personam* proceedings; in certain cases they forbid such joinder; in other cases they are silent.[3] But in cases

nature of the claim, to the prejudice of the other parties. The Alanson Sumner, 28 Fed. Rep. 670; The General Sedgwick, 29 Fed. Rep. 606; The Keystone, 31 Fed. Rep. 412; The Thomas Melville, 31 Fed. Rep. 486, New Haven Steamboat Co. *v.* The Mayor, 36 Fed. Rep. 716.

1. Rev. Sts. sec. 954; The Epwin Post, 6 Fed. Rep. 314; The Maryland, 19 Fed. Rep. 551; The Monte A., 12 Fed. Rep. 331; The George Taulane, 22 Fed. Rep. 799.

2. Rawson *v.* Lyon, 23 Fed. Rep. 107.

Amount of Stipulation.—The amounts required vary in the different districts. In the New York districts, in cases *in rem*, the stipulation must be in the sum of $250; in cases *in personam*, $100. A resident party need supply but one surety; non-residents must supply two; and all must justify in double the amount of the undertaking.

When not Required.—The United States is never required to give stipulations for costs. Under the rules of the Eastern and Southern Districts of New York, seamen, and sailors coming into port in possession of property saved, petitioners for money in the Registry of Court, and the cities of New York and Brooklyn need give no stipulations. And in any case, on proper cause shown, the court has the power to dispense with the stipulation and allow the libellant to prosecute *in forma pauperis*. Thomas *v.* Thorwegan, 27 Fed. Rep. 400. See The Phœnix, 36 Fed. Rep. 272. Chap. 209 of the Laws of 1892 (Sts. at L., vol. 27, p. 252) apparently permits a *citizen* to sue *in forma pauperis* without application to the court, and on the filing of a libel accompanied by an affidavit in the form of that statute process will issue as of course. If libellant be not a citizen, or there are any special circumstances, the order of court is still necessary. This statute seems to refer only to exemption from *prepayment* of costs. The court also has power to exact security in cases usually commenced without it. Cole *v.* Tollison, 40 Fed. Rep. 303. Seamen and poor suitors are not required to give security. The Shelbourne, 30 Fed. Rep. 510; The Phœnix, 36 Fed. Rep. 272; Bradford *v.* Bradford, 2 Flip. (U. S.) 281; Polydore *v.* Prince, 1 Ware (U. S.) 402; Thomas *v.* Thorwegan, 27 Fed. Rep. 400. *Compare* Wheatley *v.* Hotchkiss, 1 Sprague (U. S.) 225.

Waiver.—The rule requiring stipulation for costs may be waived. Polydore *v.* Prince, 1 Ware (U. S.) 402.

3. Thus in Supreme Court Rules, 12 to 20 are named cases of supplies, wages, pilotage, collision, assault, marine hypothecations, bottomry, and salvage, and the rules state specifically whether the ship, freight, owner, or master, or any one or more of them, may be proceeded against. See Bondies *v.* Sherwood, 22 How. (U. S.) 214; The Alida, 12 Fed. Rep. 343; The Guiding Star, 1 Fed. Rep. 347; The Clatsop Chief, 8 Fed. Rep. 163; The Corsair, 145 U. S. 335. In a suit *in rem* to recover possession of a wreck, it is improper to join the wreckmaster. The Margaretta, 29 Fed. Rep. 324. Joinder of *in rem* and *in personam* suits for salvage against the same goods is not permitted. Nott *v.* Steamboat Sabine, 2 Woods (U. S.) 211. When a libel is filed against a vessel and its master for a cause of action in which both may be liable, the libellant will not be compelled to elect between his remedy *in rem* and *in personam*. The Zenobia, Abb. Adm. 48. Separate trespasses by defendants who are not jointly liable. Thomas *v* Law, 2 Sumn. (U. S.) 1; Roberts *v.* Skolfield, 3 Ware (U. S.) 184. Action for assault and action for wages. Pratt *v.* Thomas, 1 Ware (U. S.) 437; Borden *v.* Hiern, B. & H. Adm. 293. An objection to a suit be-

where it is not expressly forbidden by those rules, the courts have generally agreed that the cause *in rem* may be united in one suit with the cause *in personam.*[1]

One Suit as Bar to Another.—Analogous to the above is the question whether a suit *in rem* is a bar to a suit *in personam* on the same cause of action. It is not, even in cases of collision, where the two suits cannot be joined, unless in case of special hardship caused by the bringing of the two suits. One may, however, be stayed until the hearing of the other.[2]

IX. FOREIGN ATTACHMENT—1. Generally.—The Supreme Court rules provide that the mesne process[3] may be, among other things, by a warrant of arrest of the person of the defendant, with a clause or order therein, if he cannot be found, to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishee named therein.[4] This is called *foreign attachment.*

cause of such joinder should be taken by exception before answer. The City of Carlisle, 39 Fed. Rep. 807. A suit *in personam* will not lie against a master for failing to sign a clear bill of lading, but the remedy is against the owners, or *in rem* against the vessel. Paterson *v.* Dakin, 31 Fed. Rep. 682. Collision. Ward *v.* The Ogdensburg, 5 McLean (U. S.) 622; Mayor *v.* White, 59 Fed. Rep. 617. *In rem* against the vessel and *in personam* against the master may be joined. Newell *v.* Norton, 3 Wall. (U. S.) 257. Wages. Sloop Merchant, Abb. Adm. 1. Contract. Henry *v.* The Josie, 59 Fed. Rep. 782. A proceeding against the vessel and one against the cargo may be joined when both arise out of the same transaction. The Dauntless, 7 Fed. Rep. 366. The question of the right to sue ship or freight, or master or owner, for particular services does not depend on the 12th rule, but upon the general admiralty and maritime law. Brig Eledora, 2 Ben. (U. S.) 31.

1. In suits on charter-parties and contracts of affreightment it is settled that one may join the two remedies. The Director, 26 Fed. Rep. 703; The Baracoa, 44 Fed. Rep. 102; Vaughan *v.* 630 Casks, 7 Ben. (U. S.) 506; The J. F. Warner, 22 Fed. Rep. 345; The City of Carlisle, 14 Sawy. (U. S.) 179; The Monte A., 12 Fed. Rep. 331; The Prinz Georg, 19 Fed. Rep. 653.

The 59th Rule.—This right to join the different proceedings has been considerably enlarged since the adoption of the 59th Rule, permitting one sued to bring into the same suit, by petition, an alleged joint tort-feasor. In the case of The City of Lincoln, 25 Fed. Rep. 835, the original libel was filed against the ship to recover for damage done to cargo in discharging it upon a wharf. The ship petitioned that the wharfinger might be made a codefendant, and the court, under the analogy of the 59th Rule, granted the petition and made the owner of the pier codefendant with the ship, and on final hearing each was compelled to pay one-half the damages. In the case of Joice *v.* Canal Boats, 32 Fed. Rep. 553, the court held that the 15th Rule, prohibiting joinder of owner and vessel in cases of collision, referred only to the joinder of the vessel and *her own* owners, and that even in cases of collision there could be joined one of the offending vessels with the *owners* of another vessel, alleged to be liable for the same collision. See The Alert, 40 Fed. Rep. 836. *Contra*, The Young America, 1 Brown Adm. 462.

2. Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. Rep. 279; Watson *v.* Jones, 13 Wall. (U. S.) 715; Buck *v.* Colbath, 3 Wall. (U. S.) 334; Providence Washington Ins. Co. *v.* Wager, 35 Fed. Rep. 364; The Normandie, 40 Fed. Rep. 590, *affirmed* 58 Fed. Rep. 427. See The City of New York, 25 Fed. Rep. 149.

3. See *post*, X.

4. Adm. Rule 2; Ben. Adm. § 426 *et seq.* The Alpena, 4 Fed. Rep. 361. The process of foreign attachment is gov-

2. Garnishment.—If the defendant has no goods and chattels which can be found by the marshal within the district, then his credits and effects in the hands of third parties may be attached. And as it is not necessary for the marshal to delay in attaching goods and chattels in order to find and make service upon the de-

erned primarily by the rules of the Supreme Court. Shorey *v.* Rennell, 1 Sprague (U. S.) 418.

The clause of Rule 2 providing that goods may be attached if defendant cannot be found does not mean found for the purpose of arrest, so as to justify an attachment in a case where defendant is actually within and a resident of the district, but cannot be arrested because of the state law. The Bremena *v.* Card, 38 Fed. Rep. 144.

The Practice is Old, dating at least from the time of Queen Elizabeth, being fully set forth in Clerke's Praxis, a manual of admiralty practice published at that time. Clerke, Praxis Curiæ Admiralitatis Angliæ, tit. 24–32. See Smith *v.* Miln, Abb. Adm. 373.

The Modern Practice under the Supreme Court rule is not to apply for a warrant of arrest for the defendant, but for a simple monition to him to appear and answer the libel, and if he cannot be found by the marshal, and the monition in consequence cannot be served, then the marshal may attach the respondent's goods and chattels. When the marshal returns that he has made reasonable efforts to find defendant before attaching the property, the attachment will not be set aside. Harriman *v.* Rockaway Beach Pier Co., 5 Fed. Rep. 461. An iron pier is not "goods and chattels." *Id.*

If such Goods and Chattels cannot be Found, then the marshal may attach his credits and effects in the hands of a third party. Gaines *v.* Travis, Abb. Adm. 422; Gardner *v.* Isaacson, Abb. Adm. 141. See Chiesa *v.* Conover, 36 Fed. Rep. 334. Attachable credit. Dent *v.* Radmann, 1 Fed. Rep. 882.

The Object of the Practice is to compel the *appearance* of the defendant and render him or his property subject to the decree. Smith *v.* Miln, Abb. Adm. 373. It is not necessary that he be a foreigner or a non-resident of the state. Atkins *v.* Fiber Disintegrating Co., 18 Wall. (U. S.) 272.

Non-Residence—Service of Process.—It is not even necessary that he be a non-resident of the district. The sole requisite of the right to so attach is that he *be not found* within the district by the marshal to be served with the citation. Grace *v.* Evans, 2 Ben. (U. S.) 479. A libel *in personam* in admiralty is not a civil suit within the meaning of the eleventh section of the Judiciary Act; and it is sufficient service of process to give the court jurisdiction if property of the respondent found in the district has been attached, irrespective of the residence or presence of the respondent. Manchester Hopkins *v.* Hotchkiss, 13 Int. Rev. Rec. 125, 10 Am. L. Reg. (N. S.) 379; Atkins *v.* Fiber Disintegrating Co., 18 Wall. (U. S.) 272; Bouysson *v.* Miller, Bee Adm. 186; Clarke *v.* New Jersey Steam Nav. Co., 1 Story (U. S.) 531. A court of admiralty may arrest the person, the property, or, by a foreign attachment, the choses in action, of a tort-feasor. The Invincible, 2 Gall. (U. S.) 29. When, in a suit *in personam*, defendant's property has been attached, but process has not been personally served, a decree cannot be made against the defendant personally. Boyd *v.* Urquhart, 1 Sprague (U. S.) 423.

The Marshal is not Bound to Make any Extended Search for the Defendant within the district. He should go to the defendant's residence or his place of business; but if he cannot be found at such place, the marshal is justified in making a return that, not finding the defendant, he thereupon attached his goods and chattels. See International Grain Ceiling Co. *v.* Dill, 10 Ben. (U. S.) 62.

Names of Non-Residents.—When the owners of a vessel are all non-residents it is not necessary to specify them all by name before obtaining an attachment of the vessel. Card *v.* Hines, 39 Fed. Rep. 818. See Card *v.* Hines, 35 Fed. Rep. 598. When suit has been brought against one of two shipowners, and property attached thereunder and released before the name of the other owner is introduced, the suit must be regarded as against the original respondent only. National Board of Marine Underwriters *v.* Melchers, 45 Fed. Rep. 643.

fendant, so it is not necessary for the marshal to lose time in searching for his goods and chattels when he knows of credits and effects belonging to him which may be attached in the hands of a third party. Such third party is called a *garnishee*, and such attachment is called a *garnishment* of property.[1]

3. Defendant's Default.—If the marshal returns that he has not found the defendant, but has attached his goods and chattels, the libellant may take the default of the defendant, and obtain an order for the sale of the goods and chattels to satisfy his claim. But the defendant may at any time, either before or on the return of process, obtain the release of his goods and chattels on giving proper stipulations to appear and abide by all orders of the court.[2]

4. Issue as to Ownership of Credits and Effects.—When the defendant does not appear, the garnishee may come in and deny that the credits and effects attached belong to the defendant. This raises a preliminary issue which must be determined before default can be taken. If it is admitted that the credits and effects are

1. **Garnishment Process.**—Property is attached in the hands of a third party by the service of a copy of the process on the person who holds the credits and effects, the marshal at the time exhibiting to such person the original process. Cushing *v.* Laird, 4 Ben. (U. S.) 70.

Disposal and Ownership of Property.—This cites the garnishee to appear in court on the return day of the process, and pending such return day the garnishee may not dispose of the property attached, except by delivering it to the marshal, without rendering himself liable to be attached for contempt. Hence the name *garnishee*, that is, one who is *garnished* or *warned*. Bouv. L. Dict. tit. *Garnish*. The service of a monition by a marshal upon a garnishee does not necessarily place the fund out of reach of an officer of a state court. The Olivia A. Carrigan, 7 Fed. Rep. 507.

The garnishee may at once deliver up to the marshal the specified credits and effects, and thereafter pay no further attention to the matter, the marshal returning the fact to court and becoming responsible for the credits and effects, or depositing them in the registry of court. A garnishee may always be compelled to answer on oath as to the debts, credits, or effects of the defendant in his hands. Adm. Rule 37; Ben. Adm. § 459; Shorey *v.* Rennell, Sprague (U. S.) 418. And he may deny the fact that the property so attached belongs to the respondent. He must then appear on the return of process and make oath as to the ownership of the property and his interest in it, and if there is part that he does not claim, he must pay that part into court or give a stipulation to abide the event. In default of this he may be attached for contempt.

2. It must be always remembered that as the reason for a foreign attachment is simply to compel an *appearance* (see Reed *v.* Hussey, B. & H. Adm. 525), such attachment can always be avoided by an appearance. As the marshal cannot attach if he can find the defendant to serve him, so if the defendant learns of the proceeding and enters an appearance before his property is attached, no attachment can thereafter be made, and the defendant is not obliged to give any stipulation other than the ordinary stipulation in $100 for costs, exacted in any suit *in personam*. But when a foreign attachment issued upon a libel did not rightly go against certain property in the hands of third parties, and such third parties might therefore have taken no notice of the libel, but in fact did appear and answer the libel, the court considered the case upon the same footing as if the property had been attached and the claimants had intervened in respect thereto. Reed *v.* Hussey, B. & H. Adm. 525.

the defendant's, the garnishee need not appear, but may let the case take its course, and pay over the credits and effects to the marshal, as stated above, or as ordered by the court on final decree. But if he denies that the defendant is the true owner, it is *his* duty to appear on the return of the monition, and so plead.[1]

X. **Mesne Process.**—On the filing of the libel, with proper stipulation for costs, in the office of the clerk, the latter issues, as of course, a writ or order to the marshal, which is called *process*. This is issued in the name of the President of the United States, tested by the judge of the court, and signed and sealed by the clerk. It is directed to the marshal, and, after setting forth the facts as to the filing of the libel, it directs the marshal to attach and safely keep the said property, if the action be *in rem*, or to arrest or cite the defendant to answer, or to attach his goods and chattels, if he cannot be found, according to the various prayers in the different kinds of causes.[2]

Duty of Marshal.—This process is delivered by the clerk or the proctor for the libellant to the marshal, by whom it is executed; that is, the marshal serves a citation on the defendant, or attaches his goods, or seizes the *res* proceeded against.[3]

1. **This Issue, as to Ownership** of the credits and effects, may be either put upon the general calendar of the court, and tried as any other issue is tried, or the matter may take the form of a reference, and be sent to a commissioner to determine the true ownership. The practice is not uniform in this regard, and must depend more or less on circumstances. When the subject-matter is small or the question little doubtful, a reference would probably be ordered; otherwise where the questions are serious. And, in any case, the judge, on cause shown, will undoubtedly order the case on the general calendar, for hearing in open court. On the determination of this issue, if the court finds that the credits and effects attached are those of the defendant, the latter's default may be entered, and a final decree in favor of the libellant entered as in any case of default.

2. **Warrant of Arrest.**—Adm. Rule 2. But in suits *in personam* no warrants of arrest either of the person or property of the defendant shall issue for a sum exceeding $500, except by special order on cause shown. Adm. Rule 7. And see Chiesa *v.* Conover, 36 Fed. Rep. 334; The Bremena *v.* Card, 38 Fed. Rep. 144. A warrant of arrest in admiralty may issue on Sunday. Pearson *v.* The Alsalfa, 44 Fed. Rep. 358.

3. Adm. Rule 8, 9. In admiralty, service of process is never made by any one other than the marshal and his deputies, unless in a case where the marshal is interested, when the court will appoint some disinterested party to take his place. Rev. Sts. § 922.

The arrest and detention of a vessel under admiralty process, though the claim prove untenable, does not entitle the owner to damages. Swedish Bark Adolph, 5 Fed. Rep. 114; Kemp Brown, 43 Fed. Rep. 391; Portland Shipping Co. *v.* The Alex. Gibson, 44 Fed Rep. 371; Henderson *v.* 300 Tons Ire Ore, 38 Fed. Rep. 36; The Wasco, 53 Fed. Rep. 546. But see Briggs Excursion Co. *v.* Fleming, 40 Fed. Rep. 593.

Filing libel and issuing attachment without seizure are not constructive notice of the pendency of the suit. The Robert Gaskin, 9 Fed. Rep. 62. See Daily *v.* Doe, 3 Fed. Rep. 903.

Destruction of Property Seized under Judicial Process in admiralty, without fault of the debtor, works a payment of the debt to the extent of the value of the property. The Flavilla, 17 Fed. Rep. 399.

A Seizure is Necessary to Give the Court Jurisdiction for the purposes of forfeiture. The Washington, 4 Blatchf. (U. S.) 101; The Schooner Silver Spring, 1 Sprague (U. S.) 551. A valid seizure by the marshal gives

XI. PROPERTY EXEMPT FROM SEIZURE.—Certain property cannot be seized *in rem.*[1] Thus property held by a sheriff cannot be attached.[2] Nor can property in the hands of a receiver appointed by a state court, without first obtaining permission of such court.[3]

Property in the hands of the collector of the port may be seized by service of the monition on the collector, but the marshal cannot take the property into his possession without special order of the court,[4] the collector having the right to first collect the duties; after which it would be his duty to turn over the surplus to the marshal.

As the government does not allow itself to be sued, so its prop-

the court jurisdiction, which is not lost by an accidental, fraudulent, or improvident removal of the *res* from the custody of the marshal. The Rio Grande, 23 Wall. (U. S.) 458.

When Defendant is Found and Served in the district, and is not liable to arrest, the court cannot order him to give security under penalty of imprisonment, but may on motion order his goods attached. Louisiana Ins. Co. *v.* Nickerson, 2 Lowell (U. S.) 310.

One who has Attached a Vessel may be compelled to proceed to an adjudication. Burke *v.* Trevitt, 1 Mason (U. S.) 96.

Invalid State Attachment.—A marshal attached a vessel, which was thereafter fraudulently taken out of his possession and the jurisdiction, and attached out of the state court. *Held*, that the state attachment was invalid; that the original attachment by the marshal held good; and that the federal court of the district into which she had been removed would restore her to the federal court of the district where she had been originally attached. Brig Joseph Gorham, 7 Law Rep. 135.

1. See Moran *v.* Sturges, 154 U. S. 256.

Real Estate is not ordinarily subject to attachment under mesne process in admiralty. Judge Lowell, in Louisiana Ins. Co. *v.* Nickerson, 2 Lowell (U. S.) 311, says: "It [the admiralty] retains from the ancient times of prohibitory legislation the inability to attach land or any interest therein by process out of the admiralty." If this is the origin of the inability to attach real estate, then, as the admiralty of this country has so largely shaken itself free from the bonds of the common-law prohibitions, it would seem that the right to attach real estate might now exist. There is no apparent reason why land should not be attachable as well as goods and chattels. And process on executions in admiralty always issues against lands as well as goods and chattels. See Ben. Adm. (3d ed.), § 433*a*.

2. **Property in Possession of Sheriff.**—Taylor *v.* Carryl, 20 How. (U. S.) 583; The Orpheus 3 Ware (U. S.) 143; The Olivia A. Carrigan, 7 Fed. Rep. 507; The Julia Ann, 1 Sprague (U. S.) 382. A sheriff desiring to protect his own attachment of a vessel against a seizure by a marshal should apply to the state court for protection, or bring the facts before the federal court by petition, and pray that the marshal be withdrawn, He should not appear in the admiralty suit and set up a claim to the vessel. Steamer Circassian, 1 Ben. (U. S.) 128.

3. The Red Wing, 14 Fed. Rep. 869; The E. L. Cain, 45 Fed. Rep. 367; The Willamette Valley, 63 Fed. Rep. 130; Moran *v.* Sturges, 154 U. S. 256. But see Ferryboats Roslyn and Midland, 9 Ben. (U. S.) 119; Paxton *v.* Cunningham, 63 Fed. Rep. 132.

Contempt.—Unless such permission be obtained, libellant may be called upon by the state court to show cause why he should not be punished for contempt for interference with the officers of that court. When receiver is in a foreign jurisdiction, the permission of the foreign court need not be obtained. The Willamette Valley, 62 Fed. Rep. 293.

Property in the Hands of an Assignee is not exempt. The James Roy, 59 Fed. Rep. 784; The J. G. Chapman, 62 *Id.* 939; The City of Frankfort, 62 *Id.* 1006.

4. Two Hundred and Fifty Tons of Salt, 5 Fed. Rep. 216; U. S. *v.* One Case of Silk, 4 Ben. (U. S.) 526.

erty cannot be seized,[1] and the public property of any state, or municipal corporation, such as a police-boat, cannot be attached [2] And the statutes forbid the libelling of a canal-boat for wages.[3]

XII. Return of Process—1. Time for Return.—In every case it is the marshal's duty to inform the court of what he has done under the process of the court. For this purpose each court has certain regular days which are called *return* days, on which the process issued is *returned* to the court, with the marshal's indorsement as to his action thereunder.[4]

In Suits In Personam process is returnable on the next general return day after the filing of the libel, and the same is the case in possessory actions, except that in the latter at least three days should elapse between the filing of the libel and the return, and in such actions the answer should be filed on such return day.[5]

2. Contents.—The return of the marshal is a statement of what he has done, as, that he has attached the defendant vessel, and has given or not given notice of the claim to any one who may be interested; or, that he has cited the defendant to answer, or has arrested him.[6]

3. Appearance and Default.—On the return day the process is called in open court. It is then the duty of the respondent to enter his appearance and file his answer to the libel, or obtain further time in which to answer. If the process is returned by the marshal duly served, and the respondent fails to appear, the libellant may have an order pronouncing him in contumacy and *default*, and the libel will be adjudged to be taken *pro confesso*

1. The Siren, 7 Wall. (U. S.) 152; The Fidelity, 16 Blatch. (U. S.) 569; Two Hundred and Fifty Tons of Salt, 5 Fed. Rep. 216; The F. C. Latrobe, 28 Fed. Rep. 377. See Schooner Othello, 1 Ben. (U. S.) 43.

2. The Fidelity, 16 Blatchf. (U. S.) 569; The Protector, 20 Fed. Rep. 207; The F. C. Latrobe, 28 Fed. Rep. 377. But the fact that there is no lien against the vessel does not prevent a suit *in personam*. *Id.* See Tebo *v.* Mayor, 61 Fed. Rep. 692.

3. Rev. Sts. § 4251. As to what is a canal-boat, see The Wm. L. Norman, 49 Fed. Rep. 285.

4. **False Return.**—When the marshal's return is clearly false, the court may set aside all proceedings. International Grain Ceiling Co. *v.* Dill, 10 Ben. (U. S.) 92.

Return as to Attachment.—A return by the marshal that he has attached a vessel by delivering a copy of the writ to her owner or master does not import any seizure of the vessel. Brennan *v.* Schooner Anna P. Dorr, 4 Fed. Rep. 459.

In Suits In Rem two full weeks have to elapse between the issuing of process and its return. If, therefore, the regular return day is Tuesday, and the libel is filed and process issued on Wednesday, the process will not be returned to court until two weeks from the Tuesday which follows the Wednesday on which the libel was filed.

5. **In Possessory Suits** property will not ordinarily be released on bail, especially when the cause may be put at issue and tried forthwith. Schooner Rainbow, 1 Ben. (U. S.) 40.

6. **Alias Process.**—If the marshal has not been able to find defendant or seize the vessel before the return day, he returns that fact, on which libellant may apply to the court for what is called an *alias* process, which is practically a reissuing of the original process to enable the marshal to make another attempt to serve. See Hardy *v.* Moore, 4 Fed. Rep. 843.

against him, and the court will hear the cause *ex parte* and grant the libellant such relief as may be just.[1]

4. Claim.—In ordinary suits *in personam*, where the process is a simple citation to appear and answer, nothing is ordinarily gained by filing a notice of appearance before the return day. But when the goods or the vessel of a defendant have been seized, he may appear at once and file a *claim* and *stipulations*.[2] The claim is a sworn statement as to the interest of the claimant in the thing seized, made either by the owner himself, or by an agent of the owner, or one who has some interest in the *res*.[3]

5. Respondent's Stipulation for Costs.—Before the claim will be received on file, however, a stipulation for costs must be filed by the respondent.[4] And in suits *in personam*, where no claim is filed, a stipulation for costs must be filed with respondent's notice of appearance.[5]

1. Adm. Rule 29. Rostron *v.* The Water Witch, 44 Fed. Rep. 95. A decree *pro confesso* is not final. The Lopez, 43 Fed. Rep. 95. After a default claimant cannot, as matter of right, obtain the release of the property by giving bond under Rev. Sts. sec. 941. Sloop Martha C. Burnite, 10 Ben. (U. S.) 196.

But it is not necessary for a respondent to wait until the return day of the process before entering his appearance. Indeed, in most cases it would be a hardship for one arrested to remain in custody, or one whose vessel or goods have been seized to leave them in the hands of the marshal, until the regular return of the process. A respondent arrested may therefore at once give bail, with sureties to appear and abide the event of the suit; or he may appear and claim the property seized if the suit is *in rem*, and give stipulations to answer any judgment against it, and thereupon his property will be released. And this release may be had at any time on filing appearance and proper stipulations in the clerk's office—on the very day of the attachment, if necessary. On filing stipulations the clerk issues an order to the marshal to release the property. The giving of a stipulation cures any defect in service of the process. The Acadia, Brown Adm. 73. After claimant has given a stipulation, a forcible seizure of the vessel by him is not a contempt of court. U. S. *v.* Towns, 7 Ben. (U. S.) 444.

2. Filing stipulations without claim. See Todd *v.* Bark Tulchen, 2 Fed. Rep. 600. After appearance and answer, it is too late to move to dismiss the libel because of a misnomer. Mina *v.* I. & V. Florio S. S. Co., 23 Fed. Rep. 915.

3. Schooner Adeline, 9 Cranch. (U. S.) 286; U. S. *v.* Casks of Wine, 1 Pet. (U. S.) 547. Claimant, who is. The Two Marys, 12 Fed. Rep. 152; Bark Laurens, Abb. Adm. 302. The first step in a defense is to interpose a claim. Who may claim and how. Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713.

The Master of a Vessel in a Foreign Port frequently claims on behalf of his absent owners. And a consul of a foreign government may claim, on behalf of subjects of his country, a vessel seized as prize. The Bello Corrunes, 6 Wheat. (U. S.) 153; The London Packet, 1 Mason (U. S.) 14; Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713.

Contents of Claim.—The claim states the interest of the claimant, or the ownership, and that no other person is owner, and if made by an agent, that he is duly authorized thereto by the owner, and if by the master, that he is the lawful bailee thereof for the owner, and should end with a short prayer to the court for permission to defend the suit. (Adm. Rule 26). A claim is a sufficient notice of appearance.

4. See Rawson *v.* Lyon, 15 Fed. Rep. 831.

5. Adm. Rule 25.

This Stipulation is Similar to Libellant's Stipulation filed with the libel, in the sum of two hundred and fifty dollars in cases *in rem* and one hundred dollars in cases *in personam*, and is signed by the defendant and at least

6. Stipulations for Release.—When a defendant has been arrested in a suit *in personam* or a ship or goods have been attached in a proceeding *in rem*, and the defendant desires a release, he must give another undertaking in addition to the stipulation for costs.[1]

Form of Undertaking.—In suits *in personam* where defendant is arrested, this undertaking is in the form of a bond or stipulation conditioned that the defendant will appear and abide by all orders of the court, interlocutory or final, and pay the money awarded by the final decree rendered therein by the court to which the process is returnable, or by any appellate court.[2]

Ordinary Penal Bond.—And in suits *in personam*, where property is attached, and in suits *in rem*, the undertaking may be an ordinary

one surety resident in the district. A non-resident defendant must supply two sureties. An objection that only one surety has signed the stipulation must be seasonably made. The Infanta, Abb. Adm. 327.

1. **In all Proper Cases of Seizure** under any statute, the invariable practice of the district court has been to take bonds for the property, on application by claimant. The Brig Alligator, 1 Gall. (U. S.) 145.

Waiver of Defects.—The giving of a stipulation for the release of a vessel is a waiver of any defect in the service of the process. The Acadia, Brown Adm. 73. The giving of a stipulation is not necessarily a waiver of the right to deny the legality of the custody of the marshal. Ferryboats Roslyn and Midland, 9 Ben. (U. S) 119; The Berkeley, 58 Fed. Rep. 920.

Vessel Never in Custody—A stipulation for the demand, given under notice of the filing of the libel, is valid though the vessel was never in custody. *Id.*

In Possessory Suits property will not ordinarily be released on bail. Schooner Rainbow, 1 Ben. (U. S.) 40; Muir *v.* Brig Brisk, 4 Ben. (U. S.) 252.

In Cases of Prize, never before a hearing. See *post*, § XX; The Diana, 2 Gall. (U. S.) 93.

The Owner of Cargo arrested for freight cannot be compelled to give bail for the value of the cargo; and he has also no right to give bail for freight which he acknowledges to be due. He should therefore pay the freight into court. The Freight Money of Canal-boat Monadnock, 5 Ben. (U. S.) 357.

When Goods in a Bonded Warehouse are libelled by the government, the claimant is entitled to have them on giving a bond for their value, not including the amount of duties chargeable on them. Four Cases Silk Ribbons, 1 Ben. (U. S.) 214.

Taking Proceeds from Registry.—A libellant may take proceeds from the registry on giving bonds, when. Bark Archer, 10 Ben. (U. S.) 99.

2. Adm. Rule 3. A bond to perform the decree of the court means the court which shall finally decide the cause. U. S. *v.* Schooner Little Charles, 1 Marsh. (U. S.) 380. A bond executed to the marshal is valid though valuation was not made by commissioners appointed by the court. *Id.* In a joint and several bond, when one obligor dies, the court will proceed against the survivors, or, at the option of plaintiffs, against the representatives of the deceased. Ship Octavia, 1 Mason (U. S.) 149. Sureties on a bond to appear and abide may surrender their principal, when. Lane *v.* Townsend, 1 Ware (U. S.) 289. But the practice of the admiralty does not admit of the surrender of the principal in exoneration of bail. *Id.*; Cure *v.* Bullus, Abb. Adm. 555. After judgment against a respondent in suit *in personam* it is not necessary to take out an execution and have it returned in order to charge the bail. *In re* Snow, 2 Curt. (U. S.) 485. A bond to secure the appearance of a party to answer a libel in admiralty is to be considered not as a bail bond at common law, but as an admiralty stipulation. Lane *v.* Townsend, 1 Ware (U. S.) 289. A stipulation by a party arrested in admiralty to abide the decree of the court is in proper form, and he cannot be compelled to stipulate to pay the amount decreed against him. Grace *v.* Evans, 3 Ben. (U. S.) 479.

penal bond to the libellant, under seal, to abide the event and pay the judgment, if rendered. But the two customary undertakings to release property seized in an admiralty cause are the *stipulation for value*, and the *bond to the marshal* under the act of 1847.[1]

7. The Stipulation for Value is an instrument reciting the institution of the suit and the appearance and claim of the defendant; it is executed by the defendant and sureties, and contains the consent of the sureties that in case of default or contumacy on the part of the defendant or the sureties, execution to the amount of the stipulation may issue against their goods, chattels, and lands.[2]

The Amount of this Stipulation is supposed to be the full value of the property seized (in a bond to the marshal, double the value), but it is often a matter of agreement between the parties to the suit or their proctors. Thus, if a valuable vessel is libelled for a small claim, the libellant's proctors will usually agree that, for the purposes of that suit, the value of the vessel may be considered to be an amount sufficient to cover libellant's claim and interest.[3]

1. Adm. Rule 4. See Pope *v.* Seckworth, 46 Fed. Rep. 858. Rev. Sts. sec. 941; Poland *v.* Cargo of Brig Sparton, 1 Ware (U. S.) 134. A release bond given on seizure under an invalid warrant of arrest is not a waiver of the illegality nor an appearance in the suit. The Berkeley, 58 Fed. Rep. 920.

Substitutes for Property.—Bonds given in admiralty on release of property seized are substitutes for the property. The Palmyra, 12 Wheat. (U. S.) 1; Steamer Webb, 14 Wall. (U. S.) 406; The Wanata, 95 U. S. 611; U. S. *v.* Ames, 99 U. S. 35. When a vessel is released on a bond, her subsequent loss and the filing of a petition in limitation of liability is no defense to the libel. The Percy Birdsall, 55 Fed. Rep. 683.

2. **Amount of Stipulation.**—A surety cannot be compelled to pay more than the amount expressed in his stipulation. The Wanata, 95 U. S. 600; The Ann Caroline, 2 Wall. (U. S.) 538; Steamer Webb, 14 Wall. (U. S.) 406; Jaycox *v.* Chapman, 10 Ben. (U. S.) 517. A release bond is not rendered invalid by the omission of the specified sum to be paid in case of a default. The Haytian Republic, 59 Fed. Rep. 476.

Interest.—Agents or sureties are responsible as principals for interest on their stipulations when they appear and defend the suit. The Wanata, 95 U. S. 612; The Maggie J. Smith, 123 U.S. 356; The Maggie M., 33 Fed. Rep. 591. When obligors in a stipulation will be liable for interest. Steam Propeller Belle, 5 Ben. (U. S.) 57. Under a stipulation for value the obligors are not liable for interest on the sum stipulated, except on default in complying with the terms of the stipulation. The Sydney, 47 Fed. Rep. 260.

Condition of Bond.—Under Adm. Rule 4, which provides that an attachment may be dissolved on defendant giving bond to abide by all orders of court, and pay the amount awarded by final decree, attached property cannot be released on bond conditioned for payment of the value of the property released, when such property is less than the debt sued for. Pope *v.* Seckworth, 46 Fed. Rep. 858.

Waiver and Appearance.—The submission of the sureties to the jurisdiction of the court is not a waiver of the irregularity and does not operate as an appearance in the suit, when the vessel was seized and the stipulation given under an invalid warrant of arrest. The Berkeley, 58 Fed. Rep. 920.

3. See The Monarch, 30 Fed. Rep. 283. But when the value is fixed by consent, a motion to reduce the amount of the stipulation cannot be made. Otherwise when the amount has been fixed by the court or under Rev. Sts. § 941. *Id.* Or the court will fix the amount when claimant contends that the amount exacted by libellant is exorbitant.

On the other hand, when the claim is equal to or greater than the value of the vessel, the claimant will be unwilling to give a stipulation for more than her value, beyond which value he cannot be held liable.[1]

Appraisal.—It is therefore necessary to ascertain the actual value of the vessel, and this is done by *appraisal* (Adm. Rule 11.) Claimant applies to the court, on notice to libellant, setting forth by affidavit the claim against his vessel, and prays for the appointment of appraisers, which appointment is usually a matter of course, the libellant merely being heard as to their disinterestedness or competency. Having appraised the vessel, the appraisers file a report of the appraisal in the clerk's office, and the stipulation for value is given in that amount. It is filed in the clerk's office.[2]

Bond to Marshal—Form.—A bond to the marshal is in the form of a penal bond, under seal, to the marshal of the district, in double the amount of the libellant's claim, reciting the filing of the libel, and the filing of the claim and stipulation for costs, and conditioned that the claimant shall abide by and perform the decree of the court, or otherwise the sureties will be answerable. The sureties justify in double the amount of the bond.[3]

Judgment Against Sureties.—On a bond to the marshal, summary judgment may be entered by the libellant against the sureties on the rendering of the decree; on a stipulation for value, the sureties are ordinarily called upon to show cause within four days why execution should not issue against them.[4]

1. Laws 1884, ch. 121, sec. 18; 23 Sts. at L. p. 57; The Wanata, 95 U. S. 600. When the claims exceed the value of the vessel, claimant may obtain a release on giving a stipulation for the value of the vessel, without including the freight. Bark Vivid, 3 Ben. (U. S.) 397.

2. **After Appraisal** and the giving of a stipulation claimant cannot insist that the value of the ship is less than the sum named in the stipulation. Ship Virgin *v.* Vyfhius, 8 Pet. (U. S.) 538.

3. See The City of Hartford, 11 Fed. Rep. 89. Under such a bond a decree may be entered against the obligors for libellant's claim and costs, provided the decree does not exceed the amount of the penalty of the bond. The Madgie, 31 Fed. Rep. 926.

Additional Stipulation.—After a bond to the marshal has been given, the libellant has no power to exact any additional stipulation. Gaines *v.* Travis, Abb. Adm. 297.

Release on Bond After Default.—It seems that a party cannot, as matter of right, obtain the release of a vessel from custody by giving a bond under section 94, Rev. Sts., after a default on return of process. Sloop Martha C. Burnite, 10 Ben. (U. S.) 196.

Filing and Approval.—Although drawn to the marshal, this bond is filed in the office of the clerk, like the stipulation for value, and, unlike a stipulation for value, may be approved by the collector of customs of the port, as well as by the court.

4. The Belgenland, 108 U. S. 153; The Sydney, 47 Fed. Rep. 260.

Rights and Liabilties of Sureties.—Sureties who have paid a judgment against their principal are subrogated to the rights of the original libellant. Carroll *v.* Steamboat T. P. Leathers, Newb. Adm. 432; The Madgie, 31 Fed. Rep. 926. See Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388; The Baltic, B. & H. Adm. 149.

A court of admiralty cannot compel a surety to appear and submit to an examination touching his property. The Blanche Page, 1 Blatchf. (U. S.) 1. Nor can it sequestrate his property. *Id.* Sureties cannot be arrested on

Increasing or Reducing Security.—And in all cases of stipulations in admiralty and maritime causes any party may apply to the court, on cause shown, for greater or further security;[1] or the claimant, on showing that libellant's claim is exaggerated, or a respondent, arrested in a suit *in personam*, may apply to have the amount reduced.[2] The whole matter is in the discretion of the court.[3]

8. Sale of Perishable Property.—Pending the return of process, the owner may desire to have it sold, as, for example, in case of attachment of a cargo of ice or fruit.[4] In such case, on proper proof of the liability of the property to deterioration, the court will always order the sale of the property and the deposit of the proceeds in the registry of court.[5]

9. Tender.—Before suit is brought, respondent may tender what he admits to be due. If this be refused, and suit is thereafter brought, the amount tendered should be deposited in court, and the fact of the tender alleged in the answer.[6] After suit

execution in an admiralty cause in New York. The Kentucky, 4 Blatchf. (U. S.) 448; The Blanche Page, 16 Blatchf. (U. S.) 1. But see Sawyer *v.* Oakman, 11 Blatchf. (U. S.) 65. The rules of the Supreme Court place a principal and his surety on bond or stipulation given on arrest *in personam* on the same footing; and summary process of execution may issue against the surety in the same way and at the same time as against the principal, and consequently without an order to show cause. Holmes *v.* Dodge, Abb. Adm. 60.

Justification of Sureties.—The sureties on any bond or stipulation, even the stipulation for costs, may be compelled to justify on demand therefor served on the proctors for the party giving the stipulation; in common practice the approval of the sufficiency of the sureties is usually sought from the libellant's proctor before the stipulations are filed. If libellant's . . . proctor or the court have approved the stipulation, the clerk, on the filing of the same, will at once issue a direction to the marshal to release the property. See The Jeanie Landles, 17 Fed. Rep. 91.

The addition of a new party, or any amendment which the court may make without affecting the identity of the suit, will not affect the undertaking of a surety. The Maggie Jones, 1 Flip. (U. S.) 635.

If libellant will not approve the stipulation, the sureties may be taken before the judge, and his approval obtained.

1. The Virgo, 13 Blatchf. (U. S.) 255; The City of Hartford, 11 Fed. Rep. 89.

2. Adm. Rule 6. But the fact that a libellant seems to have more than sufficient security, though having only the customary security, is no reason for depriving him of a part of it. Bark Archer, 9 Ben. (U. S.) 455.

3. **Reseizure of Property.**—The Union, 4 Blatchf. (U. S.) 90. See Steamship Jewess, 1 Ben. (U. S.) 21. Property which has once been arrested in admiralty and fairly discharged on stipulation cannot be arrested again in admiralty for the same cause of action. The White Squall, 4 Blatchf. (U. S.) 103; The Thales, 3 Ben. (U. S.) 327, 10 Blatchf. (U. S.) 203; The Old Concord, Brown Adm. 270; The City of Hartford, 11 Fed. Rep. 89. But on cause shown, as fraud, or the total failure of the sureties, the court can order the reseizure of a vessel. The Favorite, 2 Flip. (U. S.) 86. This should be by an order to the marshal made on affidavits showing cause therefor, directing him to take the vessel back into his custody under the original process, not by the issuing of a new process. But a regularly executed stipulation is *prima facie* good. The Snap, 24 Fed. Rep. 510.

4. Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542; The Cheshire, Blatchf. P. C. 165. Property whose value is being destroyed by charges during its custody, as storage charges, may be sold as perishable property.

5. Adm. Rule 10.

6. Answer should specify how much

brought, respondent may, without actually offering the cash to the libellant, pay what he admits to be due into court, adding thereto the libellant's costs to the date of the tender. If thereafter the libellant does not recover a decree for a larger sum than the tender, he must pay costs.[1]

10. Sale on Return—Publication.—On the return of process, regularly executed, property of any kind which has been attached may be sold to satisfy the libellant's claim, unless the respondent has appeared and secured the claim in some way.[2] Property is sold at auction, by the marshal, after notice given to all parties known to be interested and after publication of the notice of sale in a newspaper designated by the court.[3]

XIII. Respondent's Pleadings.—The process is now returned and the respondent has appeared in court, and has filed security for libellant's claim, and has obtained the release of his property. His first pleading may be an exception to the libel.

1. Exceptions to Libel.—Exceptions are of two kinds.

The peremptory exception is in one respect like a demurrer at common law.[4] If an absolute bar to the suit appears on the face of

is tendered on claim, and how much on costs. The Good Hope, 40 Fed. Rep. 608.

1. Payment of money into court is an unconditional admission that such an amount is due. Ye Seng Co. *v.* Corbitt, 9 Fed. Rep. 423. One has no right to give bail for freight moneys which he admits to be due, and he should pay the same into court on attachment of cargo for the freight; but he cannot be compelled to give bail for the cargo. Freight Money of Canal-boat Monadnock, 5 Ben. (U. S.) 357. A party who is not responsible for refusal of a tender should not pay costs. The Dennis Valentine, 47 Fed. Rep. 664, *affirmed* 57 Fed. Rep. 398.

Withdrawal of Money.—The libellant is usually allowed on motion and order to withdraw from court the money deposited as a tender by the defendant, or a portion thereof, even though he continue to press the suit. Such a withdrawal is not necessarily regarded as an acceptance of the tender. Higbie *v.* Tomatoes, 59 Fed. Rep. 783.

2. Adm. Rule 29.

3. But notice by publication is not always a necessity. Daily *v.* Doe, 3 Fed. Rep. 903.

Order of Publication—Short Order.—If it is probable from the first that the property will have to be sold, as in a case of salvage against a derelict, or the attachment of the property of an insolvent, an order of publication should be obtained on filing the libel, and the publication should be made daily until the return of the process. And in any case the ordinary period of publication is two weeks. But this period of publication may be reduced on cause shown, and a *short order* of publication may be had on application to the court. This is ordinarily a publication of the notice for six days, but the court may reduce even this time in its discretion. The desirability of obtaining an order for immediate sale on taking a default on return of process, and hence of having the publication completed by that day, renders the short order convenient when, for any reason, the publication has not been begun immediately on the filing of the libel.

4. Brig Attila, Crabbe (U. S.) 326. See Prince S.S. Co. *v.* Lehman, 39 Fed. Rep. 704. Exceptions in admiralty have the effect of a demurrer, and also that of a motion to make more definite and certain. Steamboat Transport, 1 Ben. (U. S.) 86.

Must State the Insufficiency.—An exception that a libel does not state facts sufficient to constitute a cause of action is not well taken unless it states in what the insufficiency consists. The Active, Deady (U. S.) 165; The Sea Gull, Chase's Dec. (U. S.) 145; A Raft of Spars, Abb. Adm. 291; Reed *v.* Hussey, B. & H. Adm. 525.

the libel, the respondent may dismiss the suit by peremptory exception.[1]

The Dilatory Exception is simply a preliminary objection, or an objection to the form of the libel.[2]

Amendment of Libel.—If the libellant agrees to the exception, he will file his amended libel within a reasonable time.[3] If he refuses to amend, either party may notice the hearing of the exceptions before the court, who examines the matter and orders the libel amended or not, according to justice.[4]

Other Exceptions.—Exceptions may be also taken to a pleading for surplusage, irrelevancy, impertinence, or scandal, and the exceptionable matter may be stricken from the pleading if the court so orders.[5]

2. Petition under Rule 59.—Another pleading which may now be made by a defendant is a petition under admiralty rule 59.[6] In collision cases it not infrequently happens that only one of the colliding vessels is sued.[7] This objection may be taken ad-

1. **What May be Set Up.**—If respondent is willing to rely on one matter of bar, as lack of jurisdiction, payment, etc., he may set that up by peremptory exception, though the subject-matter may not appear on the face of the libel. And facts judicially known to the court may be brought up by exceptive allegation when they do not appear in the libel. The Seminole, 42 Fed. Rep. 924.

When to be Taken.—Exceptions in matters of substance must be taken before joining issue and filing cross-bill, or else the exception will be held to be too late. The Fifeshire, 11 Fed. Rep. 743; Ben Adm. § 468; Betts Pr. p. 48.

Practice to Unite with Answer.—It is also quite common practice to unite exceptions with an answer on the merits, the pleading being entitled the Exceptions and Answer of the claimant or respondent, and in such case the exceptions are heard when the case comes up regularly for trial.

2. As when a defendant excepts to a collision libel because it does not state the direction of the wind or the tide, the courses or lights of the ships, or any of the matters as to which the defendant is entitled to be fully informed of the libellant's claim before answering. See Adm. Rule 28. Certain Logs of Mahogany, 2 Sumn. (U. S.) 589.

3. **New York.**—In the Southern and Eastern Districts of New York, within four days after notice of his submitting. D. C. Rule 44.

4. **Court may Impose Terms.**—The court, on granting leave to the libellant to amend in matter of form, may impose terms.

5. Exceptions for insufficiency and impertinence should not be taken to the same matter. The Whistler, 13 Fed. Rep. 295. Exceptions to pleadings in collision cases are permitted only when made in good faith. The Intrepid, 42 Fed. Rep. 185.

Admiralty Rule 36 provides for a reference of such matters to a commissioner to report his findings thereon, which are subject to the approval of the court. It is common practice, however, for the court to hear the exceptions and pass upon them in the first instance.

6. This rule grew out of the case of The Hudson, 15 Fed. Rep. 162. See Copp *v.* DeCastro, 8 Ben. (U. S.) 321. It is noticed here because the proceeding under it should be taken before or at the time of filing the answer, although the court may for cause shown allow it to be made later.

7. Thus an owner of cargo damaged by reason of a collision may sue only the boat which was carrying the cargo on the breach of its carrier's contract, while the owner of such boat may regard the other vessel in collision as solely responsible for the accident. Or the owner of a boat in tow of tug A may be run into by tug B, and tug

vantage of by a petition setting forth the facts.[1]

Other Cases Than Collision.—The 59th rule specifies only cases of collision, but the courts have enlarged it to take in cases of damage arising from other causes.[2]

3. Answer—Time of Filing.—On the return day of process, or within such further time as may be allowed by the court, or granted by libellant's proctor, the respondent files in the clerk's office his answer to the libel.[3]

Contents.—This, like the libel, is addressed to the judge by name and titles. It describes itself as the answer to a certain specified libel, and replies in specific paragraphs to the various allegations of the libel, sets up any affirmative defence, and concludes with the general prayer for relief that the libel may be dismissed with costs.[4]

B alone be libelled. But the owner of B may think that the fault for the collision lies with A alone. In such cases proceedings under the 59th rule are proper.

1. The owner of such vessel may thereupon file a petition setting forth the facts of the collision, and the fact that the suit is brought against his boat alone, and alleging that, for reasons specified, another vessel or some other party is wholly or partially liable for the damage, and may thereupon pray that the latter vessel or her owner, or any other party liable, may be made codefendant with his own vessel in the original suit of the damaged boat. This petition is filed in the clerk's office, with a stipulation by petitioner consenting to pay to the libellant, or any claimant or new party brought in by virtue of process under such petition, all such costs, damages, and expenses as shall be awarded against the petitioner by the court. Process will thereupon issue, and the new party be summoned into court and compelled to give security as though it or he were the only party proceeded against. Petitioner must also answer the original libel, and the new party brought in must answer the petition; and the cause proceeds as though the original libel had been filed against both vessels. The Greenville, 58 Fed. Rep. 805.

Costs.—But if the vessel originally proceeded against is held liable and the vessel brought in is dismissed, the costs of such vessel are taxed against the petitioner. The Waverley, 42 Fed. Rep. 188; The Brothers, 30 Fed. Rep. 75.

2. The City of Lincoln, 25 Fed. Rep. 835; The Alert, 40 Fed. Rep. 836.

3. Adm. Rule 27; The Dictator. 30 Fed. Rep. 699; Virginia Home Ins. Co. *v.* Sundberg, 54 Fed. Rep. 389; The City of Salem, 7 Sawy. (U. S.) 477.

As to new matter in answer, see The Whistler, 8 Sawy. (U. S.) 233, 13 Fed. Rep. 295.

Excessive formality is not required. Schooner Navarro, Olc. Adm. 127.

4. Requisites and Sufficiency of Answers.—Answer must be full, explicit, and distinct. The Commander-in-Chief, 1 Wall. (U. S.) 43; Propeller Sun, 1 Biss. (U. S.) 373; Schooner Boston, 1 Sumn. (U. S.) 328. Proof must correspond with allegations. The Washington Irving, Abb. Adm. 336. Answer which neither admits nor denies a material allegation is insufficient. The Elizabeth Frith, B. & H. Adm. 195. Impertinent and irrelevant allegations will be stricken out on motion. The Gustavia, B. & H. Adm. 189. Particular matters of defense must be averred. The William Harris, 1 Ware (U. S.) 367. A deliberate omission to file answer is a waiver of the right to do so. Ferryboats Roslyn and Midland, 9 Ben. (U. S.) 119.

An agreement to arbitrate temporarily suspends the necessity for answer. The Nineveh, 1 Lowell (U. S.) 400.

When one part of an answer is inconsistent with another, the court must accept the part most adverse to the claimant. Bark Olbers, 3 Ben. (U. S.) 148.

The statute of limitations must be pleaded. Brown *v.* Jones, 2 Gall.

Exceptions and Verification.—It may be joined with exceptions to the libel, as indicated above, and it is required to be verified in all cases in which the libel must be verified, and in a similar manner.[1]

New Facts Alleged.—When the answer alleges new facts, these are considered as denied, and no replication is allowed.[2]

4. Counterclaim.—Cross-Libel.—The respondent may set up in his answer any matter of recoupment or counterclaim arising out of the same cause of action as is set up in the libel,[3] but the general

(U. S.) 477. Also the defence of stale claim. The Platina, 21 Law Rep. (U. S.) 397.

It is sufficient to aver a release without setting out the particulars of the release. The Western Metropolis, 2 Ben. (U. S.) 212.

The answer need not respond to mere narrative statements. Brig Aldebaran, Olc. Adm. 130.

Causes of action may be severed and judgment rendered for claim admitted to be due. Larrinaga *v.* Two Thousand Bags of Sugar, 40 Fed. Rep. 507. An allegation that respondent is "ignorant" of an allegation of the libel is, *it seems*, sufficient. The City of Salem, 10 Fed. Rep. 843. All allegations in a libel not denied by the answer are not to be taken as true; but when the answer is silent as to facts in the libel supposed to be peculiarly within the respondent's knowledge, it is within the court's discretion to take the fact *pro confesso*. Campbell *v.* Steamer Uncle Sam, McAll. (U. S.) 77.

It is not proper practice to make an answer in a collision case operate by agreement as a cross-libel. Ward *v.* Chamberlain, 21 How. (U. S.) 572.

A respondent cannot change his ground and rely on a defense not set up in his answer. Turner *v.* Ship Black Warrior, McAll. (U. S.) 181.

The fact that a material allegation of a libel was not denied in the original answer, although it was denied in an amendment to such answer, may be taken into account by the court, if there is a conflict of testimony on the fact averred. Steamboat Empire State, 1 Ben. (U. S.) 57.

One may refuse to answer an allegation of the libel on the ground that such answer will subject it to a forfeiture or penalty. Pollock *v.* Steamboat Laura, 5 Fed. Rep. 133.

In Prize Cases the answer should set forth specifically the owner of the vessel, the place of her outfit, and the course of her employment. The Hannah M. Johnson, Blatchf. P. C. 97. All the answer required in prize is a brief assertion that the property is not liable to condemnation and forfeiture. The Lynchburg, Blatchf. P. C. 3.

Answer as Evidence.—Cushman *v.* Ryan, 1 Story (U. S.) 91; Sherwood *v.* Hall, 3 Sumn. (U. S.) 127; Steamboat H. D. Bacon, Newb. Adm. 274; The Santa Claus, Olc. Adm. 428.

Objections.—An answer should be objected to as insufficient before taking testimony. The Rocket, 1 Biss. (U. S.) 354; The California, 1 Sawy. (U. S.) 463.

Separate Answers by different defendants must be supported each by its own proof. Gardner *v.* Bibbins, B. & H. Adm. 356.

1. Adm. Rule 27; see Coffin *v.* Jenkins, 3 Story (U. S.) 108; Gammell *v.* Skinner, 2 Gall. (U. S.) 45; The Infanta, Abb. Adm. 265.

2. Adm. Rule 51; Moore *v.* The Robilant, 42 Fed. Rep. 162. The evidence of two witnesses is not necessary in admiralty to overcome an answer under oath. Jay *v.* Almy, 1 Woodb. & M. (U. S.) 262. On the submission of a cause on the pleadings, new matter in the answer, or general denials, must be wholly disregarded, except so far as they may be admissions against interest. The River Mersey, 48 Fed. Rep. 686.

3. Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162; The C. B. Sanford, 22 Fed. Rep. 863; The Zouave, 29 Fed. Rep. 296; The Sapphire, 18 Wall. (U. S.) 51; The Dove, 91 U. S. 383; O'Brien *v.* 1614 Bags of Guano, 48 Fed. Rep. 726. See The City of New Bedford, 20 Fed. Rep. 57; White *v.* The Ranier, 45 Fed. Rep. 773. Although courts of admiralty do not generally take notice of set-offs, the fact that a respondent has claims against the libellant which might properly be allowed in other courts by way of set-off does not oust the jurisdiction of an admiralty court. Dexter *v.* Munroe, 2 Sprague (U. S.)

practice is to file a cross-libel.[1]

When Cross-Libel Necessary.—If the respondent desire to obtain damages in excess of those claimed by libellant, a cross-libel is necessary, as the court cannot award any such excess to respondent on the answer alone.[2]

Security.—When such a cross-libel is filed, the respondents, i.e. the original libellants, must give security in the usual amount and form unless the court shall otherwise direct; and all proceedings on the original libel will be stayed until such security is given.[3]

39. A defendant in a libel for freight may claim by way of recoupment that the goods carried were damaged by the libellant's negligence. Such counterclaim may also be set up by cross-libel. Snow *v.* Carruth, 9 Law Rep. N. S. 198. But no excess can be recovered without a cross-libel. Snow *v.* Carruth, 1 Sprague (U. S.) 324. No set-off is allowable on a libel for seaman's wages. Bains *v.* Schooner James & Catherine, Baldw. (U. S.) 544.

1. **On What Founded.** — A cross-libel must be founded on a claim arising out of the same cause of action as the original libel. Crowell *v.* The Theresa Wolf, 4 Fed. Rep. 152; Maxwell *v.* The Powell, 1 Woods (U. S.) 99; Nichols *v.* Tremlett, 1 Sprague (U. S.) 361; Snow *v.* Carruth, 1 Sprague (U. S.) 324; The Ping-On *v.* Blethen, 11 Fed. Rep. 607; Vianello *v.* The Credit Lyonnais, 15 Fed. Rep. 637; Ward *v.* Chamberlain, 21 How. (U. S.) 572.

When Cross-Libel Not Necessary.—See Brooklyn, etc., Ferry Co. *v.* The Morrisania, 35 Fed. Rep. 558.

Notice of Filing.—Libellant's proctor cannot be deemed the agent of the libellant to receive notice of the filing of a cross-libel. But if the libellant in the original libel is out of the jurisdiction, the court may order a stay. Nichols *v.* Tremlett, 1 Sprague (U. S.) 365. Substituted service of monition on cross-libel. The Eliza Lines, 61 Fed. Rep. 308.

Dismissal of Libel.—On dismissal of a libel, a cross-libel not so connected with the subject-matter of the libel as to be maintainable must also be dismissed. Kemp *v.* Brown, 43 Fed. Rep. 391.

2. Snow *v.* Carruth, 1 Sprague (U. S.) 324; Kennedy *v.* Dodge, 1 Ben. (U. S.) 311; Erbert *v.* Schooner Reuben Dowd, 3 Fed. Rep. 520; Willard *v.* Dorr, 3 Mason (U. S.) 161. See Bains *v.* Schooner James & Catherine, Baldw. (U. S.) 544; Ward *v.* Chamberlain, 21 How. (U. S.) 572; The Nadia, 18 Fed. Rep. 729; The Ciampa Emelia, 39 Fed. Rep. 126; Southwestern Transp. Co. *v.* Pittsburg Coal Co., 42 Fed. Rep. 920.

3. Adm. Rule 53. Rule 46 of the Southern and Eastern Districts of New York is as follows: "In suits *in rem* in collision cases, where one of the colliding vessels shall be wholly lost, so that no cross-libel against her could be maintained, the defendant, if he shall desire to recoup or offset any damage to his own vessel in case it shall be determined on the trial that the collision occurred through the fault of both vessels, must in his answer state the facts and his own damages, in like manner as upon filing a cross-libel; and such statement of damage shall be without prejudice to any defense he may make that the collision was wholly the fault of the other vessel." See Steamer Bristol, 4 Ben. (U. S.) 55; The Toledo, Brown Adm. 445; Vianello *v.* The Credit Lyonnais, 15 Fed. Rep. 637; Empresa Maritima a Vapor *v.* North & South American Steam Nav. Co., 16 Fed. Rep. 502; Compagnie Universelle du Canal Interocéanique *v.* Belloni, 45 Fed. Rep. 587; The Electron, 48 Fed. Rep. 689.

The fifty-third rule, requiring respondents in a cross-libel to give security, applies to suits *in rem* as well as to suits *in personam*. The Toledo, Brown Adm. 445.

Respondent on a cross-libel may be compelled to give security when the parties plaintiff were not parties of record in the original suit, provided the proceeding is really and practically a cross-libel. The George H. Parker, 1 Flip. (U. S.) 606.

Original Suit.—It is not essential to file a cross-libel if defendant in original suit desires to proceed independently. Brooklyn, etc. Ferry Co. *v.* The Morrisania, 35 Fed. Rep. 558.

XIV. Issue.—On the filing of the answer with the clerk, the cause, in certain districts, is at issue without further proceedings by either party, and will come up in its turn on the regular calendar, or be set down for hearing on a particular date by the court. In other districts the cause is not placed on the calendar until a note of issue is filed with the clerk, and a calendar fee paid.[1]

XV. Trial—Method of Trial.—In some districts the court never sees the witnesses. As soon as the cause is at issue, an order of course is entered that the evidence in the cause be taken, and one of the standing commissioners of the court is usually appointed to take down the testimony.[2] And not until it is all written down is the cause submitted to the court, the pleadings and evidence being read to the court by the advocates, and the cause thereupon summed up and submitted on written briefs. In other districts the witnesses are present in court. The cause is opened by the reading of the libel by the advocate for the libellant, followed by the reading of the answer for the respondent. The libellant then calls his witnesses and the respondent his, and, the evidence being all in, the cause is summed up. A difference between the ordinary trial practice in summing up a case, and the summing up of an admiralty cause, is that in the latter the libellant has the right to open the argument, and when the defendant has presented his side of the case the libellant has the right to reply and thus conclude the summing up. There is no nonsuit in admiralty, the court always hearing the defendant's case, or requiring him to rest without putting in evidence; and, in cases of collision, the libellant is always bound to make out a *prima-facie* case of negligence in the vessel libelled.[3]

Court Reserving Decision.—Admiralty causes of any importance are rarely decided by the court at once. In perhaps no class of cases is a careful study of the evidence so necessary in order to reach a just decision.[4] At the close of the argument, therefore, the

1. **Note of Issue.**—The note of issue is a mere statement of the title of the cause, the various proctors, and the date of issue, with frequently but not necessarily a statement of the nature of the suit, as that it is of collision, or on contract, or for damage to cargo, etc.

Delay in Bringing Cause to Hearing.—Delay in bringing a cause to hearing after issue joined is no ground for dismissing the libel. The Mariel, 6 Fed. Rep. 831.

2. **Reason for Reference.**—Under Adm. Rule 44, the District Court may refer any cause to a commissioner to take testimony without assigning any special reason for the reference. The Wavelet, 25 Fed. Rep. 733.

3. **Method of Procedure.**—McNally *v.* Steam-tug L. P. Dayton, 4 Fed. Rep. 134, 120 U. S. 337; The Honora Carr, 31 Fed. Rep. 842; The Gibson, 35 Fed. Rep. 333.

4. **New Trial—Rehearing, etc.**—The granting of a new trial in admiralty is practically unknown. Even a rehearing and the introduction of further evidence, after decision once had, is unusual, though it is of course within the power of the court. The Vaderland, 19 Fed. Rep. 527; Mainwaring *v.* Bark Carrie Delap, 1 Fed. Rep. 880. See Burdett *v.* Williams, 29 Fed. Rep. 542; The Havilah, 39 Fed. Rep. 333 Hatch *v.* The Newport, 44 Fed. Rep. 300; The Newport, 38 Fed. Rep. 669.

A motion for a rehearing should be made at the same term in which final decree was rendered. The Comfort,

court usually takes the papers and in due course renders its decision.[1]

XVI. Interlocutory Decree and Reference—1. **Generally.**—The court does not act as assessor of damages. When the amount claimed in the libel is a definite amount, or easy of ascertainment, the court may pronounce for a definite amount. Usually, though, the matter is referred to a commissioner.[2] The libellant, therefore, enters an interlocutory decree and order of reference. This is a decree reciting the suit and the submission of it to the court, and ordering, adjudging, and decreeing that the libellant recover of the ship and its sureties, or of the respondent, the damages sustained by libellant by reason of the matters and things in the libel alleged, and further ordering that the matter be referred to a certain commissioner to ascertain the amount of the libellant's damage and report thereon to the court.

A copy of this decree is served on the respondent, and a certified copy delivered to the commissioner named. Thereafter a notice of the time and place of the reference, signed by the commissioner, is served upon the respondent, and at the appointed time the libellant, with his witnesses, appears before the commissioner and gives evidence as to his damages.[3]

32 Fed. Rep. 327; The Madge, 31 Fed. Rep. 926; The Annex No. 3, 38 Fed. Rep. 620; The Oriental, 2 Flip. (U.S.) 6.

The rule that a rehearing may not be had after the term at which the cause was originally decided, except upon a showing of fraud, applies only to a direct proceeding in the same cause, and does not affect a proceeding to review the original suit. Jackson *v.* Munks, 58 Fed. Rep. 596; Snow *v.* Edwards, 2 Lowell (U. S.) 273; Northwestern Car Co. *v.* Hopkins, 4 Biss. (U.S.) 51.

1. **The Judgment.**—If the decision be in favor of the defendant, the judgment will be that the libel be dismissed, with or without costs, and defendant taxes his costs, as referred to hereafter, and enters a final decree that the libel be dismissed. If the decision is in favor of the libellant, then the matter is usually referred to a commissioner.

2. **Who Acts as Referee.**—In a collision case, for example, where the damages may consist of hundreds of items, and in other cases,—in fact, in admiralty causes generally,—the clerk of the court, or one of the United States commissioners, acts as a referee to ascertain the exact amount of the libellant's damage.

3. **Proceedings before Commissioner.**—A reference before a commissioner proceeds like an ordinary trial; objections to evidence are passed upon by the commissioner at the time of offering them, and are afterwards reviewable by the court. Ship E. C. Scranton, 2 Ben. (U. S.) 81; Brigantine Beaver, 8 Ben. (U. S.) 594. Either party, however, is at liberty to insist that the court pass upon the question objected to *instanter* and before the continuance of the reference. This is the proper method of procedure when objection is made to the method of the commissioner in ascertaining the damages. The E. C. Scranton, 4 Ben. (U. S.) 125; Schooner Transit, 4 Ben. (U. S.) 138; Brigantine Beaver, 8 Ben. (U. S.) 594.

The reference being then adjourned, the commissioner will certify to the court the question objected to, with his ruling thereon, and his reasons for the ruling, if he so desires, and the matter may be brought before the court, on notice, on any motion day, or according to the practice of the particular district, and having been passed upon by the court, the reference proceeds. At the close of the libellant's evidence, the defendant offers his evidence tending to reduce the claim of the libellant, and the matter will then be summed up and submitted to the commissioner.

Commissioner's Report.—In due time the commissioner makes his report, which, with the evidence and exhibits, is filed in the office of the clerk.[1]

2. Exceptions to Report.—Either party may except to the commissioner's report. The exceptions should state particularly the ground of the exception;[2] and they may be brought on for hearing before the court on short notice. Exceptions are usually heard on some regular motion day of the court, and are argued and submitted, with the report, evidence, and exhibits, and the court, either on the argument or at a later date, passes upon them, overruling or allowing them, *seriatim*.[3]

Confirming Report.—The exceptions having been finally disposed of, the report is confirmed by the court. And if no exceptions at all have been filed, the report will be confirmed absolute in a reasonable time after notice of the filing of the report has been given the other side.[4]

The case is now ready for the taxation of costs and entry of final decree.

XVII. Taxation of Costs.—In some districts the costs are taxed before the final decree is entered, and the amount of them is included in and forms a part of the amount of the final decree. In other districts the final decree is entered for the damages alone, and the taxed bill is a separate paper to be attached to the decree, the amount of both the decree and the bill of costs being, of course, inserted in the execution, when issued.[5]

XVIII. Final Decree, What is.—The final decree is an order of court reciting the commencement of the suit, the hearing, the interlocutory decree, the reference to a commissioner, the report, the exceptions, if any were taken, and the action of the court thereon, and finally ordering, adjudging, and decreeing that the libellant recover of the respondent such and such specified sum,

1. **Principles on which Damages are Assessed.**—The commissioner's report should explain the principles on which the damages are assessed. Murray *v.* Schooner Charming Betsey, 2 Cranch (U. S.) 64.

Adoption by Court.—The court will generally adopt the commissioner's report unless errors are clearly established by the excepting party. Steamboat Narragansett, Olc. Adm. 388; Baker *v.* Ship Potomac, 18 How. Pr. (N. Y.) 185.

2. The Commander-in-Chief, 1 Wall. (U. S.) 43; Schooner Transit, 4 Ben. (U. S.) 138.

3. **Further Reference.**—It is quite within the power of the court, and not infrequently done, to refer the matter again to the commissioner, to take further evidence in regard to some disputed point. And the commissioner's second report may be excepted to in like manner to the first.

4. **Confirmation Nisi and Absolute.**—In some districts, a report, on being filed in the office of the clerk, is at once, and of course, confirmed *nisi*, that is, confirmed *unless* exceptions are filed within a specified time; and if no exceptions are filed within that time, the report is, as matter of course, confirmed *absolute*.

5. **The Costs are Taxed by the Clerk** after notice to the proctor for the other side, and such taxation is subject to an appeal by either party to the court. The taxed bill is filed in the clerk's office. The amount of costs will be considered later. See *post*, XXVIII, *Costs*.

being the amount of the libellant's damages, costs, and interest to date.[1]

Performance by Stipulators.—It may also contain the order that unless the decree be satisfied or an appeal intervene, the stipulators for value and for claimant's or respondent's costs cause the engagement of their stipulations to be performed, or show cause within a certain time why execution should not issue against them, their goods, chattels, and lands.[2] On this decree, after the time to

1. **Proper Form of Decree** for libellant on appeal.—Deems *v.* Albany & C. Line, 14 Blatchf. (U. S.) 474.

In Suit for Damages for Personal Injuries, court may make a decree for expenses of cure. The Lizzie Frank, 31 Fed. Rep. 477.

When Several Libellants have distinct damage interests, decree may be for all for an aggregate sum, and direct a distribution. The City of Alexandria, 44 Fed. Rep. 361.

A Decree Pro Confesso is not final. The Lopez, 43 Fed. Rep. 95. Nor is a decree dismissing a libel for want of evidence. The Delaware, 33 Fed. Rep. 589.

Interest on Demurrage.—Milburn *v.* Bopo, 57 Fed. Rep. 237; The M. Kalbfleisch, 59 Fed. Rep. 198.

2. Decree against Principal and Sureties.—The decree may be entered against both principal and sureties at the time of its rendition, where a bond to the marshal has been given. The Belgenland, 108 U. S. 153.

Where Damages are Divided between Two Vessels, each being held liable for one-half of libellant's damages, the decree should provide that each pay one-half the damage, to the amount of their respective stipulations, and that if either vessel is unable to pay such half, the balance shall be collected from the other offender. The Alabama, 92 U. S. 695; The Civilta, 103 U. S. 699; The Virginia Ehrman, 97 U. S. 309; The Sterling, 106 U. S. 647; The Washington, 9 Wall. (U. S.) 513. See The Helen R. Cooper, 10 Blatchf. (U. S.) 212; The Eleanora, 17 Blatchf. (U. S.) 88; The Shubert *v.* The Brown, 45 Fed. Rep. 500. Division of damages where more than two vessels in fault. The Brothers, 2 Biss. (U. S.) 104; The Peshtigo, 25 Fed. Rep. 488. See The Anerley, 58 Fed. Rep. 794.

The Act of February 13, 1893, 27 Sts. at Large, 445, provides (section 3) that under certain conditions "neither the vessel nor her owner . . . shall be held responsible for loss resulting from faults of navigation." It has been held that this applies only to claims for damage to cargo on board the vessel in fault. The Viola, 59 Fed. Rep. 632; The Berkshire, 59 Fed. Rep. 1007. When in a case of collision, both vessels have been held in fault, the assessment of damages is made as follows: the damages of the two vessels, including personal effects (which are to be treated as part of the vessel) are first to be made even. Either vessel whose cargo has been damaged cannot be charged, directly or indirectly, with any part of the loss suffered by her own cargo, nor can any offset against the carrying vessel's claim for her own damage be made by the other vessel on account of what the latter must pay for the carrying vessel's cargo damage; but the claim of the cargo of the carrying vessel must be reduced by the amount which would, before the passage of the above act, have been charged against such carrying vessel, or against the moneys payable to her. The Viola, 60 Fed. Rep. 296.

In Cases of Cross-libels for Collision, where both vessels have been damaged, and both are held in fault, the decree should provide that the party suffering the greater damage shall recover one-half the excess of his damage over the damage of the other vessel. Subtract the lesser damage from the greater damage, and divide the result by two, and the result will be the amount to be entered in the decree for the vessel suffering the greater damage. The North Star, 106 U. S. 18; Steamship Oregon, 14 Sawy. (U. S.) 440, 43 Fed. Rep. 62.

A Personal Judgment cannot ordinarily be entered against a claimant in a suit *in rem* unless he has signed the stipulation. Atlantic Ins. Co. *v.* Alexandre, 16 Fed. Rep. 279. Or on issuing new process, or on a general appearance. The Monte A., 12 Fed. Rep. 331.

appeal and the time allowed stipulators to show cause has expired, a summary judgment may be obtained against the defendant and his sureties, and an execution issued thereon.

XIX. Summary Judgment and Execution.—On proof by affidavit, *ex parte* or on notice to the proctors for the losing party, that the time to appeal has expired and the judgment remains unpaid, the court will enter a summary judgment[1] against the stipulators for the amount of the stipulations, on which execution will issue instantly against the sureties.[2]

Sale of Property and Distribution of Proceeds.—When, in pursuance of this execution, the marshal has sold the property,[3] he pays the proceeds into the registry of the court, and the clerk, under direction of the court, will satisfy the libellant's decree, or distribute the proceeds if there are several creditors.[4]

XX. Appeals—1. Generally.—An appeal can be taken only from final decrees.[5] But when so taken it brings up the whole case for

1. **No Necessity for an Action.**—The admiralty stipulations containing agreements on the part of the respondent and his sureties that in case of default on the part of the principal, execution may issue against them, their goods, chattels, and lands, there is never any necessity for an *action* against the sureties on their stipulation. The Baltic, B. & H. Adm. 149.

Marshal's Bonds.—This is the case only on bonds to the marshal. In stipulations for value an order is ordinarily made calling on the sureties to show cause in four days why execution should not issue against them, their goods, chattels, and lands; and if no cause is shown, execution issues as of course. And see The Sydney, 47 Fed. Rep. 260; Adm. Rule 21. See The Blanche Page, 16 Blatchf. (U. S.) 1.

2. **Execution.**—The execution is in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount of the judgment out of the goods and chattels, lands and tenements, or other real estate of the defendant or his stipulators, and the marshal collects the judgment by sale of such goods and lands, as in ordinary cases of execution.

3. **Sale of Property.**—There is no warranty, express or implied, in the sale of property by a court of admiralty. The Monte Allegre, 9 Wheat. (U. S.) 616. A court of admiralty has power to compel the payment of the purchase money in a judicial sale by attaching the person of the purchaser. The Kate Williams, 2 Flip. (U. S.) 50. A sale may be set aside on petition showing collusion, mistake, or a wholly inadequate price. Steamer Sparkle, 7 Ben. (U. S.) 528. But a motion to set aside a sale must be made seasonably. U. S. *v.* Steamboat Austin, 9 Ben. (U. S.) 350; The Kaloolah, Brown Adm. 55.

4. **Distribution of Proceeds.** — It is highly irregular for the marshal to retain proceeds or himself distribute them. The Collector, 6 Wheat. (U. S.) 194; Bark Laurens, Abb. Adm. 508. The surplus of proceeds of sale may be appropriated to the payment of other liens on the original property. Brackett *v.* The Hercules, Gilp. (U. S.) 184; The Fanny, 2 Lowell (U. S.) 508; Rodd *v.* Heartt, 21 Wall. (U. S.) 558; Gardner *v.* Ship New Jersey, 1 Pet. Adm. 223; The Santa Anna, B. & H. Adm. 79; Harper *v.* The New Brig, Gilp. (U. S.) 536; The Skylark, 2 Biss. (U. S.) 251. One who had no right of action *in rem* may be paid out of surplus proceeds in a court of admiralty. The Stephen Allen, B. &. H. Adm. 175; Petrie *v.* Steam-tug Coal Bluff No. 2, 3 Fed. Rep. 531. *Contra*, Remnants in Court, Olc. Adm. 382. When a cargo is arrested for freight, the owner should pay the freight admitted to be due into court. Freight-money of Canal-boat Monadnock, 5 Ben. (U. S.) 357.

5. See The Delaware, 33 Fed. Rep. 589. Where libellant sued both ship and charterer in the District Court, which fixed the liability of the ship, but left the charterer's liability unsettled, it was *held* that the decree was

review, including all interlocutory decrees and orders which may have been entered during the progress of the suit.[1]

How Taken.—The appeal is taken by filing with the clerk of the district court, and serving on the proctor for the adverse party, a notice, signed by the appellant or his proctor, to the effect that the appellant appeals from the decree complained of.[2]

2. Appeal Bond.—Within ten days thereafter the appellant must also file a bond[3] in the sum of $250, conditioned that he will prosecute his appeal to effect, and pay the costs if the appeal is not sustained.

Bond to Stay Execution.—This bond is therefore necessary to an appeal, but the giving of it does not stay execution of the decree below. In order to do that, another bond must be given, in such sum[4] as is ordered by the judge of the District Court or a judge of the Circuit Court of Appeals, conditioned that the appellant will abide by and perform whatever decree may be rendered by the Circuit Court of Appeals in the cause, or, on the mandate of that court, by the court below.[5]

final and appealable as between libellant and the ship. The Alert, 61 Fed. Rep. 113.

1. The Havilah, 48 Fed. Rep. 684; The State of California, 49 Fed. Rep. 172. A finding of fact by a commissioner will, when erroneous, be reversed on appeal. The Cayuga, 59 Fed. Rep. 483. A commissioner's findings, made on conflicting evidence, should not be disturbed unless error clearly appears. Panama R. Co. *v.* Napier, 61 Fed. Rep. 408.

Proper Appellant.—The claimant of record in the court below is the proper appellant, though he be but the master of the vessel, claiming for the benefit of the owner. The owner and surety, appearing also of record, may join in the appeal. Aiken *v.* Smith, 54 Fed. Rep. 894.

Within What Time Final Decree Executed.—The final decree of the District Court cannot be executed until ten days after entry of such decree in that court; in some districts, until ten days after notice of such entry has been served on the proctor for the party against whom the decree is entered.

2. Notice of Appeal.—This notice stays the execution of the decree of the District Court for the further period of ten days from the date of filing the notice of appeal. In the second circuit the notice of appeal may contain the statement that the appellant desires to review one or more questions only, which questions must be stated in the notice, and the appellant is concluded by such notice, and the review on such appeal is limited to such questions. See Adm. Rule 3, Ct. C. A., Second Circuit.

Time to Perfect Appeal.—In the absence of any general rule or special order, the appellant, under Admiralty Rule 45, has thirty days from the rendition of the appeal within which to perfect his appeal. The Canary No. 2, 22 Fed. Rep. 536.

3. Bond Not Given in Time.—If this bond is not given within such ten days, the appeal will be deemed abandoned, and the decree of the District Court may be executed, unless otherwise ordered by a judge of the Circuit Court of Appeals.

4. Amount of Bond.—The amount of this bond is usually a matter of agreement between proctors, and should be amply sufficient to cover the amount of the decree of the District Court, and interest thereon pending the appeal.

5. Appeal Bond and Bond for Costs.—Both this bond and the bond for costs are drawn to the appellee as obligee, and both bonds may be, and in common practice usually are, combined in one instrument, which recites that the appellant's bondsmen are bound in such and such a sum, and in the further sum of $250, conditioned that the appellant shall prosecute his appeal to effect, and pay all costs if the appeal be not sustained, and will also abide by and perform whatever decree may be rendered

3. Petition of Appeal.—Under the old admiralty practice, a petition of appeal was necessary. This is a petition addressed to the judges of the appellate court, setting forth minutely the date of the filing of the libel, the exceptions thereto, if any, the date of the filing of the answer, and the time and place of hearing in the District Court, with the decision of the court thereon, and the date of the entry of the interlocutory decree; a mention of the reference, and the amount of the final decree, with its time of entry; and the fact that the appellant is advised and insists that the decree is erroneous: the whole concluding with a prayer that the appellate court will call up the record from the District Court and will hear the cause anew and revise the decree. It is signed by the proctor for the appellant, and need not be verified.[1]

4. Assignment of Errors.—The appellant is also required to indicate in what particulars he considers the decree of the District Court erroneous. This is called assigning error to the decree, and the document setting forth such error is called an assignment of errors.[2]

5. The Citation.—The citation is a notice issued by the appellate court, directed to the appellee in the cause, reciting briefly the appeal, and the filing of proper security by the appellant, and calling upon him to present himself at a certain time before the ap-

by the Circuit Court of Appeals in the cause, or, on the mandate of that court, by the court below. Appeal bonds may be taken before a United States commissioner. The Canary No. 2, 22 Fed. Rep. 536. When appeal has a standing in the appellate court, irrespective of the bond. The Natchez, 27 Fed. Rep. 309. In the Brantford City, 32 Fed. Rep. 324, it was held not necessary to give a new stipulation for the whole amount of the decree and costs. This decision was before the passage of the Circuit Court of Appeals Act, but probably would be followed.

1. **Necessity for Petition of Appeal.**—In the Second Circuit, when the Circuit Court of Appeals has prescribed special rules in admiralty governing appeals, separate from the general rules in use in all the circuits, the petition of appeal would appear to be unnecessary. For the 1st Admiralty Rule provides that an appeal shall be taken by the filing of a *notice* of appeal, and Rule 4 requires the record on appeal to begin with a statement which contains all the facts for the information of the court formerly inserted in the petition of appeal. And yet General Rule 11, which by the 19th Admiralty Rule is specified as an admiralty rule, states that no writ of error or *appeal* shall be allowed until the assignment of error shall have been filed. This, by providing for the *allowance* of an appeal, would certainly seem to indicate that an appeal, or petition of appeal, is necessary. But in actual practice it is rarely used in the Second Circuit. In other circuits which have no admiralty appeal rules, and where appeals are governed solely by the general rules, a petition of appeal would apparently be necessary.

2. Ct. C. App. Rule 11.

Particularity Required.—In admiralty causes, which are frequently mere reviews of fact, it is often practically impossible to assign minute error to the decree; and in the Second Circuit, at least, the assignment of errors is usually most simple, stating merely that the court erred in decreeing as it did, with the further error that it did not decree as the appellant thinks it ought to have decreed. If further error can be assigned, as to the admission or rejection of evidence, or the conduct of the trial, it should be set out in due form. And when the error alleged is as to the admission or rejection of evidence, the assignment must quote the full substance of the evidence admitted or rejected.

pellate court to do and receive what may appertain to justice to be done in the premises.[1]

6. **Filing Papers.**—The assignment of errors, bonds, petition of appeal, and citation being all prepared, the appellant presents all four papers to the judge of the District Court, or a judge of the Circuit Court of Appeals, who allows the appeal, approves the bond, and signs the citation. A copy of the citation is then served on the appellee or his proctors, and all four documents, the citation accompanied by proof of service of a copy on the respondent or his proctors, are filed in the office of the clerk of the District Court.

7. **Exceptions to Bond.**—The approval of the bond by a judge, as mentioned above, is a formal matter, but is required before the citation can be signed.[2]

8. **The Apostles.**—The clerk of the District Court thereupon makes up a transcript of the record of the cause. This is called the Apostles.[3]

Certification and Return.—The Apostles are certified by the clerk of the District Court, and are returned to the Circuit Court of Appeals within thirty days after filing the notice of appeal.[4]

Notice and Appearance.—The appellant's proctor thereupon serves notice on the appellee of the return of the Apostles, and the appellee must enter his appearance in the Circuit Court of Appeals within ten days thereafter, otherwise the appellant may proceed *ex parte*.

9. **New Testimony.**—Under the old practice of appeal in admiralty, either party had a right to file new pleadings and take new evidence on appeal as matter of course. It was one of the great

1. **Necessity of Citation.**—It is doubtful if a citation is necessary in an admiralty appeal. It belongs more properly to a writ of error. The notice of appeal given in an admiralty cause gives to the appellee all the warning necessary of the carrying up of the case, and makes the service of a citation a superfluity.

2. Rev. Sts. sec. 1000.

On filing the bond in the District Court, the appellant should give notice of such filing, and of the names and residences of the sureties. If the appellee excepts to the sureties, they must justify on short notice. If no exception be served, the bond is deemed approved.

3. **Derivation.**—Greek Ἀποστέλλειν, to *send from*, i.e., that which is *sent from* the District Court.

Making up the Apostles.—The Apostles contain a short history of the cause, with the dates of the various events; all the pleadings, the proofs, the interlocutory decree, and any order of court which appellant desires to have reviewed; the reports of the commissioner, the exceptions thereto, and the rulings on the exceptions; the opinions of the court, the final decree and appeal papers, and the assignment of errors. Adm. Rule 52. In the Second Circuit parties may stipulate that the Apostles may consist of portions of the record only, when only one or more questions are sought to be reviewed. See Adm. Rule 4 of the Circuit Court of Appeals, Second Circuit. When the record is not made up in accordance with Adm. Rule 52, the Appellate Court cannot be required to review the testimony. The Alijandro *v.* Wallace, 56 Fed. Rep. 621.

4. No dismissal for failure to docket case. The Chatham, 52 Fed. Rep. 396.

Printing.—In the Second Circuit the Apostles are printed by the clerk of the Circuit Court of Appeals, who delivers a certain number of copies to each proctor. In other circuits the appellant prints the record.

differences between an admiralty and a common-law appeal. This practice is retained in many of the circuits.[1]

10. Briefs.—Following the practice of the Supreme Court, the Circuit Courts of Appeal require printed briefs to be filed a certain number of days before the hearing of the appeal.[2]

11. Hearing.—The appeal comes up for hearing in regular order, and is argued by the respective advocates, the appellant being entitled to open and close, except in case of cross-appeals, when the libellant in the court below is entitled to open and close.[3]

12. Decision—Mandate.—In due course the court hands down its decision. The successful party thereupon prepares the mandate, which is the order of the Circuit Court of Appeals to the District Court to do certain matters and things in the cause. The mandate is rendered necessary by the fact that the appellate court does not execute its own decrees. An order is at the same time prepared directing the mandate to issue to the District Court; and a copy of this proposed order and of the proposed mandate is served on the proctor for the losing party, with a notice of motion for the order. The losing party may attend on the motion to object to the form of the order or mandate as proposed. When the proper form has been settled, the costs of the Circuit Court of Appeals are made up by the clerk of that court and attached to the mandate, which is signed by the clerk, and delivered to the

1. **New Testimony—When Allowed.**—An admiralty appeal has always been regarded as a new trial. Irvin *v.* The Hesper, 122 U. S. 256; The Ethel, 31 Fed. Rep. 576; The Cassius, 41 Fed. Rep. 367. See Shaw *v.* Folsom, 40 Fed. Rep. 511; The Ciampa Emilia, 50 Fed. Rep. 239; The Guy C. Goss, 53 Fed. Rep. 826. But in some of the circuits such new testimony can be taken only on order granted by the Court of Appeals on cause shown. And the courts are somewhat inclined to discourage the general taking of such testimony, and allow it only on good cause being shown for the previous omission to take it. Singlehurst *v.* Compagnie Générale Transatlantique, 50 Fed. Rep. 104; The Venezuela, 52 Fed. Rep. 873; Sorensen *v.* Keyser, 51 Fed. Rep. 188; The Lurline, 57 Fed. Rep. 398; Red River Line *v.* Cheatham, 60 Fed. Rep. 517; The Philadelphian, 60 Fed. Rep. 423. See Ross *v.* Southern Cotton Oil Co., 41 Fed. Rep. 152; The Sirius, 54 Fed. Rep. 188; The Beeche Dene, 55 Fed. Rep. 526; New Pleadings, The Thomas Melville, 34 Fed. Rep. 350.

2. **This Time Varies** in the different circuits, but the appellant must always file his brief first, and an opportunity thus be given to the appellee of seeing it in sufficient time before printing his own brief to answer the argument of his opponent.

3. **Conflicting Evidence.**—The decision of the District Court on questions of fact, when the evidence is conflicting, will ordinarily not be disturbed. The Thomas Melville, 37 Fed. Rep. 271; Cooper *v.* The Saratoga, 40 Fed. Rep. 509; The Ludwig Holberg, 43 Fed. Rep. 117; Duncan *v.* The Gov. Francis T. Nicholls, 44 Fed. Rep. 302; Mentz *v.* The Sammy, 44 Fed. Rep. 624; The Parthian, 48 Fed. Rep. 564; Bixby *v.* Deemar, 54 Fed. Rep. 718; The City of New York, 54 Fed. Rep. 181; The Alijandro, 56 Fed. Rep. 621; S.S. Wilhelm, 59 Fed. Rep. 169.

No Allowance of Interest.—When both parties appeal from the decision of the District Court apportioning damages, the Circuit Court, on affirming its decree, will not allow interest. The C. P. Raymond, 36 Fed. Rep. 336.

Appeals in Salvage Cases.—The Bay of Naples, 48 Fed. Rep. 737; The Albany, 48 Fed. Rep. 565.

proctor for the successful party, who files the same in the clerk's office of the District Court.[1]

13. Final Decree.—A decree is thereupon entered in the District Court in the terms of the mandate, commanding that the libel be dismissed or that the libellant recover a certain sum, or decreeing any other relief called for by the mandate, and ordering the original sureties and the sureties on appeal to make good the obligation of their stipulations, as in the final decree of the District Court in the first instance.[2] And thereupon execution may issue as already indicated.[3]

14. Appeal to the Supreme Court.—An appeal to the Supreme Court in the cases where an appeal lies directly from the District Court to the Supreme Court is taken in the same manner as an appeal to a Circuit Court of Appeals under the general rules of the latter courts.[4]

Prohibition—Mandamus—Certiorari.—In cases where prohibition, mandamus, or certiorari to a District Court, or for mandamus or certiorari to a Circuit Court of Appeals[5] is applied for, the application is made *ex parte*, on a petition setting forth the facts. The petition should be accompanied by twenty-five copies of the record in the court below,[6] one of which must be certified by the clerk of that court.[7]

XXI. Evidence—1. Generally—Rules.—The Supreme Court has provided no rules relating to the general examination of witnesses in an admiralty cause.[8] Hence each court has in general followed its own rules.[9]

1. **Costs.**—The question of costs should be settled by motion, if necessary, before the mandate issues from the appellate court. The State of California, 54 Fed. Rep. 404.

2. The Sydney, 47 Fed. Rep. 260.

3. See *ante*, XIX.

4. Act March 3, 1891; 26 Sts. at L. p. 826. See Supreme Court Rules 35 and 36.

Amount Involved.—The old provision requiring the amount involved in such an appeal to be $5000 is done away with by the Act of March 3, 1891.

5. **District Court.**—The statutes give the Supreme Court power to issue prohibition to the *District* Court only. Rev. Sts. § 688.

6. **Copies of Record.**—The clerk of the Supreme Court will sometimes accept ten copies of the record on the application for the order to show cause why the writ should not issue, one copy for the files and one for each of the justices; but if the order to show cause be granted, the full number must be filed before the hearing.

7. **In Cases of Certiorari** the Supreme Court may issue the writ on such *ex parte* application alone.

In Cases of Prohibition and Mandamus it is usual for the Supreme Court to issue an order to the court below, calling upon it to show cause why the writ should not issue. That court returns what it has done in the cause, and leaves it to the proctor for the party who objects to the prohibition or the mandamus in the court below to show the requisite cause. If, on hearing before the Supreme Court, proper cause be not shown, the writ will issue. If certiorari be granted, the case will go on the calendar of the Supreme Court, and the cause be fully examined in regular order, as though it were an actual appeal.

8. **Rules Prescribed by Supreme Court.**—The Revised Statutes provide that the mode of proof in admiralty causes shall be according to rules to be propounded by the Supreme Court. Rev. Sts. § 862.

9. **Examination of Witnesses in Different Courts.**—It has been heretofore noted that in some districts the witnesses are

The General Laws of Each State govern the competency of witnesses,[1] and the rules of the state courts as to the admissibility of evidence in general are to be considered.[2]

2. Depositions De Bene Esse.—It often happens in the admiralty that witnesses cannot be kept in port until the hearing of a suit, and hence that their evidence must be reduced to writing. This is accomplished by an examination *de bene esse*, notice of the holding of which must be served on the opposing proctor a reasonable time beforehand.[3]

Place of Examination.—It is not necessary that the examination should be held in the district which is the place of trial.[4]

Opposing Side Unrepresented.—If the notice was properly served, and the requisites as to the departure or infirmity of the witness are shown, the deposition can be read in evidence, though the opposing side was unrepresented at the examination.[5]

examined orally in open court; in others, their testimony is written down before trial by a commissioner, and the written testimony only submitted to the court.

1. Rev. Sts. § 858.

2. **Variance between Pleading and Proof.**—Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162; Brig Sarah Ann, 2 Sumn. (U. S.) 206; The Gen. Meade, 20 Fed. Rep. 923; The Iris, 1 Lowell (U. S.) 520; Davis *v.* Leslie, Abb. Adm. 123; The Rocket, 1 Biss. (U. S.) 354; The Camanche, 8 Wall. (U. S.) 448; The William Penn, 3 Wash. (U. S.) 484.

Admission in Answer.—An admission in an answer, afterward withdrawn, still has weight as evidence. Kenah *v.* Tug John Markee, Jr., 3 Fed. Rep. 45.

Exceptions to Ruling of Court.—It is not necessary to *except* to the adverse ruling of a court in a matter of the admission or exclusion of evidence in order to have such admission or exclusion reviewed on appeal. The assignment of errors practically takes the place of such exception, and calls the attention of the appellate court to the disbelief of the appellant in the correctness of the ruling, which is the function of an exception.

3. **Notice of Examination.**—Sections 863, 864, and 865 of the Revised Statutes provide an easy method of securing such evidence. The proctor for the party desiring to take it serves on the opposing proctor a simple notice that the witness, naming him, who resides at a greater distance than 100 miles from the place of trial, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or is ancient or infirm, will be examined *de bene esse* at a certain time and place before a magistrate, and that the opposing proctor is required to be present at such examination and put such questions to the witness as he shall think fit.

Depositions in a Foreign Country cannot be taken under § 863. Cortes Co. *v.* Tannhauser, 18 Fed. Rep. 667.

Production of Books and Papers.—A witness examined under § 863 may be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, on the trial of the cause, but he cannot be compelled to produce books and papers merely for the purpose of refreshing his memory. U. S. *v.* Tilden, 10 Ben. (U. S.) 566.

4. **Reasonable Notice.**—A notice can be served on a New York proctor to take testimony in San Francisco under this section, but in all cases the notice of examination must be served in season to allow a reasonable time for the proctor so notified to be present or represented at the examination. What is such reasonable notice is a question for the court.

5. **Motion to Suppress.**—But if the notice is too brief to allow the opposing proctor to be present, or if he is aware that the requisites of the statute are not complied with, a *motion* to *suppress* the

The Deposition must be Reduced to Writing by the magistrate taking it, after the witness has been sworn, and must be subscribed by the deponent.[1]

Return.—It must then be returned by the magistrate to the court for which it was taken, under seal, and with a certificate of the reasons for which it was taken, and the notice given to the adverse party.[2]

3. Dedimus Potestatem, or Commission to Take Testimony.—It very commonly happens in admiralty suits that the testimony of witnesses resident abroad is required. On affidavit showing the materiality of such testimony, and on notice to the other side, the court will issue its commission to some disinterested party, empowering him to take the evidence of the witness therein named and return the same to the court.[3]

Interrogatories.—The motion for the commission being granted, the moving party serves written interrogatories on the opposite party, who in turn serves cross-interrogatories, which are settled by the court on notice, if the parties disagree concerning them. The clerk then attaches such interrogatories to the commission, which is issued by the clerk and under the seal of the court, with instructions as to its execution, and it is despatched to its destination.[4]

After Execution.—After being executed it is returned to the clerk, who opens it on order or by consent and in the presence of both proctors, and places it on the files.

4. Letters Rogatory.—An admiralty court will also obtain the evidence of foreign witnesses by means of letters rogatory.[5]

deposition must at once be made on such ground. Doane *v.* Allen, 24 Wall. (U. S.) 33. And it will not do to wait until the time of trial and then object to the admission of the deposition, for the reason that if a deposition is suppressed before trial for irregularity in the method of taking it, there may yet be time for the party calling the witness to take his deposition over again in proper form and in due season for the trial. Bibb *v.* Allen, 149 U. S. 481.

1. Rev. Sts. § 864. Cook *v.* Burnley, 11 Wall. (U. S.) 659.

Right of Master to be Present.—The master of a vessel has a right to be present at the taking of the depositions of his crew. Bark Havre, 1 Ben. (U. S.) 295.

2. Rev. Sts. § 865.

3. See Ship Norway, 2 Ben. (U. S.) 121.

Commissions to Foreign Countries.—In commissions to foreign countries the commissioner named is usually the nearest United States consul.

Time of Moving for Commission.—In the New York districts the commission must be moved for within fourteen days after the claim or answer is filed and perfected.

Commission for Special Object.—A commission may be issued for some special thing besides the obtaining of evidence, such as the verification of a libel personally by a foreign libellant.

Stay of Proceedings.—The order for commission usually contains a stay of proceedings until the return of the commission duly executed.

4. **Oral Cross-Examination.**—An order for oral cross-examination on a commission may be made. Steamship Louisiana, 1 Ben. (U. S.) 328.

Enlarging Time.—On proof of newly-discovered evidence, the court may enlarge the time for taking testimony, although previously closed by order. Schooner Ruby, 5 Mason (U. S.) 451.

5. **Nature of Letters Rogatory.**—This is a document issued by the court to some foreign tribunal requesting it to call

5. Depositions In Perpetuam Rei Memoriam.—The statutes provide also that any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States.[1]

XXII. Petitions and Motions.—Almost any matter in which either of the parties to a suit desires relief may be brought before the court by a petition or a motion; by a petition, generally, if the matter is *ex parte*,[2] otherwise by a motion. And the court will hear evidence on the matter, either *ex parte*, or on notice to such parties as are known to it as persons who may be interested in the decision; or on general notice by publication; and will decide according to justice.

Motions are applications for relief of some kind made on notice[3]

before it, by its ordinary process, certain witnesses within its jurisdiction and examine them touching certain subjects, either orally or on interrogatories. And the letters always assure the foreign tribunal that the court issuing the letters will do the same for it in return, if the occasion should arise. This method of obtaining evidence is especially valuable if the witnesses sought to be examined are hostile or indifferent to the party desiring their testimony, inasmuch as the foreign tribunal can put forth its process and compel the appearance and testimony of the witness by its ordinary methods for so doing.

How Obtained.—An order for the issuing of letters rogatory can be obtained on simple motion, accompanied by proof of the necessity therefor.

1. **Testimony for Future Suit.**—Rev. Sts. § 866. Under this section a deposition can be taken before suit brought, and for the purpose of perpetuating the testimony in the event of a future suit.

How Taken.—It is taken according to the usages of chancery. On petition to the Circuit Court, setting forth the necessary facts, the court will, as of course, grant the order to perpetuate the testimony. Notice of the examination should be served on all known parties who may possibly be interested, and the deposition, when taken, is filed with the clerk of the Circuit Court. If suit is thereafter brought in the District Court, an order for the transmission of the deposition from the files of the Circuit to the District Court can be obtained, as of course, before trial.

2. **Examples.**—The petition under the 59th Rule, the petition of an executor to continue the suit after the death of a party, and the petition for leave to intervene, are common examples. It often happens, also, that when property has been sold and the proceeds have been deposited in court, a surplus may remain after all claimants are paid. When there is such a surplus, the owner may come to the court with a petition stating his ownership and praying the restoration of his property. Or other persons, having claims of a maritime nature against the owner, may attack the fund in court by a petition. Such a petition need not be accompanied by a stipulation for costs. Adm. Rule 43; Andrews *v.* Wall, 3 How. (U. S.) 568; Mutual Safety Ins. Co. *v.* Cargo of Brig George, Olc. Adm. 89; The Santa Anna, B. & H. Adm. 79; The Boston, B. & H. Adm. 309; The Stephen Allen, B. & H. Adm. 175; The E. V. Mundy, 22 Fed. Rep. 173. See The Albert Schultz, 12 Fed. Rep. 156. Effect of coming in by petition after final decree of condemnation and sale. The Sea Lark, 34 Fed. Rep. 52. But a proceeding by a salvor against a fund in court, already decreed to another salvor, to secure contribution thereof under an alleged contract, cannot be maintained in the admiralty. Sheldrake *v.* The Chatfield, 52 Fed. Rep. 495. But a salvor may proceed in admiralty against his co-salvor to recover a share of the salvage money. McMullin *v.* Blackburn, 59 Fed. Rep. 177. Payment of proceeds to proctors. See Rostron *v.* The Water Witch, 44 Fed. Rep. 95.

3. **Notice.**—Reasonable notice is usually sufficient, and in many cases

to the other side during the progress of a suit.[1] They do not differ from motions in ordinary cases at law, except that they are usually more informally made. And it is not always necessary to accompany the notice of motion with an affidavit.[2] The whole matter, in this as in other branches of the admiralty practice, lies in the sound discretion of the court, and is little confined by arbitrary rules.[3]

XXIII. Limitation of Actions.—There is no absolute statute of limitations in admiralty.[4]

Laches.—But the court will not allow a stale claim to be prosecuted, and what lapse of time will make a claim stale is always a question of fact for the court. In general, an admiralty court will adopt the term specified by the statute of limitations of the state, and hold a claim which at common law would be barred by such statute to be barred in admiralty by the *laches* of the plaintiff,[5] unless there is some peculiarity of a maritime nature

when speed is necessary twenty-four hours' notice is all that is given.

1. **Question of Jurisdiction.**—A question of jurisdiction ought not to be disposed of on motion, but presented by pleading at the trial. Cushing *v.* Laird, 4 Ben. (U. S.) 70; The Crusader, 1 Ware (U. S.) 437; Lands *v.* A Cargo of Coal, 4 Fed. Rep. 478.

Giving of a Stipulation.—The giving of a stipulation is not necessarily a waiver of an objection to the jurisdiction. The Orpheus, 3 Ware (U. S.) 143.

Joinder of Issue.—But joinder of issue and filing of a cross-libel is such waiver. The Fifeshire, 11 Fed. Rep. 743.

Motion to Dismiss Libel.—A motion to dismiss a libel *in rem* in admiralty may be made, although a full hearing has been had on the merits. The John C. Sweeny, 55 Fed. Rep. 540.

2. **Affidavit.** — Any formal motion, such as one to obtain a short order of publication or to confirm a report *nisi*, need not be accompanied by an affidavit, though the court, on hearing the motion, may require proof as to the facts before granting the motion; and this even though the motion be not defended.

A motion for additional security in the admiralty may be supported by the affidavit of the proctor. Brig Harriet, Olc. Adm. 222.

3. **New York.**—In New York, where person or property is arrested, any one interested may, on evidence showing any improper practices or manifest want of equity on the part of the libellant, have a mandate from the judge for the libellant to show cause *instanter* why the arrest or attachment should not be vacated. D. C. Rule 19.

4. **Adopting State Statutes.** — The nearest approach is when the admiralty determines to follow some state statute, as in cases of liens for supplies furnished to domestic vessels. Then the requirements that specifications shall be filed with the county clerk within thirty days after the completion of the work, and that the suit must be commenced within one year unless the vessel is absent at the end of the year, are strictly enforced.

5. McCluny *v.* Sillman, 3 Pet. (U. S.) 270; Ross *v.* Duval, 13 Pet. (U. S.) 45; Jay *v.* Allen, 1 Sprague (U. S.) 130; Brig Sarah Ann, 2 Sumn. (U. S.) 206; The Key City, 14 Wall. (U. S.) 653; The H. B. Foster, 3 Ware (U. S.) 165; Coburn *v.* Factors, etc., Ins. Co., 20 Fed. Rep. 644; The Platina, 3 Ware (U. S.) 180; The Harriett Ann, 6 Biss. (U. S.) 13; The Blenheim, 5 Sawy. (U. S.) 192; Scull *v.* Raymond, 18 Fed. Rep. 547; The Robert Gaskin, 9 Fed. Rep. 62; Harpending *v.* Dutch Church, 16 Pet. (U. S.) 455; The Columbia, 13 Blatchf. (U. S.) 291; The D. M. French, 1 Lowell (U. S.) 43; The Frank Moffatt, 2 Flip. (U. S.) 291; The Bristol, 20 Fed. Rep. 800; Bailey *v.* Sundberg, 49 Fed. Rep. 583; Smith *v.* Sturgis, 3 Ben. (U. S.) 330; Joy *v.* Allen, 2 Woodb. & M. (U. S.) 303; Ship Mary, 1 Paine (U. S.) 180; Syles *v.* Steamship Santiago de Cuba, 2 Fed. Rep. 271; The Utility, B. & H.

which makes it a matter of justice that the plaintiff be allowed to sue.[1] In such cases the court in its discretion will disregard the periods fixed by state statutes.

XXIV. INTERVENTION.—There are many cases where one may be interested in the outcome of an admiralty suit, though he is not the libellant, or owner of the *res* libelled. Such person may intervene for his own interest in the suit already begun.[2]

How Accomplished.—Intervention may be accomplished by a petition to the court setting forth the interest of the intervenor, and praying that he may be permitted to intervene for his own interest. Such petition must be accompanied by a stipulation for costs, as in all cases of appearance.[3] The court will usually grant the prayer of such a petition as of course; but if there is doubt as to the propriety of the intervention, an order can be always had requiring libellant or claimant to show cause why the prayer of the petition should not be granted, or even referring the mat-

Adm. 218; Southard *v.* Brady, 36 Fed. Rep. 560; Nesbit *v.* The Amboy, 36 Fed. Rep. 926; The Queen of the Pacific, 61 Fed. Rep. 213.

1. The Key City, 14 Wall. (U. S.) 653.

2. **Salvage Cases.**—Thus where there are several salvors and one of them libels the vessel saved, the proper proceeding for the other salvors is not to commence independent proceedings, but to intervene in the suit of the first salvor. But when in salvage cases the various interests are somewhat antagonistic it is not only proper but sometimes necessary that several libels be filed. The S. S. Merrimac, 1 Ben. (U. S.) 68. These may then be tried together.

Suit for Wages—Mortgagee, etc.—And when one seaman has brought suit for his wages, other seamen suing for wages on the same voyage are required to come into the first suit instead of libelling anew; likewise when a vessel is libelled for any cause whatever and the owner has appeared and claimed, a mortgagee or other lienor may intervene to defend the vessel in the interest of his own lien. Steamboat Edward Howard, Newb. Adm. 522; The L. B. Goldsmith, Newb. Adm. 123; The Two Marys, 12 Fed. Rep. 152; The Steamship Oregon, 42 Fed. Rep. 78; Steamer City of Paris, 1 Ben. (U. S.) 529; The Nahor, 9 Fed. Rep. 213; Pertie *v.* Steamship Cold Bluff No. 2, 3 Fed. Rep. 531; The Queen, 40 Fed. Rep. 694; The Julia, 57 Fed. Rep. 233.

Bond Given for Full Value.—When the stipulation or bond is given for the full value of the *res* libelled, an intervenor may proceed against the bond as he would against the *res* itself. The Oregon, 45 Fed. Rep. 62.

Bond Given for Original Claim.—But apparently not where the bond has been given simply to cover the original claim. The T. W. Snook, 51 Fed. Rep. 244; Osborne *v.* U. S., 91 U. S. 474; The Commander-in-Chief, 1 Wall. (U.S.) 43.

Mortgagee.—One having a mortgage on a vessel may intervene and be paid out of the proceeds in court, although he may not have been able to maintain a libel for want of jurisdiction in the court. Leland *v.* Ship Medora, 2 Woodb. & M. (U. S.) 92.

Lienor—Suit for Forfeiture.—One having a lien on a vessel may intervene for his interest in a suit for forfeiture. The Mary Anne, 1 Ware (U. S.) 104; The Old Concord, 1 Brown Adm. 270.

Possessory or Petitory Suit—State Statute.—In a possessory or petitory suit the party having a lien under state statutes cannot intervene to enforce his lien, which cannot be effected by the decree in a possessory suit. The Tarranto, 1 Sprague (U. S.) 170.

Insurer.—An insurer may intervene. Propeller Monticello *v.* Mollison, 17 How. (U. S.) 152,

Court May Impose Terms.—The court may impose terms on allowing one to intervene. The America, 56 Fed. Rep. 1021.

3. Adm. Rule 34; Rawson *v.* Lyon, 15 Fed. Rep. 831.

ter to a commissioner to take proof as to the propriety of the would-be intervenor's application.

XXV. CONSOLIDATION OF SUITS.—The admiralty courts, when no injustice will be perpetrated thereby, will not hear more than one controversy involving the same facts.[1] And where there are a number of suits against the same object and arising out of the same transaction, the court, on motion, will consolidate the suits.[2]

State Laws.—Suits can also be consolidated where the law of the state allows a consolidation.

XXVI. PERSONAL INJURIES.—A suit to recover for personal injuries occasioned by negligence may be brought in admiralty, either *in personam* or *in rem*, where the *locus* of the tort was within the admiralty jurisdiction. And the case is heard as any case of tort in the admiralty, and the amount of damages to be awarded is entirely in the discretion of the court.[3]

Death Claims.—In the absence of any act of Congress allowing a personal representative to recover damages for a tort causing death, such a suit cannot be maintained in the admiralty when the death occurred on the high seas.[4]

1. Rev. Sts. § 921; The North Star, 106 U. S. 17; The Queen of the Pacific, 61 Fed. Rep. 213. Thus the old rules of the District Court for the Southern District of New York provided that when various actions were pending, all resting upon the same matter of right or defense, the court, in its discretion, would compel the parties in one suit to abide by the decision of the other, though there was no common interest among them. This rule is now obsolete. But its effect is retained in a rule providing for consolidation of similar suits, and this practice is common to other districts than the one specified. And when several parties are suing the same *res*, though with distinct rights, the proceedings are, for certain purposes, necessarily to be considered together, as to matters of priority. See The Prinz Georg, 19 Fed. Rep. 653.

Husband and Wife's Suit for Same Cause of Action.—Where libellant sued for damages, and while his suit was still pending his wife began a separate suit for the same cause of action, the court held that she should have made herself a party to her husband's suit, and dismissed her libel. The William F. McRae, 23 Fed. Rep. 557.

2. Various Libels for Same Cause.—If more than one seaman on a particular voyage libels a vessel, the court, on motion, will of course consolidate the suits. And so in cases where various salvors libel for a salvage service rendered in common by all. In such a suit not only is an advantage gained in a saving of time and expense, but the whole matter being before the court at once, it can observe more readily the relative merits of the different salvors. The Eliza Lines, 61 Fed. Rep. 308; The Sarah E. Kennedy, 25 Fed. Rep. 672.

3. Locus of Tort Generally.—The Neil Cochran, Brown Adm. 162; The Ottawa, Brown Adm. 356; The Plymouth, 3 Wall. (U. S.) 20; *Ex parte* Phœnix Ins. Co., 118 U. S. 610; The Epsilon, 6 Ben. (U. S.) 381; The Maud Webster, 8 Ben. (U. S.) 547; The Curtis, 37 Fed. Rep. 705; The City of Lincoln, 25 Fed. Rep. 835; City of Boston *v.* Crowley, 38 Fed. Rep. 202; Assante *v.* Charleston Bridge Co., 40 Fed. Rep. 765; Hill *v.* Board of Freeholders, 45 Fed. Rep. 260; Penn. R. Co. *v.* Cent. R. Co., 59 Fed. Rep. 190; Greenwood *v.* Town of Westbrook, 60 Fed. Rep. 560.

Contributory Negligence No Bar.—Contributory negligence is not a bar to a suit in the admiralty for a personal injury; but where negligence is shown on both sides, the court may award libellant one-half his damages. The Max Morris, 137 U. S. 1; The Explorer, 20 Fed. Rep. 135; The Truro, 31 Fed. Rep. 158; Anderson *v.* The Ashbrooke, 94 Fed. Rep. 124; The Mystic, 44 Fed. Rep. 398; Olsen *v.* Flavel, 13 Sawy. (U. S.) 232.

4. The Alaska, 33 Fed. Rep. 107; Welsh *v.* The North Cambria, 39 Fed.

But when the tort occurs within the boundaries of a state, though on navigable waters within the admiralty jurisdiction, and the law of the state gives a right of action for such tort, the admiralty court will adopt to itself the state law, and award as damages for the tort the amount allowed by the statute of the state, or other amount in its discretion.[1] The libellant is of course the executor or administrator of the decedent.[2]

XXVII. Death of a Party.—When a party dies pending a suit, his personal representatives may come in by petition to the court, and prosecute or defend the suit to an end.[3] Or, if they decline to do so voluntarily, they may be made parties on the petition of the adverse party.[4] And the usual stipulations are required of parties so coming or brought into a suit.[5]

XXVIII. Costs.—The award of costs in admiralty is always a matter in the discretion of the court.[6] The amount of costs is

Rep. 615; The Harrisburg, 119 U. S. 199.

1. Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 262; Steamship Oregon, 42 Fed. Rep. 78. See The St. Nicholas, 49 Fed. Rep. 671; Cheatham *v.* Red River Line, 56 Fed. Rep. 248; Boden *v.* Demwolf, 56 Fed. Rep. 846; Oleson *v.* The Ida Campbell, 34 Fed. Rep. 432. But such a suit being subject to the conditions of the state statute, contributory negligence of the deceased will bar recovery in an admiralty court. The City of Norwalk, 55 Fed. Rep. 98. In Jones *v.* The St. Nicholas, 49 Fed. Rep. 671, where a shipowner filed a libel in limitation of his liability for death claims, the court held that by this action the owner was estopped from denying the right of the representatives of the deceased to share in the fund realized from the sale of the boat if negligence was found, although the statute of the state, giving a right of action for wrongful death, gave no lien therefor.

2. **Actions In Rem and In Personam.**—Although it has been held that a vessel carries with her on the high sea the laws of the state to which she belongs (McDonald *v.* Mallory, 77 N. Y. 546), yet the Supreme Court has held that no action *in rem* will lie to recover for death, although by the law of the state a right of action may survive to the decedent's personal representative, unless such state shall expressly give a lien for the tort, which most of the state statutes allowing recovery for a tort causing death fail to do. The Corsair, 145 U. S. 335.

But the action will lie *in personam* when the tort occurred within the state whose law gives a right of action for damages for such tort. The City of Norwalk, 55 Fed. Rep. 98, 61 Fed. Rep. 364; *In re* Humboldt Lumber Manuf'r's Assoc. 60 Fed. Rep. 428. Where the constitution and code of a state fix its seaward boundary at a line three miles from shore, an action can be maintained for wrongful death occurring on the high seas two miles from shore. *Id.* When the local law gives a right of action for wrongful death, and makes the damages a lien on the vessel, a suit *in rem* will lie. The Premier, 59 Fed. Rep. 797.

3. Penhallow *v.* Doane, 3 Dall. (U. S.) 54; Nevitt *v.* Clarke, Olc. Adm. 316; Ship Octavia, 1 Mason (U. S.) 149. See The Cadiz, 20 Fed. Rep. 157.

4. **Contents of Petition.**—The petition should contain briefly the prayer of the original pleading, the interest of the new party, and the proceedings theretofore had in the cause, and conclude with a prayer that the persons named may be made parties to the suit.

5. **Death Pending Appeal.**—As to the death of a party pending an appeal to the Circuit Court of Appeals, see C. C. App. Rule 19.

6. **When Allowed.**—An exaggerated claim may be followed by a disallowance of costs. The Maggie J. Smith, 123 U. S. 349. See The Benison, 36 Fed. Rep. 793; Forace *v.* Salinas, 50 Fed. Rep. 284; The Komuk, 50 Fed. Rep. 618; The Stelvio, 34 Fed. Rep. 431; The Marinim S., 28 Fed. Rep. 664. See Pettie *v.* Boston Tow-boat Co., 44

regulated by statute, and, if we except disbursements, which are sometimes heavy, are very moderate when compared with the costs allowed by the courts of many of the states.[1]

Fed. Rep. 382; The Weatherby, 49 Fed. Rep. 463; The O. C. DeWitt, 59 Fed. Rep. 620.

Unnecessarily encumbering record. The Ashland, 19 Fed. Rep. 651.

No costs allowed when libel dismissed on grounds not pleaded. The Ocean Express, 22 Fed. Rep. 176.

No costs allowed on dismissal of libel where there were apparently good grounds for bringing the suit. The Geneva, 26 Fed. Rep. 647.

No costs where libellant did not properly present his case until it reached the appellate court. The Jefferson, 31 Fed. Rep. 489; The Olympia, 52 Fed. Rep. 985; The John Sherman, 52 Fed. Rep. 985; The Pioneer, 53 Fed. Rep. 279; The D., L. & W. No. 6 C., 53 Fed. Rep. 284; The Atlantic, 53 Fed. Rep. 607; The Union Ice Co. *v.* Crowell, 55 Fed. Rep. 87.

Costs given against one who sues for debt before it is due, although the libel was retained. The Papa, 46 Fed. Rep. 576.

On Appeals a docket fee of $25 is allowed, the expenses of printing record and briefs, and the fees of the clerk of the appellate court. See The Lillie, 42 Fed. Rep. 179; Miller *v.* Cox, 46 Fed. Rep. 662. See also Healy *v.* Cox, 46 Fed. Rep. 663. When a decree for libellant includes interest, he is entitled to interest on the whole amount of the decree below, unless there are special circumstances. The Umbria, 59 Fed. Rep. 475. On a libel against one vessel for damages to cargo of another vessel by collision, and decree against the vessel libelled, if the decree is reversed on claimant's appeal, claimant is entitled to costs. *Id.* What costs libellant entitled to. *Id.* One who appeals from a decree in his favor in a collision case is not entitled to interest pending the appeal. The Express, 59 Fed. Rep. 476.

And when both parties appeal from a decree, dividing damages, and the decree is affirmed, interest will not be allowed. The C. P. Raymond, 36 Fed. Rep. 336.

Failure of a party to a decree for division of damages to appeal therefrom prevents reversal as to him. The J. and J. McCarthy, 61 Fed. Rep. 516.

Ten per cent additional damages on unjustifiable appeal. *Id.*

Appellate court may modify decree by excluding interest. The North Star, 62 Fed. Rep. 71.

1. **Docket Fee.**—The proctor is entitled to a docket fee of twenty dollars on the final hearing; for each deposition taken and used in evidence, $2.50; for services rendered in removing a case from a district to a circuit court by appeal, $5.00.

Docket fee allowed in Hayford *v.* Griffith, 3 Blatchf. (U. S.) 34; Andrews *v.* Cole, 22 Blatchf. (U. S.) 184; The Bay City, 3 Fed. Rep. 47; Goodeyear *v.* Sawyer, 17 Fed. Rep. 2; Price *v.* Coleman, 22 Fed. Rep. 694; Partee *v.* Thomas, 27 Fed. Rep. 429. Final hearing. The Alert, 15 Fed. Rep. 621. On exceptions. The Anchoria, 23 Fed. Rep. 669. On reference. Kelley *v.* The Topsy, 45 Fed. Rep. 486. Deposition fee allowed in Beckwith *v.* Easton, 4 Ben. (U. S.) 357; Jerman *v.* Stewart, 12 Fed. Rep. 271; The Sallie P. Linderman, 22 Fed. Rep. 557; Wooster *v.* Handy, 23 Fed. Rep. 49; American Diamond Rock Boring Co. *v.* Sheldon, 28 Fed. Rep. 217. In summary proceedings, when amount is less than $50, no proctor's fee except by special allowance of the court. The Ethel, 59 Fed. Rep. 474.

Only one docket fee when case is appealed. The Lillie, 42 Fed. Rep. 179; Miller *v.* Cox, 46 Fed. Rep. 662. Not allowed in Jones *v.* Schell, 8 Blatchf. (U. S.) 79; Doughty *v.* West, 8 Blatchf. (U. S.) 107; Yale Lock Mfg. Co. *v.* Colvin, 21 Blatchf. (U. S.) 168; Strafer *v.* Carr, 6 Fed. Rep. 466; Cox *v.* Perkins, 13 Fed. Rep. 111, and note; McLean *v.* Clark, 23 Fed. Rep. 861; Consolidated Bunging Apparatus Co. *v.* American Process Fermentation Co., 24 Fed. Rep. 658; Wighton *v.* Brainerd, 28 Fed. Rep. 29; Ryan *v.* Gould, 32 Fed. Rep. 754; Cleaver *v* Traders' Ins. Co., 40 Fed. Rep. 863; Hunter *v.* International R. Co., 28 Fed. Rep. 842; Winegar *v.* Cahn, 29 Fed. Rep. 676; Stimpson *v.* Brook, 3 Blatchf. (U. S.) 456; Gorse *v.* Parker, 36 Fed. Rep. 840. On depositions before the commissioners in proceedings to distribute funds in court. James Dalzell's Sons & Co. *v.* The Daniel Kaine, 31 Fed. Rep. 746.

Bill of Costs.—The bill of costs is taxed by the clerk subject to review by the judge, and is included in and forms a portion of the

Clerk's Fees.—By sec. 828 Rev. Sts. the clerk is allowed fees for his various services in the progress of a suit, such as issuing process and subpœnas, filing papers, administering oaths, certifying records on appeal, etc. In U. S. courts subpœnas are always issued by the clerk and not by the proctor. The clerk is also entitled to a commission on moneys deposited in and paid out of the registry of the court.

Clerk's costs considered in the Yacht Siren, 9 Ben. (U. S.) 194; Schooner F. Merwin, 10 Ben. (U. S.) 403; Cavender *v.* Cavender, 10 Fed. Rep. 828. Commissions on moneys deposited in bank. *Ex p.* Prescott, 2 Gall. (U. S.) 146. General objections to his costs not considered. Dedekam *v.* Vose, 3 Blatchf. (U. S.) 153. Fees collected from United States. Hill *v.* U. S., 40 Fed. Rep. 441; Erwin *v.* U. S., 37 Fed. Rep. 470; Jones *v.* U. S., 39 Fed. Rep. 410. Charge for note of issue and making up record. The Alice Tainter, 14 Blatchf. (U. S.) 225; The Thomas Fletcher, 24 Fed. Rep. 481; Blain *v.* Home Ins. Co., 30 Fed. Rep. 667. Attendance in court. Goodrich *v.* U. S., 35 Fed. Rep. 193.

Marshal's Fees.—By sec. 829 Rev. Sts. U. S., the marshal is entitled to fees for attaching property, serving process, and the expenses incident to keeping and selling property. He is also entitled to poundage when the claim is settled by the parties, and on a levy under execution.

Keeper's fees allowed. U. S. *v.* 300 Barrels of Alcohol, 1 Ben. (U. S.) 72. Although notified not to put keeper in charge. Canal Boat Independent, 9 Ben. (U. S.) 489. Although private keeper aboard. The San Jacinto, 30 Fed. Rep. 266. Keeper's fees disallowed—day and night fees. The Captain John, 41 Fed. Rep. 147. Two dollars and fifty cents per day not necessarily limit of charge for keeper's fees. The Perseverance, 22 Fed. Rep. 462; The Nellie Peck, 25 Fed. Rep. 463. Wharfage. Schooner F. Merwin, 10 Ben. (U. S.) 403. Dry-dock charges. Steamboat Novelty, 9 Ben. (U. S.) 195. Auctioneer's fees. The John E. Mulford, 18 Fed. Rep. 455. Retaining keeper on board after suit settled. The J. W. Dennis, 19 Fed. Rep. 799. Same vessel held under different processes. Steamship Circassian, 6 Ben. (U. S.) 512. Actual travelling expenses in lieu of mileage. The Wavelet, 25 Fed. Rep. 733. Preservation of property. The Georgeanna, 31 Fed. Rep. 406. Goods attached in warehouse. Jorgensen *v.* 3173 Casks of Cement, 40 Fed. Rep. 606; Steamship Russia, 5 Ben. (U. S.) 84; Steamship Acadia, 10 Ben. (U. S.) 482. Commission. The Clintonia, 11 Fed. Rep. 740; Robinson *v.* 15,516 Bags of Sugar, 35 Fed. Rep. 603. The Morgan City, 38 Fed. Rep. 572. Commission not allowed. The Colorado, 21 Fed. Rep. 592.

Commissioner's and Witnesses' Fees.—Commissioners (sec. 847 Rev. Sts. U. S.) are also entitled to fees for performing the services rendered by them in an admiralty suit, usually on references; and witnesses' fees are taxable by sec. 848 Rev. Sts. U. S.

Commissioner's fee chargeable though parties do not appear. The Wavelet, 25 Fed. Rep. 733. Fees of three commissioners. Young *v.* Merchants' Ins. Co., 29 Fed. Rep. 275. Testimony written by person other than commissioner. Schooner F. Merwin, 10 Ben. (U. S.) 403. Notary's charge for depositions. *Id.* One charge for issuing summons for seamen's wages. Kelly *v.* The Topsy, 45 Fed. Rep. 486. Amount larger than three dollars. Doughty *v.* West, 8 Blatchf. (U. S.) 107. State officers acting as commissioners. Jerman *v.* Stewart, 12 Fed. Rep. 271. Bill of commissioner's fees. Beckwith *v.* Easton, 4 Ben. (U. S.) 357. Witness fees taxable though witness not examined. Clark *v.* American Dock, etc., Co., 25 Fed. Rep. 641. Must show actual payment. Beckwith *v.* Easton, 4 Ben. (U. S.) 357; The Highlander, 19 How. Pr. (N. Y.) 343. Travel 100 miles, unless distance wholly within district. The Syracuse, 36 Fed. Rep. 830; Buffalo Ins. Co. *v.* Providence, etc., S. S. Co., 29 Fed. Rep. 237; Beckwith *v.* Easton, 4 Ben. (U. S.) 357; Steamship Leo, 5 Ben. (U. S.) 486; Eastman *v.* Sherry, 37 Fed. Rep. 844; The Vernon, 36 Fed. Rep. 113. Court may allow mileage for more than 100 miles. Smith *v.* Chicago, etc., R. Co., 38 Fed. Rep.

decree against the losing party; it is filed with the papers in the cause.[1]

XXIX. LIMITATION OF LIABILITY—1. Generally.—The Revised Statutes[2] provide that a shipowner shall not be liable in cases of loss by fire on a vessel;[3] and that in cases where damage has been done, occasioned, or incurred without the privity or knowledge[4] of

321. Witness from without state. U. S. *v.* Sanborn, 28 Fed. Rep. 299; Cahn *v.* Monroe, 29 Fed. Rep. 675; Haines *v.* McLaughlin, 29 Fed. Rep. 70. Fees taxable throughout district. Sims *v.* Schult, 40 Fed. Rep. 143; Anonymous, 5 Blatchf. (U. S.) 134; Steamship Leo, 5 Ben. (U. S.) 486. Taxable though deposition taken. Beckwith *v.* Easton, 4 Ben. (U. S.) 357. Party as witness. Schooners Elizabeth and Helen, 4 Ben. (U. S.) 101; Hussey *v.* Bradley, 5 Blatchf. (U. S.) 210; Tuck *v.* Olds, 29 Fed. Rep. 883. Witness in more than one case. Young *v.* Merchants' Ins. Co., 29 Fed. Rep. 273; Archer *v.* Hartford Fire Ins. Co., 31 Fed. Rep. 660; The Vernon. 36 Fed. Rep. 113. Money actually paid, but in excess of statutory fees, not taxable. Leary *v.* The Miranda, 40 Fed. Rep. 607. Mileage of witnesses may be charged, though their depositions might have been taken. Hunter *v.* Russell, 59 Fed. Rep. 964. How mileage computed. *Id.*

Stenographer's Fees.—Stenographer's fees are not taxable except by consent of the parties or order of the court. Bridges *v.* Sheldon, 18 Blatchf. (U. S.) 508; The E. Luckenbach, 19 Fed. Rep. 847.

Cost of Printing—Other Expenses.—The necessary cost of printing is also taxable, and ordinarily any expense incurred under a rule or order of the court may be charged against the losing party. Copies. Yale Lock Mfg. Co. *v.* Colvin, 14 Fed. Rep. 269; Hussey *v.* Bradley, 5 Blatchf. (U. S.) 210; Dennis *v.* Eddy, 12 Blatchf. (U. S.) 195. Printed papers. Dennis *v.* Eddy, 12 Blatchf. (U. S.) 195. Commission. The Frisia, 27 Fed. Rep. 480. Map. The Vernon, 36 Fed. Rep. 113. Surveys. Tuck *v.* Olds, 29 Fed. Rep. 883. Auctioneer. The John E. Mulford, 18 Fed. Rep. 455. Telegrams, postage. Hussey *v.* Bradley, 5 Blatchf. (U. S.) 210. Searching title of sureties. Simpson *v.* 110 Sticks of Timber, 7 Fed. Rep. 243.

Libellant Recovering less than $300.—When a libellant, on his own appeal, recovers less than the sum or value of $300, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be compelled to pay costs. Rev. Sts. sec. 968.

Costs—Several Libels Filed.—When several libels are filed against vessel and cargo which might legally be joined in one libel, only one bill of costs can be taxed to the libellants, unless special cause for libelling the vessel separately is satisfactorily shown on motion in open court. See The Julia, 57 Fed. Rep. 233. Where two libels were filed for the same collision, but not in form of cross-libels, and the suits were heard together, the successful party taxed two bills of costs, except docket fee. The Medusa, 47 Fed. Rep. 821.

But allowance may be made on one libel or information for the costs incidental to several claims. Sec. 978 Rev. Sts.

Cause Dismissed for Lack of Jurisdiction.—Where a cause is dismissed for lack of jurisdiction, no costs are allowed. The McDonald, 4 Blatchf. (U. S.) 477; Wenberg *v.* A Cargo of Mineral Phosphate, 15 Fed. Rep. 285. But this rule does not apply when the lack of jurisdiction is only disclosed by subsequent pleadings or evidence, after the parties are in court. The City of Florence, 56 Fed. Rep. 236; Lowe *v.* Canal-boat Benjamin, 1 Wall. Jr. 187.

1. Rev. Sts. § 983.

2. Act of Congress of March 3, 1851, the provisions of which are now embodied in §§ 4282, 4283, 4284, and 4285 of the Revised Statutes.

3. **Vessel Entitled to Immunity.**—The vessel itself is entitled to immunity from liability for a loss by fire, although its ownership may have changed since the damage. The Rapid Transit, 52 Fed. Rep. 320. § 4282 does not release a shipowner from liability to contribute in general average. The Roanoke, 59 Fed. Rep. 161.

4. See The Maria & Elizabeth, 11 Fed. Rep. 520; Sumner *v.* Caswell, 20 Fed. Rep. 249; The City of Para, 44 Fed. Rep. 689; The Anna, 47 Fed. Rep.

the shipowner, such owner shall not be held liable therefor beyond the value of his interest in such vessel and her freight pending.[1] This act applied only to torts, but was later extended to cover the general debts of a ship. If, therefore, a shipowner is sued or his ship libelled for a claim of loss arising under such circumstances, it is sufficient for him in his answer, after pleading to the merits, if he desires, to set up the provisions of the statute and pray that the court decree, if he is to be held liable for the loss, that he be declared not liable beyond the value of his vessel and her freight pending, or his interest in them.[2]

525; Whitcomb *v.* Emerson, 50 Fed. Rep. 128; Quinlan *v.* Pew, 56 Fed. Rep. 111; Matter of Meyers Excursion, etc., Co., 57 Fed. Rep. 240; Lord *v.* Goodall Steamship Co., 4 Sawy. (U. S.) 299. Passenger's baggage is not merchandise. The Marine City, 6 Fed. Rep. 413. Claim for unearned freight. *In re* Liverpool, etc., Steam Co., 3 Fed. Rep. 168.

1. Ben. Adm. (3d ed.) §§ 554–584. The act includes claims for personal injuries. Steam Propeller Epsilon, 6 Ben. (U. S.) 378; Butler *v.* Boston SS. Co., 130 U. S. 527; *In re* Petition of Long Island, N. S., P., etc., Co., 5 Fed. Rep. 599; The Amsterdam, 23 Fed. Rep. 112. Where claims in excess of the value of the vessel were made and the shipowner filed a petition for limitation, and claimants thereupon reduced their claims, it was held that the jurisdiction, once acquired, could not be so divested. The Tolchester, 42 Fed. Rep. 180. Applies to vessels navigating inland waters, when. *In re* Petition of Long Island, N. S., P., etc., Co., 5 Fed. Rep. 599. Not to steam pleasure yacht. The Mamie, 5 Fed. Rep. 813. Not to vessel solely employed on Hudson River. Tug Sears, 8 Fed. Rep. 365. (But the three last-named decisions were made before the passage of the Act of June 19, 1886.) The court cannot take jurisdiction of a petition for limitation of liability where it would not originally have had cognizance in admiralty of the cause of action. *Exp.* Phenix Ins. Co., 118 U. S. 610. Elwell *v.* Geibel, 33 Fed. Rep. 71. The statute does not protect a shipowner against a claim on which the vessel has been seized and released on bond, although the vessel be subsequently lost and a petition in limitation thereupon filed. The Percy Birdsall *v.* The Invertrossacks, 55 Fed. Rep. 683. "Privity or knowledge." Lord *v.* Goodall, etc., Co., 4 Sawy. (U. S.) 299; Craig *v.* Continental Ins. Co., 26 Fed. Rep. 292; The Anna, 47 Fed. Rep. 525; Matter of Petition of Myers Ex'n Co., 57 Fed. Rep. 240, *aff.* 61 Fed. Rep. 109; Quinlan *v.* Pew, 56 Fed. Rep. 111.

Passage money and freight prepaid at the port of departure are not "freight pending." The Main *v.* Williams, 152 U. S. 122.

Value.—The value can be ascertained by an appraisal, and a stipulation for value given for such appraised value, as in ordinary cases; and the suit will proceed in regular course, though the shipowner is protected by the provisions of the statute.

2. L. 1884, ch. 121, § 18; 23 Sts. at L. p. 57; L. 1886, ch. 421, § 4; 26 Sts. at L. p. 80. The Scotland, 105 U. S. 24; The Manitoba, 122 U. S. 100; The Doris Eckhoff, 30 Fed. Rep. 140. The statutes may be brought up by exceptions to the libel. Miller *v.* O'Brien, 35 Fed. Rep. 779. If there is but a single claim, it has been held that this defense may be set up in an answer to an action at law, and hence that an independent proceeding in admiralty would not be allowed, or a stay of the case at law issued. The Rosa, 53 Fed. Rep. 132. But this holding was disapproved by the Circuit Court of Appeals for the First Circuit, in Quinlan *v.* Pew, 56 Fed. Rep. 111. Petitioner is liable for interest on his stipulation from the date thereof. The Favorite, 12 Fed. Rep. 213.

Validity — Exemptions. — The act of June 19, 1886, extending the benefits of limited-liability legislation to all vessels used on lakes and rivers or in inland navigation, including canal-boats, barges, and lighters, is valid. *In re* Garnett, 141 U. S. 1; The Katie, 40 Fed. Rep. 480; Butler *v.* Boston, etc., SS. Co., 130 U. S. 527. But

2. The Proceeding—*a.* GENERALLY.—But it often happens not only that the vessel has done damage exceeding her value without the privity or knowledge of her owner, but that the claims arising from such damage are numerous, or are largely unknown, or that suits are brought thereon in different courts, or the owner sued in the courts of a state and the vessel libelled in the admiralty court. The rules of the Supreme Court have provided a method, under the above-mentioned law, by which the whole matter can be heard in a single proceeding, and all other proceedings enjoined, and, if the owner succeeds in establishing his position, all possible claimants against him on account of this particular damage and loss may be forever barred, and pending suits perpetually stayed.[1] Such is a proceeding in limitation of liability taken in the admiralty courts of the United States.[2]

the act is not retroactive. Chappell *v.* Bradshaw, 35 Fed. Rep. 923. The later statutes do not exempt a shipowner from liability on his personal contracts. The Amos D. Carver, 35 Fed. Rep. 665; McPhail *v.* Williams, 41 Fed. Rep. 61; The Giles Loring, 48 Fed. Rep. 471; Douse *v.* Sargent, 48 Fed. Rep. 695; Laverty *v.* Clausen, 40 Fed. Red. 542; Gokey *v.* Fort, 44 Fed. Rep. 364. Nor does the statute exempt from liability for the destruction of structures on land destroyed by fire communicated by a vessel. Goodrich Transp. Co. *v.* Gagnon, 36 Fed. Rep. 123; *Ex p.* Phenix Ins. Co., 118 U. S. 610.

Applicable to British Corporation.—A British corporation may take advantage of the act, though the accident happened within English jurisdiction. Levinson *v.* Oceanic Steam Nav. Co., 17 Alb. L. J. 285. See *In re* Leonard, 14 Fed. Rep. 53; The State of Virginia, 60 Fed. Rep. 1018.

1. Adm. Rules 54–58; Black *v.* Southern Pac. R. Co., 14 Sawy. (U. S.) 120. But when, in a case of collision, both vessels are in fault, the statute cannot be applied until the balance of damage has been struck; and then the party against whom the decree passes may claim the benefit of the statute in respect to the balance which he is decreed to pay. The North Star, 106 U. S. 17.

2. Rules of the Southern and Eastern Districts of New York in Proceedings to Limit Liability.—Rule 73. "Petitions or libels to limit liability must state: (1) the facts showing that the application is properly made in this district; (2) the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands, including all unsatisfied liens or claims of liens on contract or on tort, arising on that voyage, so far as known to the petitioners, and what suits, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage, or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, as nearly as the petitioners can ascertain, and where and in whose possession they are; also the amount of any pending freight, recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars, according to the best knowledge, information, and belief of the petitioner, shall be sufficient."

Rule 74. "If a *surrender* of the vessel is offered to be made to a trustee, the libel or petition must further show whether there is any prior paramount lien on the vessel, and whether she has made any, and, if so, what voyage or trip since the voyage or trip on which the claims sought to be limited arose, and any existing lien or liens, maritime or domestic, arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; also the special facts on which the right to surrender the vessel is claimed, notwithstanding such subsequent trip or voyage, and whether the vessel sustained any injury upon, or by reason of, such subsequent voyage or trip.

b. THE PETITION OR LIBEL.—The shipowner first files a libel or petition, setting forth the casualty, and its happening without his privity or knowledge, and alleging that the damages are in excess of the amount of his interest in the vessel and her pending freight, and that claims therefor have been made upon him or his vessel, or that he is in fear that such claims will be made.[1] The

"Upon surrender of the vessel no final decree exempting from liability will be made until all such liens as may be admitted or proved, prior to such final decree, to be superior to the liens of the claims limited, shall be paid or secured independently of the property surrendered, as may be ordered by the court; and the monition in cases of surrender shall cite all persons having any claim upon the vessel to appear on the return day or be defaulted, as in ordinary process *in rem*."

Rule 75. "If, instead of a surrender of the vessel, an appraisement thereof be sought for the purpose of giving a *stipulation for value*, the libel or petition must state the names and addresses of the principal creditors and lienors, whether on contract or in tort, upon the voyage on which the claims are sought to be limited, and the amounts of their claims, so far as they are known to the petitioner, and the attorneys or proctors in any suit thereon; or if such creditors or lienors be very numerous, then a sufficient number of them properly to represent all in the appraisement; and notice of the proceedings to appraise the property shall be given to such creditors as the court shall direct, and to all attorneys and proctors in such pending suits."

Rule 76. "The stipulation for value upon such appraisement shall be given with sufficient sureties and upon justification as required under these rules in actions *in rem*, and shall provide for the payment of the appraised amount with interest from the close of the voyage, unless otherwise ordered by the court."

Rule 77. "If issue is taken by the pleadings upon the right of the petitioners to any limitation of liability, or upon the liability of the petitioners for the claims alleged against them, such issue will not be heard and determined until the publication of the monition, unless otherwise ordered on application to the court."

Rule 78. "Proof of claims presented to the commissioner shall be made by or before the return day of the monition by affidavit specifying the nature, grounds, and amount thereof, the particular dates on which the same accrued, and what, if any, credits were given thereon, and what payments, if any, have been made on account; with a bill of particulars giving the respective dates and amounts, if the same consists of several different items. Such proof shall be deemed sufficient, unless within five days after the return day of the monition, or after interlocutory decree in case of issue joined by answer to the petition, or within such further time as may be granted by the court, the allowance of the claim shall be objected to by the petitioner or by some other creditor filing a claim, who shall give notice in writing of such objection to the commissioner and to the proctors of the claim objected to, if any. Any claim so objected to must be established by further legal *prima-facie* proof on notice to the objecting party, as in ordinary cases; but any creditor desiring to contest the same upon any specific defense must, with his notice of objection, or subsequently, if allowed by the commissioner or the court, state such defense, or be precluded from giving evidence thereof; and the unsuccessful party to such contest may be charged with the costs thereof. The commissioner shall, on the return day of the monition, file in open court a list of all claims presented to him."

1. **Proceedings.**—See The Rose Culkin, 52 Fed. Rep. 332.

It is unnecessary to aver or prove that the claims against the vessel are in excess of her value. The Garden City, 26 Fed. Rep. 770.

The proceeding may be instituted before any suit is brought against the owner or his vessel. *Ex p.* Slayton, 105 U. S. 451; Steamship John Bramall, 10 Ben. (U. S.) 511; Black *v.* Southern Pac. R. Co., 39 Fed. Rep. 565.

Claims and Claimants.—The Benefactor, 103 U. S. 239.

petitioner thereupon claims the benefit of the statute, and offers to surrender the vessel during the pendency of the proceeding, to a trustee to be appointed by the court; or else he asks for an appraisal, offering to deposit the appraised amount in court, or give bonds. The libel also prays for the appointment of a commissioner to receive proof of claims. The libel may simply ask that the owner be not held liable beyond the value of his vessel, surrendering such value without contest to any claimants; or it may contest the liability of the owner to any extent whatever, on the merits, while claiming the benefits of the statute, if the court finds that the contention of entire exemption from liability is untenable.

Filing Libel—Stipulation.—The libel should be filed in the district in which the vessel is found, or in the district in which the owner resides and may be sued.[1] It is accompanied by the usual stipulation for costs.

c. PROCEEDINGS UNDER THE LIBEL—**Trustee.**—On the filing of the libel the court may appoint a trustee, to whom the libellant may turn over his vessel.[2]

If Appraisal is Asked the court appoints appraisers who value the vessel and pending freight, whereupon libellant pays the appraised amount into court, or gives a stipulation therefor.[3]

1. Adm. Rule 57. See The Alpena, 8 Fed. Rep. 280; *In re* Leonard, 14 Fed. Rep. 53. The proceeding must originate in the District Court. Elwell *v.* Geibei, 33 Fed. Rep. 71, a proceeding in equity, wrongly reported as in admiralty; The Mary Lord, 31 Fed. Rep. 416. Where the jurisdiction of the District Court has attached, it is exclusive. Black *v.* Southern Pac. Co., 39 Fed. Rep. 565; *In re* Morrison, 147 U. S. 14.

2. **Turning Over Vessel—Interest.**—This is done by ordinary bill of sale, or, better, by an instrument reciting the proceeding, and stating that the transfer is made in accordance with such proceeding. It is not necessary that the vessel be placed in custody of the marshal. *In re* Morrison, 147 U. S. 14. Trustee may sell to prevent destruction. The Mendota, 14 Fed. Rep. 358. The owner must surrender the vessel free from previous liens. The U. S. Grant, 45 Fed. Rep. 642. When owners surrender a vessel, they cannot be required to add interest on her appraised value from the time the liability was incurred, though they have long delayed the surrender. But when they elect to give a bond for the appraised value, they may be required to provide for interest until such time as the money is paid. The Battler, 58 Fed. Rep. 704; *In re* Harris, 57 Fed. Rep. 243.

3. The Anna, 47 Fed. Rep. 525; The H. F. Dimock, 52 Fed. Rep. 598; The City of Norwich, 1 Ben. (U. S.) 89; Norwich, etc., Transp. Co.'s Petition, 8 Ben. (U. S.) 312; The Doris Eckhoff, 30 Fed. Rep. 140; The U. S. Grant, 45 Fed. Rep. 642; Gokey *v.* Fort, 44 Fed. Rep. 364. The court may require that the bond include a stipulation for interest. *In re* Harris, 57 Fed. Rep. 243.

The price realized at a marshal's sale of a vessel is not conclusive as to her value, and the court, on cause shown, may require a bond for the actual value, as proved. The U. S. Grant, 45 Fed. Rep. 642.

The voyage of a vessel, sunk in collision, terminates on such sinking, and the owner's liability is measured by her value as she lies at the bottom, and is not affected by the fact that she is afterwards raised and repaired. The City of Norwich, 118 U. S. 468; The Scotland, 118 U. S. 507; The Great Western, 118 U. S. 520. See The Anna, 47 Fed. Rep. 525.

The value is the actual value of the vessel, without any deduction on account of liens. The Leonard Richards, 41 Fed. Rep. 818.

Proof of Claims.—The court also appoints a commissioner to receive proof of claims, and issues to the marshal its monition concerning the notification of claimants.[1]

Staying Proceedings.—An injunction order is also made at the same time, staying all proceedings already begun, and the commencement of any others, until the final disposition of the proceeding in question.[2]

d. PROOF OF CLAIMS AND RETURN OF MONITION.—Being notified, claimants appear before the commissioner, and make proof of their claims, and the commissioner returns to the court the complete list thereof.[3]

On the return of the monition, also, claimants should appear in court and answer the libel or obtain time to answer, and the petitioner should take the default of all claimants who do not so appear. The libel being answered, the cause goes upon the calendar, and is heard on evidence as in ordinary cases.

e. DECREE.—If the court decrees that the petitioner is not entitled to the limitation of liability which he claims, a decree will be made dismissing the petition, dissolving the injunction, and allowing claimants to proceed against the petitioner or his vessel.

Insurance on a vessel is not part of the owner's interest to be surrendered. The City of Norwich, 118 U. S. 468; The Scotland, 118 U. S. 507; The Great Western, 118 U. S. 520; The Rapid Transit, 52 Fed. Rep. 320. When the vessel is lost and no freight is earned, the owner is not liable for freight pending. *Id.*

1. Court's Monition to Marshal.—This directs him to publish a notice once a day for 14 days, and thereafter once a week until the expiration of not less than three months from the date of the first publication, citing all persons having claims by reason of the casualty in question to appear before the commissioner and make proof of such claims at or before a certain time named in the writ; and also to appear in court and answer the allegations of the libel, if the claim of the libel is contested. The court, in its discretion, may also direct further notice to be given, through the post-office or otherwise.

2. See Providence, etc., Co. *v.* Hill Mfg. Co., 109 U. S. 578; Black *v.* Southern Pac. R. Co., 39 Fed. Rep. 565.

Copy of Injunction Order.—A copy of this injunction order must be served on all known claimants with the monition. Adm. Rules 54–57.

3. Practice before Commissioner.—The proper practice, on proof of claims before a commissioner, in a case where petitioner is seeking to limit his liability, and is also claiming, on the merits, an absolute exemption from all liability, is for each claimant to file with the commissioner an affidavit setting forth his claim and the amount thereof. The commissioner should return a list of these to the court, on or before the return day of the monition, and the petitioner should thereupon, on entering his order for the default of all persons not appearing, incorporate into it a provision that all proceedings before the commissioner be stayed until the hearing in court on the merits. Unless this method is followed, claimants may be put to minute proof of the claims before the commissioner, with questions of priority, etc., before it is settled that they have any claim at all. If the petitioner is declared liable by the court, if only to the extent of the fund, the matter may be referred back to the commissioner, to hear formal proof as to the claims, with such opposing evidence as other claimants or the petitioner may adduce, as in ordinary references on interlocutory decree. When petitioner does not contest the right of claimants to the fund, but only seeks to limit his liability to such fund, the strict proof of claims may be as well before as after the hearing in court.

If the decision is that the petitioner is not in fault for the damage complained of, the court makes a decree to that effect, and the injunction against the commencement or continuance of the proceedings is made perpetual, and the trustee is directed to return his boat to the petitioner, or the clerk directed to return to petitioner the money deposited in court, or an order entered cancelling petitioner's stipulations.[1]

If the decision of the court be that petitioner is liable, but is nevertheless entitled to the benefit of the statute, a decree will be made that the petitioner pay into court the amount called for by the stipulation, if the money be not already so deposited, and that the fund be distributed among the various claimants in proportion to their claims, or that the trustee sell the vessel and distribute the proceeds in like manner.[2]

f. COSTS.—Costs in limitation proceedings are usually paid out of the fund.[3] The costs taxable in such cases are the same as are taxable in ordinary cases.[4]

XXX. PRIZE—1. Generally.—When vessels or other property are captured in time of war, or in time of peace are seized as pi-

1. Norwich, etc., Transp. Co.'s Petition, 10 Ben. (U. S.) 193. Or any surplus of the fund over the amount of claims filed may be returned to petitioner. See Wallace *v.* Providence, etc., SS. Co., 14 Fed. Rep. 58.

2. **Reference Back to Commissioner.**—If there are questions of priority of payment among claimants, or if petitioner desires to contest any of the claims, the matter is ordinarily referred back to the commissioner who originally received the claims, to hear and decide such questions and report to the court. Meantime the petitioner may enter an order that he be exempted from all liability beyond such fund, and that any further suits, actions, or proceedings, unless against the fund, be perpetually enjoined.

3. Adm. Rule 53. See Norwich, etc., Transp. Co.'s Petition, 10 Ben. (U. S.) 194, 17 Blatchf. (U. S.) 221, 118 U. S. 468. But the practice adopted in the foregoing case, where the successful petitioner taxed a docket fee for each claimant, is not now followed. Petitioner is ordinarily allowed one docket fee on hearing and one on reference only.

The provision that costs shall be paid out of the fund applies only to cases where petitioner, after having established his right to limitation, does not contest the liability of his vessel. The Leonard Richards, 41 Fed. Rep. 818; *In re* Harris, 57 Fed. Rep. 243.

Award of Costs.—When the petitioner is held not entitled to his limitation, costs go to the claimants; when the limitation is allowed him, even though he be held liable on the merits, petitioner is entitled to costs against the fund, though claimants may tax their disbursements against it. When petitioner is declared exempt from all liability, it would seem that claimants are liable to pay petitioner's costs on their stipulations for costs, filed with their answers. In some cases, however, costs have been taxed against the fund in favor of petitioner in such cases. The shipowner may be held to pay costs beyond the amount of his stipulation, if he opposes and defends. The Wanata, 95 U. S. 600; *In re* Harris, 57 Fed. Rep. 243. Where the decree is against the owners, they are liable *in solido* for costs. The Giles Loring, 48 Fed. Rep. 463. A claimant who desires to contest the liability of a vessel, sold by a trustee under the Limited Liability Act, and gives a stipulation for costs under Admiralty Rule 26, is liable only for the costs properly incident to such contest. The Vernon, 36 Fed. Rep. 113.

4. When one enjoined from continuing a state court proceeding, and brought into an admiralty court by limitation proceedings, may recover costs incurred in state court. *In re* The Garden City, 27 Fed. Rep. 234.

rates or slavers, or violators in any way of the law of nations, their condemnation as prize has always been required, in civilized countries, before the captured property, or its proceeds, can be appropriated by the captors.[1]

Of such proceedings the United States District Court has cognizance.[2]

2. Captor's First Duty.—Therefore, when a captured vessel, or other captured property, is brought into a port of the United States, the first thing necessary for the captor to do is to notify the judge of the District Court, or the prize commissioners appointed by such court, of that fact, and of the place where the property can be found.[3]

3. Prize Commissioners.—In time of war[4] there are permanent commissioners appointed by the judge of the District Court at each prominent seaport.[5]

They are called prize commissioners, and it is their duty to attend to the preliminary matters in cases of prize, as herein below set forth.[6]

1. **Formal Proof that Vessel Subject to Forfeiture Necessary.**—It must appear as matter of formal proof that the vessel actually was an enemy's vessel, or otherwise subject to be forfeited by the laws of war or of nations.

2. **Jurisdiction.**—This condemnation proceeding, with its allied actions, has always been peculiarly within the jurisdiction of the admiralty. The United States District Court when sitting in such a proceeding becomes a court of prize, as in ordinary admiralty cases it is an instance court, and in admiralty matters involving crime a criminal court. See Bouvier L. Dict., title Instance; Ben. Adm. sec. 330.

Practice.—Practice in prize cases is considered in Note II in the appendix to vol. 1 of Wheaton's Reports, 1 Wheat. (U. S.) 494.

3. Prize Rule 2.

4. **In Peace.**—In time of peace these commissioners are appointed only on occasion arising to call for their services.

5. **Number, etc., of Commissioners.**—They are not to exceed three in number, one of whom must be a retired naval officer. Rev. Sts. sec. 4621; Prize Rule 1.

6. **Duty of Commissioners.**—On receiving a notification of the arrival of a prize, or without any notification, if the commissioners become in any way aware of the fact, it is their duty to go at once to the captured property, examine its condition, and see that it is in a place of safety; to take possession of all ship's papers, if the prize be a vessel, and documents of every kind relating to the captured property, and seal it up, by securing a vessel's hatches, or in any other way if the prize be other property; and such seals may not be thereafter broken without the special order of the court, except in case of fire or tempest, or of absolute necessity of some kind. Prize Rules 3-6.

If the Property is Perishable, the commissioners must so report to the court, in order to secure its immediate sale. Rev. Sts. secs. 4622, 4627; Steamer Ella Warley, Blatchf. P. C. 288; The Cheshire, Blatchf. P. C. 165.

Taking Possession of Ship's Documents.—This taking possession of all the documents of a ship is of the utmost importance, because in cases of prize all the evidence to convict the vessel is drawn primarily from the ship herself and the testimony of those on board of her; and ordinarily a case of prize is decided only upon such proof, unless that proof shows that the liability to forfeiture is doubtful. The Sir Wm. Peel, 5 Wall. (U. S.) 517; The Georgia, 7 Wall. (U. S.) 32; The Dos Hermanos, 2 Wheat. (U. S.) 76; The Pizarro, 2 Wheat. (U. S.) 227; The Amiable Isabella, 6 Wheat. (U. S.) 1; The Luminary, 8 Wheat. (U. S.) 407; D. C. Prize Rule 46.

Duty of Master.—The master of the

4. Examinations in Preparatorio.—Within a reasonable time after the arrival of the prize in port, the captor must produce before the commissioners certain of the persons who were captured with or who claim the prize.[1]

When the witnesses are before the commissioners, the latter must proceed to examine them on the standing interrogatories.[2] This examination is called the examination in preparatorio.

Return of Answers.—Where all the witnesses have answered the entire list of questions, the answers to the interrogatories are returned to the office of the clerk of the District Court, under the seal of the commissioners, together with all the ship's documents.[3]

5. Filing the Libel.—At any time after the arrival of the prize in port, and before or during the examination *in preparatorio*, a libel *in rem* must be filed against the prize.[4] And it must be filed within a reasonable time.[5]

capturing vessel, or some one who was present at the taking of the prize, must therefore make an affidavit that all documents taken from the prize have been delivered to the commissioners, or, if they have not, the reason why, and also that if before final condemnation or acquittal any other papers are found, they shall also be delivered to the commissioners.

1. Rev. Sts. sec. 4625. Three days. Prize Rule 12. Three or four persons, if there be so many of the company who were captured with or who claim the property; and if the capture be a vessel, the master and mate, or supercargo, must always be two. *Id.*

Effect of Captor's Neglect.—If the captor has not given notice of arrival as above stated to be required, or does not produce the captured crew, any claimant of the prize may give the notice to the judge or commissioners, and the commissioners must at once notify the captor to forthwith produce the documents and the witnesses; and if the captor still neglect to do so, the commissioners shall certify the facts to the judge, who will take proper action thereon. Prize Rule 22.

2. Prize Rule 12.

History and Nature of Interrogatories.—These interrogatories are very old, descending from the English prize courts, and are the same for all the district courts of this country; they consist of a minute inquisition into the relation of the witness to the prize, the vessel, her cargo and voyage, and the circumstances of the capture.

Practice concerning Interrogatories.—No other interrogatories besides the standing interrogatories are allowed to be put by the commissioners; the witness may not see the interrogatories, documents, or papers, or consult with counsel or with any person interested without the special order of the court; and the claimant of the prize has no right to object to questions, or to cross-examine, though he may be present at the examination. Rev. Sts. sec. 4622; Prize Rule 13.

3. Prize Rule 11.

4. Filing the Libel—Nature.—This is the real beginning of the proceeding, the foregoing being regarded but as preliminary thereto. Prize Rule 24. Betts Pr. 72. This libel is filed by the United States attorney for the district, in the name of the United States, or in his own name, as district attorney, but on behalf of the United States, in cases where the capture has been made by a government vessel. The Palmyra, 12 Wheat. (U. S.) 1; Jecker *v.* Montgomery, 18 How. (U. S.) 110. When a private armed vessel has made the capture, the libel is filed by her master or owner, through his private proctor, on behalf of himself, his officers and crew. The libel is in the ordinary form of an admiralty libel, setting forth the jurisdiction and the facts of the capture, and praying for the condemnation and forfeiture of the prize, and the distribution of her proceeds.

5. Effect of Punctuality.—If the libel is promptly filed by the captor, a monition thereupon issues, returnable in ten days, and the mesne process under the libel is delivered to the marshal and executed as in any proceeding

6. Proceedings on Return of Process.—No Answer to a Libel in Prize Need be Filed, but the owner or any one interested in the captured property may appear in court and file a claim.[1]

7. Decree by Default.—The cause is placed on the calendar and comes on to be heard in regular order, on the libel and the evidence taken at the examination *in preparatorio*. If the property be not claimed, a decree of condemnation and sale is entered by default.[2]

If, however, a claim be interposed, and on the libel and the claim and the answers to the standing interrogatories the court still has a doubt as to the propriety of condemning the property as prize, it will order further proofs.[3]

8. Further Proofs.—Further proofs are, as the name indicates, additional evidence tending to acquit or condemn the vessel.[4] When the case is reheard on such further proofs, the decision of the court is final.

in forfeiture on the instance side of the court. Prize Rule 44.

Effect of Tardiness.—If this proceeding is not begun by the captor within a reasonable time after the arrival of the prize, any claimant may move for a monition to show cause why such proceedings should not be commenced, or may institute an original suit for restitution, and in either case the monition shall be served on the district attorney and the Secretary of the Navy, and on such other persons as the court shall order to be notified. Rev. Sts. § 4625.

Reasonable Time. — Twenty-four hours for notification, and two days for filing libel. D. C. Prize Rules 22, 23.

1. Prize Rule 42.

Claim Must be Accompanied by Affidavit —Pleading.—The claim filed by one alleging ownership of or interest in the property captured must be accompanied by an affidavit, called a *test affidavit*, stating the facts respecting the claim, and its truth, and how the deponent stands connected with or acquired knowledge of it. Prize Rule 42. These are all the pleadings required; and if the owner does not even claim, he may still be heard in court on the libel and the proofs afforded by the examination *in preparatorio*.

Delivery of Prize Property. — Prize property cannot be delivered to the claimant on any stipulation or security, except when there has been a decree of restitution from which the captors have appealed, or when the court has ordered further proofs, or when the claimant can satisfy the court that the property has some peculiar value to him independent of its market value. Rev. Sts. § 4626; The Diana, 2 Gall. (U. S.) 93.

2. Unless Proof of Forfeiture Clear, Court Retains Proceeds.—But even in such cases, unless the evidence is clear that the property is forfeited, the court will direct the proceeds to remain in its registry for a year and a day, to await a possible claimant. None appearing within that time, a decree of distribution is entered as of course.

3. The Sally Magee, 3 Wall. (U. S.) 451.

4. Additional Plea or Answer — Evidence. — Further proofs are usually offered by claimant. And the claimant may now file a plea or answer, additional to his claim, setting up any defense which may relieve the vessel from condemnation, and may obtain the release of his vessel on giving security, and may examine witnesses to prove his allegations. And such evidence should be taken by depositions. Betts Pr. 77; The London Packet, 2 Wheat. (U. S.) 371.

But no commission to take testimony can be issued to an enemy's country. On the other hand, the captor may be examined as a witness and may *invoke* further proof in the form of documents from other vessels, first obtaining the mandate of the court to do so, on affidavit specifying the materiality of such papers. Rule 30; The Anne, 3 Wheat. (U. S.) 435.

9. Distribution of Proceeds.—The proceeds of a prize captured by a vessel of the navy belong to the captors, when the prize is of superior or equal force to the vessel making the capture; when of inferior force, one half is decreed to the United States and the other half to the captors.[1]

After decree of condemnation the court will consider the claims of all vessels entitled to participate in the proceeds, and will hear evidence and make the proper decree of distribution.[2]

10. Costs and Expenses.—All costs and all expenses incident to the bringing in, custody, preservation, sale, or other disposal of the prize property, when allowed by the court, shall be a charge upon such property, and shall be paid out of the proceeds thereof, unless the court shall decree restitution free from such charge.[3]

11. Damages.—Damages may be awarded to the owner of the prize when the seizure is declared to be without probable cause.[4] And they may be awarded against the United States.

1. **Capture by Privateers or under Letters of Marque.**—In cases of capture by privateers or under letters of marque the whole prize belongs to the captors, unless it shall be otherwise provided in the commissions issued to such vessels. Rev. Sts. § 4630.

2. **Method of Distribution.** — The method of distribution is governed by statute. Rev. Sts. secs. 4631, 4632, 4633.

Contents of Decree.—The decree must recite the amount of the gross proceeds of the prize, subject to the order of the court, the amount deducted therefrom for costs and expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors or one half to the captors and one half to the United States. Rev. Sts. sec. 4634.

Appeal.—And even if there be an appeal from the decree of condemnation, the District Court may still proceed to make the decree of distribution so far as to determine what share shall go to the captors, and what vessels are entitled to participate therein. Rev. Sts. sec. 4637.

3. Rev. Sts. sec 4639.

Unjustifiable Capture.—Costs are also awarded against the captor when it appears that the seizure was unjustifiable. And such costs can be awarded against the United States when an unjustifiable capture has been made by a naval vessel. But in all such cases the unjustifiable nature of the seizure must plainly appear. When there was probable cause for the capture, costs will not be awarded against the captor, though the decree restore the property to the owner. The Thompson, 3 Wall. (U. S.) 155; The Marianna Flora, 11 Wheat. (U. S.) 1.

Restitution on Rightful Seizure. — Where the seizure was rightful, and a decree of restitution was granted on causes subsequently arising, the disbursements were allowed against the vessel captured, and not against the United States. The Ambrose Light, 25 Fed. Rep. 408.

Compensation of District Attorney and Prize Commissioners.—The compensation of the district attorney and of the prize commissioners, except the naval officer, are to be paid as costs in the cause. Rev. Sts. sec. 4646.

Security for Costs.—And the court may require any party, at any stage of the cause, and on claiming an appeal, to give security for costs. Rev. Sts. sec. 4638.

4. **Probable Cause** —As to meaning of "probable cause," see Locke *v.* U. S., 7 Cranch (U. S.) 339.

Recovery and Award of Damages.—Such damages may be recovered by the claimant on the failure of an ordinary prize suit against the captured property, or may be awarded in an independent suit brought against the captor or the capturing vessel for the purpose of recovering such damages. The Anna Maria, 2 Wheat. (U. S.) 327.

Amount of Damages.—The amount of the damages to be awarded is ascertained by a reference to commissioners

12. Appeals.- An appeal in all prize causes may be taken directly to the Supreme Court.[1]

13. Military Salvage on Recaptures.—Cases of recapture are cases of prize, and American property recaptured before it has been condemned as prize by a foreign tribunal must be restored to its owners.[2]

appointed by the court. The Anna Maria, 2 Wheat. (U. S.) 327.

1. Act March 3, 1891, secs. 5–26, Sts. at L. p. 826.

Practice on Appeal—Such appeal must be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case; and the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, or allow any amendment, either in form or substance, if it appears that any notice of appeal or of intention to appeal was filed with the clerk of the District Court within thirty days next after the rendition of the final decree therein. Rev. Sts. secs. 1009, 4636.

2. **Procedure.**—The procedure is the same as in ordinary cases of prize, but it must affirmatively appear to the court that the property has not been condemned abroad as prize before its recapture. Schooner Adeline, 9 Cranch (U. S.) 244; The Star, 3 Wheat. (U. S.) 78; The Ann Green, 1 Gall. (U. S.) 274.

Restoration of Recaptured Property.—If the recaptured property belonged to the United States, it is restored to it, and the treasury pays the salvage, costs, and expenses. The salvage takes the place of the prize money in ordinary prize cases. Private property is restored to its owners, upon their claiming and making the same payment. When the recaptured property belongs to any person residing in a foreign country friendly to the United States, and by the laws of such country the property of a citizen of the United States would be restored under like circumstances of recapture, the prize is to be restored to its owner, upon his claim, on such terms as by the law or usage of such foreign government would be required of a citizen of the United States under like circumstances of recapture; or, when no such law or usage is known, it should be restored upon the payment of such salvage, costs, and expenses as the court may order. Rev. Sts. sec. 4652.

Salvage Awarded to Captors.—The whole amount awarded as salvage shall be decreed to the captors, and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize. Rev. Sts. sec. 4652.

ADULTERY (AS A CRIME).

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As to Adultery in Divorce Law, see DIVORCE.
As to Civil Action for Adultery, see CRIMINAL CONVERSATION.

I. THE INDICTMENT GENERALLY—Essential Allegations.—In prosecutions for the crime of adultery all the elements which constitute the crime must be charged with certainty in the indictment.[1]

The Form.—It is sufficient if the allegations conform substantially to the statute defining the crime; but the precise words of the statute need not be used.[2]

1. Edwards *v.* State, 10 Tex. App. 25.

2. Lord *v.* State, 17 Neb. 526; State *v.* Tally, 74 N. Car. 322. See State *v.* Miller, 60 Vt. 90, where the exact words of the statute were used and yet the indictment was held bad.

Using Words "Commit Adultery."—It has been held that the only essential allegation is the one that the defendant did "commit adultery." If this is used, no other allegation is necessary, as this implies the offense without the allegation of any other fact. State *v.* Hinton, 6 Ala. 864; Helfrick *v.* Com., 33 Pa. St. 68, 75 Am. Dec. 579.

Words in a Statute not an Element.—Under a statute which prohibits the "habitual carnal intercourse with each other, without living together, of a man and woman, when either is lawfully married to some other person," the words "without living together" are not elements in the offense of adultery, and they may be omitted from the indictment. State *v.* Carroll, 30 S. Car. 85.

Good Indictment.—The following form of indictment was held good: the indictment alleged that the respondent, on, etc., at, etc., then and there being a married man and having a wife then living, did carnally know C., she then and there being a married woman and the wife of L., of, etc., who was then living, and not the wife of the respondent, and with her did then and there commit the crime of adultery by carnally knowing her, etc. State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

Pennsylvania.—A count for adultery drawn according to established precedents recognized by the courts prior

Using Word "Adultery."—The indictment need not contain the name of the offense. The term "adultery" is not material; a statement of the facts constituting the offence is sufficient.[1]

Open and Notorious.—An averment that the adultery was open and notorious should be made, especially where this is an element of the crime as defined by statute.[2]

Surplusage.—The allegation of other acts of adultery than the one proved may be rejected as surplusage.[3]

Party Commencing Prosecution.—Where a statute provides that the prosecution must be commenced by the husband or wife of one of the guilty parties, the indictment need not allege that it was so commenced.[4]

II. Allegations of Time.—In an indictment for adultery every material fact necessary to constitute the offense charged must be set forth with certainty as to time.[5]

Between Different Periods.—It may be charged that the offense was committed between certain points of time.[6]

III. Name of Co-Criminal.—The name of the person with whom the defendant committed adultery, if known[7], is material and must be alleged truly.[8]

to the crimes acts will be adjudged sufficient, though not pursuing the language of § 36, act March 31, 1860, Pa. L. 392. Gorman *v.* Com., 124 Pa. St. 536.

1. State *v.* Baldy, 17 Iowa 39.

In an indictment the words "carnal knowledge" imply sexual bodily connection. Com. *v.* Squires, 97 Mass. 59.

2. State *v.* Johnson, 69 Ind. 85.

Living Together.—Some authorities hold that the indictment must show that the guilty parties lived together. State *v.* Gartrell, 14 Ind. 280; McGuire *v.* State, 37 Ala. 160; State *v.* Dunn, 26 Ark. 34. This last case also holds that there should be an allegation that the parties were of different sexes.

3. State *v.* Briggs, 68 Iowa 416.

Discretion of Court.—It is wholly within the discretion of the trial court to allow further specifications of the crime than those contained in the indictment. State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

4. State *v.* Maas, 83 Iowa 468; State *v.* Stout, 71 Iowa 343; State *v.* Mahon, 81 Iowa 121.

Sufficient Commencement.—The prosecution may be sufficiently commenced either by making complaint before a grand jury or by filing an information before a magistrate. State *v.* Briggs, 68 Iowa 416; State *v.* Donovan, 61 Iowa 278; State *v.* Wilson, 22 Iowa 364; State *v.* Dingee, 17 Iowa 232; State *v.* Baldy, 17 Iowa 39.

Instruction by Court.—The court need not instruct the jury as to the necessity of the prosecution being commenced by the husband or wife. State *v.* Hazen, 39 Iowa 648.

5. State *v.* Thurstin, 35 Me. 205, 58 Am. Dec. 695.

Amendment.—Where an indictment charged the offence—adultery—to have been committed in the year 1800, it was held that the state could not amend by inserting the words "sixty-eight." Com. *v.* Seymour, 2 Brew. (Pa.) 567.

6. State *v.* Way, 5 Neb. 283. And the indictment may lay a broader period of intercourse than will be proved. Bailey *v.* State, 36 Neb. 809.

Continuando.—Living together in adultery need not be charged with a *continuando*, but as on a single designated day. Swancoat *v.* State, 4 Tex. App. 105.

7. **Name Unknown.**—But if the name is unknown to the grand jurors, an allegation that the name is unknown is sufficient. Com. *v.* Tompson, 2 Cush. (Mass.) 551.

8. State *v.* Vittum, 9 N. H. 519, where the indictment alleged that the accused committed adultery with one L. W., it was held that evidence could not be in-

IV. Allegations of Knowledge.—It need not be averred that the defendant had guilty knowledge of his act. An allegation that the defendant knew the person with whom he or she committed adultery to be married is not requisite.[1]

V. Allegations of Marriage—1. Only One Married.—The crime of adultery is well laid in an indictment, if at the time of the offense only one of the parties is alleged to have been married.[2]

2. Parties Not Husband and Wife.—The allegation that the parties committing the adultery are not man and wife is a material one.[3]

Manner of Making Averment.—But any form of words stating that the woman or man was the wife or husband of some person other than the accused is sufficient.[4]

3. Name of Defendant's Wife.—The allegation that the defendant is married is sufficient; the name of his wife need not be given in the indictment.[5]

4. Name of Defendant's Husband.—But it is essential when a married woman is prosecuted for adultery that the indictment set forth the name of her husband.[6]

VI. Joinder of Counts.—The indictment may contain several counts.[7]

troduced to show adultery with L. W. *junior*.

1. Com. *v.* Elwell, 2 Met. (Mass.) 190; Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144.

2. State *v.* Hutchinson, 36 Me. 261; State *v.* Thurstin, 35 Me. 205; 58 Am. Dec. 695; Clay *v.* State, 3 Tex. App. 499; Com. *v.* Reardon, 6 Cush. (Mass.) 78; Parks *v.* State, 3 Tex. App. 337. The above authorities are probably constructions of statutes making it adultery in both parties when either is married; they are not applicable when it is necessary that the defendant should be married in order to constitute the crime.

Insufficient Allegation.—Where an indictment which charged that the defendant committed the crime of adultery with E. W., the wife of S. H. W., she being a married woman and the lawful wife of said S. H. W., it was held that the indictment did not sufficiently allege that she was a married woman when the offense was committed. State *v.* Thurstin, 35 Me. 205, 58 Am. Dec. 695.

3. Hopper *v.* State, 19 Ark. 143; Tucker *v.* State, 35 Tex. 113; State *v.* Clinch, 8 Iowa 400.

4. Moore *v.* Com., 6 Met. (Mass.) 244, 39 Am. Dec. 724; Com. *v.* Reardon, 6 Cush. (Mass.) 78. See Com. *v.* Corson, 4 Pa. L. J. 271.

Insufficient Allegation.—An indictment which alleges that P. M. on a certain day and at a certain place "did commit the crime of adultery with one M. S. by then and there having carnal knowledge of the body of said S., she, the said S., then and there being a married woman and having a husband alive," is not sufficient to support a conviction. These allegations do not show with certainty that M. S. was not the wife of P. M. Moore *v.* Com., 6 Met. (Mass.) 243, 39 Am. Dec. 724.

5. Davis *v.* Com. (Pa., 1886), 7 Atl. Rep. 194; Gorman *v.* Com., 124 Pa. St. 536, holding that such omission is but a matter of form to be set up before the jury is sworn.

6. Com. *v.* Corson, 2 Pars. Eq. Cas. (Pa.) 475. But see Collum *v.* State, 10 Tex. App. 709, holding that the husband's name may be treated as surplusage.

7. Gorman *v.* Com., 124 Pa. St. 536; State *v.* Marvin, 35 N. H. 22.

Bastardy.— A charge of bastardy may be united with that of adultery in the same count. Gorman *v.* Com., 124 Pa. St. 536.

Several Specifications.—An indictment which contains several specifications, and yet charges substantially but one offense, is not open to the objection that it charges several offenses in the same count, if such adultery was the

VII. JOINDER OF DEFENDANTS.—The parties may be jointly indicted.[1]

Better Practice.—But the better practice is to indict the parties separately.[2]

VIII. INSTRUCTIONS.—The court need not instruct the jury as to the meaning of common words in a statute which defines adultery. The jury are presumed to know the meaning of familiar phrases.[3]

same, defined by the same section of the statute, and punishable in the same manner. State *v.* Clawson, 30 Mo. App. 139.

1. State *v.* Bartlett, 53 Me. 446; Com. *v.* Thompson, 99 Mass. 444; Com. *v.* Elwell, 2 Met. (Mass.) 190; Frost *v.* Com., 9 B. Mon. (Ky.) 362.

Separate Trial.—When jointly indicted, one may be tried alone. State *v.* Carroll, 30 S. Car. 85.

2. State *v.* Dingee, 17 Iowa 232; State *v.* Wilson, 22 Iowa 364.

3. **"Habitual Carnal Intercourse."**—Where the statute makes "habitual carnal intercourse" adultery, the court need not explain to the jury the meaning of such phrase. Collum *v.* State, 10 Tex. App. 709. See State *v.* Carroll, 30 S. Car. 85, where it was held that the court might leave it to the jury to say how frequent the act must be to make it "habitual."

Change of Law.—The penal code of a state may materially change the law of adultery; and the alterations may be such as to necessite a corresponding change in the instructions to juries. "The change in the law must be borne in mind in trials for this offense where, as in the present case, the offense is alleged to have been committed since the last revision of the Code went into operation. Especially should these changes be carefully observed in the preparation of indictments or informations, and in the charge of the court as to what the proof must show in order to warrant a conviction." *Per* Winkler, J., in Collum *v.* State, 10 Tex. App. 708, 711.

The Penal Code of Texas has so changed the law that adultery may now be committed in either of two modes: (1) by the living together and having carnal intercourse with each other of a man and a woman of whom either is married to some other person; or (2) by "habitual carnal intercourse" of such persons with each other, without living together. Collum *v.* State, 10 Tex. App. 708.

"From the language employed we think it manifest that more is required to be alleged, and consequently further evidence is required by the revision than by the former law on the subject, and hence we conclude that adjudications under the old law cannot furnish a safe and sufficient guide in the administration of the present law, so far as the changes are concerned; and especially must this be the case when the change as to the proof is so manifest." *Per* Winkler, J., in Collum *v.* State, 10 Tex. App. 708.

Under a statute which prohibits "the habitual carnal intercourse with each other, without living together, of a man and woman, when either is lawfully married to some other person," it was held that the carnal intercourse must be more than occasional, and that the trial judge might properly so instruct the jury. State *v.* Carroll, 30 S. Car. 85.

AFFIDAVITS.

By W. CALVIN CHESNUT.

(See also *AFFIRMATIONS; OATHS; VERIFICATION.*)

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Affidavits of Merits or Defense, see that title.

I. **DEFINITION.**—An affidavit[1] is a voluntary[2] *ex parte*[3] state-

1. "A statement or declaration reduced to writing and sworn or affirmed to before some officer who has authority to administer an oath." 1 Bouvier Law Dict.

Robertson, J.: "The description in Bacon's Abridgment (tit. Affidavits) of an affidavit will hardly stand any critical examination as a definition. It is there called an oath in writing administered; how that can be when the form is presented orally is not very clear." Soule *v.* Chase, 1 Robt. (N. Y.) 222; 1 Abb. Pr. N. S. (N. Y.) 48.

"An affidavit is a written declaration under oath made without notice to the adverse party." *Kansas* Code Civ. Proc. 1881, § 341.

2. A court has no power to compel the making of an affidavit respecting a motion. Bacon *v.* Magee, 7 Cow. (N. Y.) 515; Dudley *v.* McCord, 65 Iowa 671.

But in Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211, and State *v.* Seaton, 61 Iowa 563, it was held that one subpœnaed to appear before a justice of the peace to make affidavit as required under sections 3692 and 3693 of the Iowa Code, must obey the subpœna, notwithstanding that the desired affidavit may be of no use as evidence in the case in aid of which it is sought; and for refusing obedience he may be committed for contempt.

3. **Compared with Deposition.**—It

ment, formally reduced to writing, and sworn to or affirmed before some officer authorized by law to take it.[1]

II. **SUFFICIENCY.**—The true test of the sufficiency of a paper as an affidavit is the possibility of assigning perjury upon it if false.[2] To meet this test it must be sufficient both in form and in substance.[3]

seems that the difference between a deposition and an affidavit is that the former is made after notice and the latter without notice. Atchison *v.* Bartholow, 4 Kan. 124; State *v.* Henning (S. Dak., 1893), 54 N. W. Rep. 536.

"A deposition is evidence given under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is to be used." Stimpson *v.* Brooks, 3 Blatchf. (U. S.) 456.

1. Affidavits must always be in writing. Windley *v.* Bradway, 77 N. Car. 333.

Compared with Oath.—A defective affidavit may be good as an oath (or affirmation) to show what facts were testified to, for every affidavit includes an oath (or affirmation). Burns *v.* Doyle, 28 Wis. 460.

Where a statute requires an oath, it will be complied with if the matter is reduced to the form of an affidavit, signed and sworn to by the proper officer. Edwards *v.* McKay, 73 Ill. 570.

But affidavits are very different from official and promissory oaths, which are not at all in the nature of evidence. State *v.* Green, 15 N. J. L. 88.

Nature.—Brewer, J.: "An affidavit is a complete thing. Like a deed, it speaks for itself, and shows by its caption, its signature, and jurat that the commencement and the close are there; and an admission that it is correct is an admission that the entire affidavit is preserved." Dewey *v.* Linscott, 20 Kan. 684.

Pleading.—An affidavit is not a pleading. Johnson *v.* Laughlin, 7 Kan. 359.

Complaint.—Under the extradition laws of Congress the term "complaint" is not necessarily or presumptively equivalent to "affidavit." State *v.* Richardson, 34 Minn. 115.

2. Hyde *v.* Adams, 80 Ala. 111; City Nat. Bank *v.* Flippen, 66 Tex. 610; English *v.* Wall, 12 Rob. (La.) 132; Neal *v.* Gordon, 60 Ga. 112; Harris *v.* Heberton, 5 How. (Miss.) 575; Mays *v.* Lewis, 4 Tex. 38; People *v.* Becker, 20 N. Y. 354; Gaddis *v.* Durashy, 13 N. J. L. 324; Peers *v.* Carter, 4 Litt. (Ky.) 268.

Language of Statute.—Lyon, J.: "The affidavit is in the language of the statute. This is sometimes sufficient, but not so in all cases. We must look for some other test by which to determine its sufficiency. The proceeding by attachment is very summary and violent. The purpose of the law, which requires that a certain affidavit be made before the writ can issue, is to protect the alleged debtor from so severe a process, unless the creditor, or some person in his behalf, under the responsibilities of an oath, shall assert the existence of certain facts which the law adjudges good grounds for issuing the writ. This requirement of the law would afford the debtor no protection whatever unless the affiant is liable to be punished criminally if he wilfully swears falsely in such affidavit. Hence, although the affidavit be in the very words of the statute, it is not sufficient unless perjury can be assigned upon it. Here, then, we find the true test of the sufficiency of an affidavit which employs the language of the statute." Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461. See also Quarles *v.* Robinson, 2 Pin. (Wis.) 97, note p. 99, 1 Chand. (Wis.) 29, note p. 32; Lathrop *v.* Snyder, 16 Wis. 293; Oliver *v.* Town, 28 Wis. 329; Mairet *v.* Marriner, 34 Wis. 582.

3. State *v.* Henning (S. Dak., 1893), 54 N. W. Rep. 536.

Perjury Assignable though Affidavit Formally Defective.—But it seems that in some instances perjury may be assigned though the affidavit is so formally defective as to preclude its being read in evidence. Bell *v.* Bament, 8 M & W. 316; Rex *v.* Hailey, 1 C. & P. 258,

1. **Formal Requisites.**—The formal requisites of an affidavit are the (*a*) title, (*b*) venue, (*c*) signature, (*d*) jurat, and (*e*) authentication.[1]

a. TITLE.—An affidavit should generally be entitled in the court and cause in which it is filed,[2] but, as the purpose of the

11 E. C. L. 383; Reg. *v.* Christian, 1 C. & M. 388, 41 E. C. L. 214.

1. Beebe *v.* Morrell, 76 Mich. 114; Am. & Eng. Ency. Law, tit. AFFIDAVITS.

2. Higham *v.* Hayes, 2 How. Pr. (N. Y.) 27; Baxter *v.* Seaman, 1 How. Pr. (N. Y.) 51; Parent *v.* Kellogg, 1 How. Pr. (N. Y. C. Pl.) 70; Dickenson *v.* Gilliland, 1 Cow. (N. Y.) 481; Vinson *v.* Norfolk, etc., R. Co., 37 W. Va. 598. Cole, J.: "The general rule in regard to the entitling of affidavits undoubtedly is that they should be regularly entitled in the court in which they are made or intended to be used. 2 Archb. Pr. 899; 3 Chit. Pr. 538; 2 Burrl. Pr. 342. And the reason generally assigned for the rule is that the affidavit must be correctly entitled, so that an indictment for perjury will lie upon it if false." Kearney *v.* Andrews, 5 Wis. 23.

Contents.—The title of an affidavit embraces its entire heading—the name or style of the court as well as the names of the parties. Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657. And it should also contain the character in which the parties sue or are sued, though this is not necessary if otherwise correct. Steyner *v.* Cottrell, 3 Taunt. 377; Bullman *v.* Callow, 1 Chit. Rep. 728 note, 18 E. C. L. 216; *Ex p.* Metzler, 5 Cow. (N. Y.) 287.

Court on Appeal.—After appeal is made, although "the title of the action need not be changed," the affidavits for motions must name the court in which they are to be used. Clickman *v.* Clickman, 1 N. Y. 611.

Title in the Body.—It will be sufficient if the title appears in the body of the affidavit, instead of at the commencement, as is usual. Saunders *v.* Erwin, 2 How. (Miss.) 732. But in Humphrey *v.* Cande, 2 Cow. (N. Y.) 509, it was held that an affidavit wrongly entitled, though the case was rightly described in the body of the affidavit, could not be read. See Blake *v.* Locy, 6 How. Pr. (N. Y. Supreme Ct.) 108.

Abbreviations of Title.—Where there is but one suit depending between several parties it will be sufficient to entitle the affidavit, "A. *et al. v.* B. *et al.*," naming only one party on each side. Seymour *v.* Bailey, 66 Ill. 288; White *v.* Hess, 8 Paige (N. Y.) 544. *Contra*, Arnold *v.* Nye, 11 Mich. 456. And perjury may be assigned upon such an affidavit, although it may be formally defective. Reg. *v.* Christian, 1 C. & M. 388, 41 E. C. L. 214.

Where there are several plaintiffs to a cause it is no objection to an affidavit made therein that the Christian name of one of the plaintiffs was omitted from the title. Maury *v.* Van Arnum, 1 Hill (N. Y.) 370; Howell *v.* Coleman, 2 Bos. & Pul. 466. But see Fores *v.* Dieman, 7 T. R. 657; Bullman *v.* Callow, 1 Chit. Rep. 727, 18 E. C. L. 216.

How Entitled.—An affidavit for a *certiorari* to a justice's court is rightly entitled in the cause in the court below, but not in the Supreme Court. Whitney *v.* Warner, 2 Cow. (N. Y.) 499. On a motion to set aside proceedings in a suit on a bail-bond for irregularity, the affidavit is well entitled in the bail-bond suit. Pell *v.* Jadwin, 3 Johns. (N. Y.) 448. In such a proceeding it is wrong to entitle the affidavit in the original action. Phelps *v.* Hall, 5 Johns. (N. Y.) 367.

Incorrectly Entitled — Misjoinder.—Generally, if the affidavit is incorrectly entitled, it cannot be used. Thus, on a writ of error, an affidavit entitled "G. D. W. *v.* W. & R.," after W. had been allowed to sever from R. in the prosecution of the writ, was held insufficient. Whipple *v.* Williams, 1 Mich. 115. But in Cunningham *v.* Von Pustan (Supreme Ct.), 9 N. Y. Supp. 255, a misjoinder of parties in the title was held not to vitiate the affidavit.

Position of Parties Reversed.—Where in the titles of all the papers, both affidavits and notice, the position of the parties is reversed so that the defendant seems to be suing the plaintiff, it is fatal. Parkman *v.* Sherman, 1 Cai. (N. Y.) 344. But it is no objection that the title reads "C. D. *adv.* A. B.,"

title is to identify the suit, if this appears in another way, as by reference to other papers duly entitled,[1] it will be sufficient.[2]

When not to be Entitled.—Some affidavits, as those used to found a suit not already begun, must not be entitled.[3] If entitled, they

instead of "A. B. *v.* C. D." Bowen *v.* Wilcox, etc., Sewing Mach. Co., 86 Ill. 11.

Entitled Two Ways.—Where an affidavit was entitled in two ways, one of which was right and the other wrong, and the affidavit proceeded to speak of the cause in the singular, it was sufficient. Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581.

Title Altered.—If an affidavit is correctly entitled when sworn it will be sufficient, although the title of the cause may have been altered by subsequent amendment. Hawes *v.* Bamford, 9 Sim. 653.

Mistake after Decree.—A mistake in the title is immaterial after the decree is rendered. Majors *v.* Edwards, 36 Neb. 56.

1. **Reference.**—An affidavit annexed to a petition, to which it refers as "the foregoing petition," is not defective because it does not contain the names of the parties. It will be presumed that the petition and affidavit were both before the affiant when he was sworn. One thus supplemented the other. Levy *v.* Wilson, 43 Iowa 605. An affidavit of service immediately following or indorsed on papers for a motion, properly entitled, need not itself be entitled. Anonymous, 4 Hill (N. Y.) 597.

Campbell, J.: "The object of entitling affidavits is to connect them with a suit, so that perjury will lie upon them. We think an affidavit referring to a paper properly entitled, to which it is appended, must be assumed to have adopted the title by reference." King *v.* Harrington, 14 Mich. 532.

2. An affidavit need not be entitled, provided it shows upon its face that it is an affidavit in the proper suit. Dunham *v.* Rappleyea, 16 N. J. L. 75.

"Our attention has not been called to any authorities, in our state or elsewhere, where it has been held that an affidavit filed in a pending suit not entitled is a nullity. The inquiry in such cases is, has the affidavit been fully identified as having been filed in that cause? If it has, then the want of the formality of a title is of no consequence, since the title is for the purpose of identifying the suit in which the affidavit is designed to be used." Beebe *v.* Morrell, 76 Mich. 114.

In Illinois it seems the title is not requisite. Scott, C. J., says: "It does not depend on the fact whether it is entitled in any cause or in any particular way. Without any caption whatever it is nevertheless an affidavit." Harris *v.* Lester, 80 Ill. 307. But in Watson *v.* Reissig, 24 Ill. 281, 74 Am. Dec. 746, the court refused to consider an affidavit which had a mistake in the title.

3. They should not be entitled in either the court or cause. If entitled, it is good cause for their rejection. Rex *v.* Jones, 2 Str. 704; Rex *v.* Pierson, Andr. 313; Rex *v.* Harrison, 6 T. R. 60; King *v.* Cole, 6 T. R. 640, 1 Dan. Ch. Pr. 891; Hawley *v.* Donnelly, 8 Paige (N. Y.) 415; 1 Barb. Ch. Pr. 600. For the English practice in entitling such affidavits, see further Hollis *v.* Brandon, 1 B. & P. 36; Green *v.* Redshaw, 1 B. & P. 227; Clarke *v.* Cawthorne, 7 T. R. 317.

Attachment.—Affidavits for attachment need not be entitled in either cause or court. West *v.* Woolfolk, 21 Fla. 189; Cheadle *v.* Riddle, 6 Ark. 480; Kinney *v.* Heald, 17 Ark. 397; Quarles *v.* Robinson, 2 Pin. (Wis.) 97, 1 Chand. (Wis.) 29. See also Bronson's Case, 12 Johns. (N. Y.) 460; Folger *v.* Hoogland, 5 Johns. (N. Y.) 235.

Mandamus and Bail.—Likewise affidavits for *mandamus* and to hold to bail must not be entitled. The reason is that there is no suit pending, and a conviction for perjury could not be had on the affidavit if false, because it could not be shown that such a cause existed in the court. *Ex p.* La Farge, 6 Cow. (N. Y.) 61; Haight *v.* Turner, 2 Johns. (N. Y.) 371; People *v.* Tioga C. P., 1 Wend. (N. Y.) 291.

Criminal Information.—Nor should an affidavit made the basis of a criminal information be entitled. "Under some circumstances it would be improper. It is usually made before there is a suit pending, and there is no title to give. It is only necessary that it should appear that the affidavit was made for the purposes of the suit in which it is afterwards filed." Haw-

will be nullities.[1]

b. VENUE.—The venue of an affidavit states the county in which it was taken and is *prima-facie* evidence thereof.[2] In the older practice it was deemed so essential that without it the affidavit was treated as a nullity.[3] Later cases modify this rule.[4]

kins *v.* State (Ind., 1894), 36 N. E. Rep. 419.

Replevin.—In a replevin suit, the affidavit of ownership of property should not be entitled. Stacy *v.* Farnham, 2 How. Pr. (N. Y.) 26.

1. Milliken *v.* Seelye, 3 Den. (N. Y.) 54; Stacy *v.* Farnham, 2 How. Pr. (N. Y.) 26; Beebe *v.* Morrell, 76 Mich. 114.

Not Surplusage.—The title is not surplusage, as without it the body of the affidavit would be, in many cases, rendered meaningless. Blake Crusher Co. *v.* Ward, 1 Am. L. T. N. S. 423; Bronson *v.* Mitchill, 12 L. J. R. 460.

Minnesota.—Strongly dissenting from these authorities is the case of Crombie *v.* Little, 47 Minn. 581. Mitchell, J.: "Another objection to the affidavit is that it was void because entitled in a cause not yet commenced. There are undoubtedly decisions which go to this length, but they are, in our judgment, devoid of reason and based upon a frivolous technicality. We do not suppose that there was ever an affidavit made in this state for a replevin, garnishment, attachment, or publication of summons that was not entitled, although, strictly speaking, the action was not yet commenced when the affidavit was sworn to. Even at common law it was, at most, a mere irregularity, which, in the language of the court in Clarke *v.* Cawthorne, 7 T. R. 317, 'did not interfere with the justice of the case.' A prosecution for perjury based on such an affidavit would lie. City Bank *v.* Lumley, 28 How. Pr. (N. Y. C. Pl.) 397. See also People *v.* Sutherland, 81 N. Y. 9."

2. Cook *v.* Staats, 18 Barb. (N. Y.) 407; Smith *v.* Collier (Supreme Ct.), 3 N. Y. St. Rep. 172; Belden *v.* Devoe, 12 Wend. (N. Y.) 225; and see following notes.

Form.—The proper venue of an affidavit taken before a United States Commissioner is: "United States of America, District of ——," naming the district and state for which the commissioner is appointed. It should not be: "State of ——, County of ——." Sterrick *v.* Pugsley, 1 Flip. (U. S.) 350.

Letters "ss."—"These letters form no material part of the venue, and although it is customary and more lawyerlike to use them after stating the venue, yet their use or omission, like the use or omission of the letters 'viz.' or the words 'to wit,' for which the letters 'ss.' are a substitute, is more a matter of form than of real substance." Smith *v.* Richardson, 1 Utah Ter. 194. Approved in McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139.

City and County.—An affidavit before a commissioner of deeds for a city is defective when the venue is laid only in the county in which the city is situated. People *v.* Dutchess County (N. Y. Supreme Ct.), 20 N. Y. Supp. 329.

3. Marvin, P. J.: "Affidavits should, by the universal practice, contain a venue; and it is said to be an essential part of an affidavit. (1 Barb. Ch. Pr. 601; Lane *v.* Morse, 6 How. Pr. (N. Y. Supreme Ct.) 394.) It is important that it should indicate the county in which it was taken, in reference to a prosecution for perjury." Cook *v.* Staats, 18 Barb. (N. Y.) 407.

In *New York* an affidavit lacking a venue is a nullity. Saril *v.* Payne (C. Pl.), 4 N. Y. Supp. 897; Vincent *v.* People, 5 Park. Cr. Rep. (N. Y.) 88; People *v.* Decamp, 5 N. Y. Wkly. Dig. 462. See also Smith *v.* Richardson, 1 Utah Ter. 194.

In *Nebraska* the affidavit must show on its face that it was taken within the officer's jurisdiction—must have a venue. Blair *v.* West Point Mfg. Co., 7 Neb. 146; Byrd *v.* Cochran (Neb., 1894), 58 N. W. Rep. 127.

Facts Not Inferred.—The venue should be given. Facts are not to be inferred from affidavits when the party has it in his power to state them positively. Brooks *v.* Hunt, 3 Cai. (N. Y.) 128.

4. Kellam, J.: "It was not material to the character of the instrument as an affidavit that it show in what county the oath was administered. It doubtless is desirable and convenient for many purposes that an affidavit so show, but we do not think it is indis-

The purpose of the venue is to show that the officer administering the affidavit acted within his jurisdiction.[1]

pensable. The important fact is that an oath was administered by an authorized officer and within his jurisdiction." State *v.* Henning (S. Dak., 1893), 54 N. W. Rep. 536. In this case it was said that the rule that without a venue the affidavit is a nullity is confined to New York.

Berry, J.: "We are of opinion that the absence of a venue is not fatal to an affidavit. (Rex *v.* Emden, 9 East 437.) Such appears to have been the opinion of Chancellor Walworth in Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 219, and in Parker *v.* Baker, 8 Paige (N. Y.) 430." Young *v.* Young, 18 Minn. 90.

Absence of Formal Venue.—An affidavit, properly entitled in the cause, and sworn to before the clerk of the court wherein the cause is pending, should not be treated as a nullity by reason of the want of a formal venue. Stone *v.* Williamson, 17 Ill. App. 175. Even if it is the general rule that the absence of a venue renders the affidavit fatally defective, it will nevertheless be sufficient if the seal of the notary shows the county for which he was commissioned and the affidavit is correct in other respects. Reavis *v.* Cowell, 56 Cal. 588. Nor did the objection that there was no venue avail where the officer signed the jurat as "Court Commissioner of Fond du Lac County, Wis." Wood *v.* Blythe, 46 Wis. 650.

Conclusion Drawn.—The conclusion to be drawn, both on the weight of authority and on reason, is that an affidavit without a venue is *prima facie* a nullity, just as the venue is *prima-facie* evidence of the place where it was taken. See Smith *v.* Collier (Supreme Ct.), 3 N. Y. St. Rep. 172.

1. **Jurisdiction Presumed.**—But the majority of cases now hold that it need not conclusively appear on the face of the affidavit, by venue, that the officer acted within his jurisdiction. It will be presumed he so acted if nothing appears to the contrary. Parker *v.* Baker, 8 Paige (N. Y.) 428; Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 218; *In re* Sheepshead, etc., R. Co., 5 N. Y. Wkly. Dig. 488. Even if he does not state for what county he was appointed. Snell *v.* Eckerson, 8 Iowa 284.

Officer of Local Jurisdiction.—But an affidavit made before an officer having only local jurisdiction must show upon its face that he acted within his jurisdiction. Saunders *v.* Erwin, 2 How. (Miss.) 732. Resort to the date of the certificate of the governor authenticating the magistrate's certificate will not remedy the defect. 1 Burr. Tr. 99. *Compare* Tooker *v.* Thompson, 3 McLean (U. S.) 92.

Venue Given.—Where the venue is given and the officer states his official title, it will be presumed that he acted within his jurisdiction, though he does not so state. People *v.* Cady, 105 N. Y. 299; Crosier *v.* Cornell Steamboat Co., 27 Hun (N. Y.) 215, 15 N. Y. Wkly. Dig. 34; Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. 528.

Thus in attesting an affidavit a notary public need not add the state or county for which he is notary, where the affidavit gives the state and county in the venue, and his title of notary public and seal are annexed to his signature. Stone *v.* Miller, 60 Iowa 243. See also Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549, 1 Abb. Pr. N. S. (N. Y.) 258, 30 How. Pr. (N. Y.) 161, and Smith *v.* Runnells, 94 Mich. 617.

In *Illinois* even the title, simply, annexed to his name will be sufficient when the affidavit is offered for use in the same county as is mentioned in the venue. Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73.

Officer Beyond Jurisdiction.—But where the affidavit shows by its venue that it was taken in one county, while it is signed by an officer appointed for another county, it cannot be read. Cook *v.* Staats, 18 Barb. (N. Y.) 407; Davis *v.* Rich, 2 How. Pr. (N. Y.) 86; Sandland *v.* Adams, 2 How. Pr. (N. Y.) 127; Snyder *v.* Olmsted, 2 How. Pr. (N. Y. Supreme Ct.) 181. Thus if there is a difference between the county of the venue and the seal of a notary public, it is bad. Byrd *v.* Cochran (Neb., 1894), 58 N. W. Rep. 127. But in Goodnow *v.* Litchfield, 67 Iowa 691, it was held that it would still be presumed that the officer acted within his jurisdiction notwithstanding the discrepancy.

An affidavit stating a certain county

c. SIGNATURE.—The better practice requires that an affidavit should be signed by the affiant in order to more readily identify it;[1] but, in the absence of some positive statute or rule of court,[2] this is generally not necessary.[3] And persons incapable,

in the venue, but certified before a commissioner of a city in that county, will be held defective if objected to promptly. People *v.* Dutchess County Canvassers (Supreme Ct.), 20 N. Y. Supp. 329.

In *Michigan* a venue is not necessary to an affidavit made before a notary public; but if made before a justice of the peace it would probably be void if no venue at all were stated in the instrument. Sullivan *v.* Hall, 86 Mich. 7.

Evidence Aliunde of Venue.—As the venue is a matter *in pais*, if legally questioned it must be proved *aliunde*. Perkins *v.* Collins, 3 N. J. Eq. 482. In a prosecution for perjury, where the venue has been omitted, extrinsic evidence may be given that the officer acted within his jurisdiction. Young *v.* Young, 18 Minn. 90.

1. Noble *v.* U. S., Dev. Ct. of Cl. 83, and cases in following notes.

2. The signature of the affiant is not necessary to an affidavit unless required by some statute or rule of court. Hitsman *v.* Garrard, 16 N. J. L. 124; Redus *v.* Wofford, 4 Smed. & M. (Miss.) 579; Watts *v.* Womack, 44 Ala. 605.

Perjury Assignable.—And the affiant is liable to indictment for perjury if the affidavit is false. Bates *v.* Robinson, 8 Iowa 318; Drake on Attachment, 91.

Not Signed, but Name Appearing.—Gilfillan, C. J.: "Although it is the universal custom for the affiant to subscribe, it is not, in the absence of a rule of court (Hathaway *v.* Scott, 11 Paige (N. Y.) 173), or a statute requiring it, necessary, where his name appears in it as the person who took the oath. Haff *v.* Spicer, 3 Cai. (N. Y.) 190; Jackson *v.* Virgil, 3 Johns. (N. Y.) 540; Redus *v.* Wofford, 4 Smed. & M. (Miss.) 579; Bates *v.* Robinson, 8 Iowa 318; Bloomingdale *v.* Chittenden, 75 Mich. 305. While it may be useful for the purpose of identification, as where there may be two persons of the same name, it does not, as does the signature of the officer, authenticate the act, or show that the oath was taken." Norton *v.* Hauge, 47 Minn. 405; Alford *v.* McCormac, 90 N. Car. 151.

Statute Requiring.—Where a statute requires a subscription to the affidavit, the absence of it renders the affidavit a nullity. Nave *v.* Ritter, 41 Ind. 301. And it seems that a subscription is required where a form for the affidavit is given, leaving a blank space for the signature. Cohen *v.* Manco, 28 Ga. 27. In *Texas* now by statute the affidavit must be signed. Gordon *v.* State, 29 Tex. App. 410.

3. Ede *v.* Johnson, 15 Cal. 53; Gill *v.* Ward, 23 Ark. 16; West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407; Alford *v.* Cochrane, 7 Tex. 485; Crist *v.* Parks, 19 Tex. 234; Shelton *v.* Berry, 19 Tex. 154; Brooks *v.* Snead, 50 Miss. 416; Noble *v.* U. S., Dev. Ct. of Cl. 83. In *New York* the signature is not necessary. Millius *v.* Shafer, 3 Den. (N. Y.) 60, and cases cited above. But see Laimbeer *v.* Allen, 2 Sandf. (N. Y.) 648, 2 Code Rep. (N. Y.) 15. In *Iowa* now an affidavit is not complete unless signed by the affiant, even though the statute does not expressly require a signature. Lynn *v.* Morse, 76 Iowa 665; Crenshaw *v.* Taylor, 70 Iowa 386. And in *Missouri* an affidavit must be signed by the affiant. Norman *v.* Horn, 36 Mo. App. 419; Hargadine *v.* Van Horn, 72 Mo. 370.

Prima Facie Sufficient.—An affidavit to a chattel mortgage not signed by affiant but regular in other respects is sufficient *prima facie*. Gambrinus Stock Co. *v.* Weber, 41 Ohio St. 689.

Where Signed. — But an affidavit should not be treated as a nullity merely because the signature of the affiant was placed below the jurat, instead of in its proper place, immediately succeeding the body of the affidavit. Launius *v.* Cole, 51 Mo. 147; Kohn *v.* Washer, 69 Tex. 67.

In *New Jersey* the practice of the court requires that "when the verification of an answer is in the form of an affidavit, the name of the deponent be subscribed at the foot of the affidavit; and where the verification is in the form of a certificate of the officer who administered the oath, the name

by disease or natural infirmities, of making either a signature or a mark, are not debarred from making an affidavit.[1]

d. JURAT.—The *jurat* is that part of an affidavit where the officer certifies that the same was "sworn before him."[2] It is no part of the affidavit proper,[3] but is always essential as a certificate of the authenticity of the affidavit.[4] Great particularity in the words used in the certificate is not ordinarily required; if they state in substance that the affiant appeared and took the oath, the affidavit is usually held to be good.[5]

of the deponent should be subscribed to the answer. The object is to facilitate the identification of the affiant in case of prosecution for perjury." Pincers *v.* Robertson, 24 N. J. Eq. 348.

And in *Missouri*, if the defendant signs the answer just above the magistrate's certificate, he need not also sign the certificate of the magistrate as an affidavit separate from the answer. Smith *v.* Benton, 15 Mo. 371. Likewise in regard to an affidavit to a mechanic's lien. Laswell *v.* Jefferson City Presbyterian Church, 46 Mo. 279.

Agent's Signature. — An affidavit which recites that the litigant appeared and swore is not vitiated because signed "A. B. by C. D., Attorney." No signature at all was necessary so long as the affidavit was the personal oath of the party making it. Coppock *v.* Smith, 54 Miss. 640. An affidavit signed "J. M. S. per D. M. S." sufficiently showed that it was made for the plaintiff, although it should have been signed "D. M. S., agent for J. M. S." Spencer *v.* Bell, 109 N. Car. 39.

Partnership Signature.—An affidavit that "I. R. P., state," etc., and signed "F. and P." is sufficient. Fortenheim *v.* Claflin, 47 Ark. 49. An affidavit having a partnership signature should be considered the affidavit of him who signed the partnership name. Randall *v.* Baker, 20 N. H. 335.

But in *Missouri*, where it is held that an affidavit must be signed by the affiant, an affidavit to which is subscribed a firm name is a nullity. Norman *v.* Horn, 36 Mo. App. 419.

Objection Too Late.—After a case has been disposed of on the merits, it is too late, on appeal, to object to affidavits to answers in chancery that they were insufficient because not signed by affiants. Yeizer *v.* Burke, 3 Smed. & M. (Miss.) 439.

1. Soule *v.* Chase, 1 Robt. (N. Y.) 222, 1 Abb. Pr. N. S. (N. Y.) 48. Perjury is assignable where a mark is made. U. S. *v.* Mallard, 40 Fed. Rep. 151.

2. Bouvier Law Dict.

Form.—The usual form is: "Sworn and subscribed before me, on the —— day of ——, 18—. ——, J. P." Where no special form is prescribed by statute this will be sufficient. Parker *v.* Clark, 7 W. Va. 467.

3. Veal *v.* Perkerson, 47 Ga. 92.

Venue of Jurat.—But it is so much a part of the affidavit that it need not have a separate venue. Rahilly *v.* Lane, 15 Minn. 447.

4. Merrimon, J.: "It must be certified by the officer before whom the oath was taken before it can be used for legal purposes; indeed it is not complete or operative until this is done. The certificate, usually called the jurat, is essential, not as a part of the affidavit, but as official evidence that the oath was taken before a proper officer." Alford *v.* McCormac, 90 N. Car. 151.

Perjury.—But on an indictment for perjury the jurat is not essential. Rex *v.* Emden, 9 East 437.

Sworn in Open Court.—A paper purporting to be an affidavit and so treated by the court below will not be held defective by the superior court because it does not appear to have the jurat of the clerk. For it may have been sworn to in open court; if so, it needs no jurat as evidence that it had been duly sworn to by the affiant. Cleveland *v.* Stanley, 13 Ind. 549. But see Nave *v.* Ritter, 41 Ind. 301.

Jurat Not Immediately Annexed.—An affidavit sufficient in all other respects will not be rendered fatally defective because the clerk before whom it was made failed for a few days to annex the jurat. Buckland *v.* Goit, 23 Kan. 327.

5. "**Before Me.**"—The jurat should contain the words "before me," or their equivalent. In Smart *v.* Howe,

e. AUTHENTICATION.—Ordinarily the jurat must be authenticated by the signature of the officer before whom the affidavit is

3 Mich. 590, and Reg. *v.* Bloxham, 6 Q. B. 528, 51 E. C. L. 526, their absence rendered the affidavit fatally defective. And in Canada the omission of these words and the date from the jurat rendered an affidavit accompanying a bill of sale fatally defective. Archibald *v.* Hubley, 18 Can. Sup. Ct. Rep. 116.

But this result will not follow when the affidavit is used before the officer who administered it. *In re* Teachout, 15 Mich. 346. And where the body of the affidavit showed that it was made before a justice, there was no force in the objection. Cross *v.* People, 10 Mich. 24. And if sworn to before a judge, such an omission is not fatal. Empey *v.* King, 13 M. & W. 519.

"Then Personally Appeared." — In Clement *v.* Bullens, 159 Mass. 193, it was said that, however it might be as to affidavits before a commissioner (Reg. *v.* Bloxham, 6 Q. B. 528, 51 E. C. L. 526), or as the basis of an appeal (Smart *v.* Howe, 3 Mich. 590), the words "before me" have not been held necessary in all cases. (Empey *v.* King, 13 M. & W. 519.) And that the words "then personally appeared," used in this case, which did not occur in any of the foregoing, meant personally appeared before the signer, by their only fair interpretation.

And the phrase "sworn before me this 1st day of Nov.," etc., without expressly certifying that the deponent appeared before the officer, is sufficient. Jackson *v.* Gumaer, 2 Cow. (N. Y.) 552.

Equivalent Words.—"Given under my hand and seal" will suffice for the stereotyped formula, "sworn to and subscribed before me." Trice *v.* Jones, 52 Miss. 138. And "subscribed and sworn to before me" is substantially equivalent to the statutory requirement "sworn to or affirmed before me, and signed in my presence." Sargent *v.* Townsend, 2 Disney (Ohio) 472.

In *New York*, in general, a substantial compliance with the requisites of the jurat, prescribed by statute, will be sufficient. Manufacturers', etc., Bank *v.* Cowden, 3 Hill (N. Y.) 461; Belden *v.* Devoe, 12 Wend. (N. Y.) 223; McKinstry *v.* Thurston, 12 Wend. (N. Y.) 225, note.

Name of Affiant.—The jurat need not name the person signing and swearing to the affidavit. Stone *v.* Miller, 60 Iowa 243. But where the affiant subscribed the affidavit, and stated that he swore to it, and his name was written in the body of it, the affidavit, construed with what preceded, sufficiently showed by whom it was made, although it was very doubtful whether perjury could be assigned upon it. Stoddard *v.* Sloan, 65 Iowa 680; Kirby *v.* Gates, 71 Iowa 100.

Sworn or Affirmed.—A jurat which stated that the affiants, naming them, were "sworn and affirmed," but not showing which were sworn and which affirmed, was held defective. State *v.* Browning, 27 N. J. L. 536.

Where an affirmation is made instead of an oath, it is not necessary for the certificate of the officer to state that the affirmant was conscientiously scrupulous of taking an oath. It is the duty of the officer to satisfy himself on that point, and, in the absence of proof to the contrary, it must be presumed that he discharged his duty. Loney *v.* Bailey, 43 Md. 10.

Surplusage.—Where the jurat stated that the facts were "affirmed, sworn to, and subscribed," it was held that the surplusage did not vitiate the affidavit. Gibbons *v.* Sheppard, 2 Brew. (Pa.) 1.

Where several persons make affidavit, the magistrate's certificate need not state that they "severally" swore, although the statute prescribes that form. The word may be regarded as surplusage, and not affecting the sense. Randall *v.* Baker, 20 N. H. 335.

Service of Copy. — Montgomery, J.: "Where a law requires a copy of an affidavit to be served upon the adverse party it is not necessary to serve a copy of the jurat. Livingston *v.* Cheetham, 2 Johns. (N. Y.) 479. Unless, without it, facts stated may be unintelligible. Union Furnace Co. *v.* Shepherd, 2 Hill (N. Y.) 413. And even then the magistrate's name may be omitted. Chase *v.* Edwards, 2 Wend. (N. Y.) 283." Veal *v.* Perkerson, 47 Ga. 92.

But an affidavit should not be served before it is sworn to. Wilson *v.* Tiffany, 3 Wend. (N. Y.) 310.

Date of Jurat.—See *post*, *f. Date.*

Omission of Name from Jurat.—Where

made;[1] but where it is proved extrinsically that it was really made,[2] the affidavit will not be rendered fatally defective by the negligence of the officer in not attesting it.[3]

Official Title.—In general the officer need not annex to his signature his title of office, although it is more regular to do so.[4] If

an affidavit stated the name of affiant, and his name was subscribed thereto, but was omitted in the jurat, it was sufficiently shown that the affidavit was sworn to by the affiant. Kirby *v.* Gates, 71 Iowa 100.

1. McDermaid *v.* Russell, 41 Ill. 489; Cantwell *v.* State, 27 Ind. 505; Morris *v.* State, 2 Tex. App. 502; Westerfield *v.* Bried, 26 N. J. Eq. 357.

Blank Form.—An affidavit lacking the signature of an officer can be regarded only as a blank form, although the jurat contains the words "sworn to and subscribed in open court, Dec. 22nd, 1841." State Bank *v.* Hinchcliffe, 4 Ark. 444.

In *Michigan* it must be signed even though offered for use before the officer who administered it. Calvert *v.* McNaughton, 2 Mich. (N. P.) 8.

Neither Signed nor Certified.—An affidavit neither signed by the affiant nor certified by the officer is a nullity. Watt *v.* Carnes, 4 Heisk. (Tenn.) 532; Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

Initials.—It is not a valid objection to an affidavit that the clerk before whom it was made, in signing the jurat, gave the initials only of his Christian name. Rice *v.* People, 15 Mich. 9.

Time of Signing.—An affidavit in replevin is not invalidated by the fact that the justice signs the jurat at some time after plaintiff has made, signed, and sworn to the affidavit. Peterson *v.* Fowler, 76 Mich. 258.

2. Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581; Stout *v.* Folger, 34 Iowa 71; Tacoma Grocery Co. *v.* Draham, 8 Wash. 263; Ladow *v.* Groom, 1 Den. (N. Y.) 429.

3. In **Pennsylvania**, a clerical omission of a prothonotary to attest an affidavit sworn to before him will not be fatal. Maples *v.* Hicks, Bright. (Pa.) 56; Pottsville *v.* Curry, 32 Pa. St. 443. But see Shortle *v.* Stockton, 7 Watts (Pa.) 526. In commenting on this latter case, it was said in Pottsville *v.* Curry, 32 Pa. St. 443, that the amendment was there refused because there was nothing upon record to show that an oath had been taken.

Illinois, Iowa, West Virginia, Alabama, Arkansas.—"The mere omission of the clerk to put his name to an act which was done through him as an instrument should not prejudice an innocent party who has done all he was required to do. The clerk's omission to write his name where it should have been written was not the fault or neglect of the affiant. He signed and swore to the affidavit." Kruse *v.* Wilson, 79 Ill. 233; Cook *v.* Jenkins, 30 Iowa 452; Farmers' Bank *v.* Gettinger, 4 W. Va. 305; Hyde *v.* Adams, 80 Ala. 111; McCartney *v.* Branch Bank, 3 Ala. 709; Lowry *v.* Stowe, 7 Port. (Ala.) 483; Fortenheim *v.* Claflin, 47 Ark. 49.

In Judge's Handwriting.—Where the jurat was in the judge's handwriting, and, though not signed by him, was immediately followed by an order for an attachment, reciting that the judge had read the petition, affidavit, etc., and signed by him, it was held that from the circumstances there arose the strongest implication that the affidavit had been sworn to before him, and that it would be sufficient to sustain an assignment for perjury. English *v.* Wall, 12 Rob. (La.) 132.

4. In *New York* the title need not be given. People *v.* Rennselaer C. P., 6 Wend. (N. Y.) 543. *Contra*, Jackson *v.* Stiles, 3 Cai. (N. Y.) 128, Col. & C. Cas. (N. Y.) 468. Where the clerk receives and files such an affidavit it is *prima facie* sufficient. Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728.

Massachusetts.—Field, J.: "Affidavits and depositions, lawfully taken by a person authorized to take them, are not to be treated as unsworn statements because the magistrate has not added to the certificate signed by him the name of his office. Courts permit the certificate to be amended, or without an amendment admit evidence of the authority of the person by whom they were taken, if they do not take judicial notice of it." Jackman *v.* Gloucester, 143 Mass. 380.

the officer taking the affidavit elects to give the title of his office, a well-understood abbreviation will usually suffice.[1]

In *New Jersey*, where neither the body of the affidavit nor the jurat, either by words at length or by the accustomed abbreviation, states the official character of the attesting officer, the affidavit is defective. State *v.* Hutchinson, 10 N. J. L. 242.

Minnesota.—See also Knight *v.* Elliott, 22 Minn. 551, which, however, was distinguished in Bandy *v.* Chicago, etc., R. Co., 33 Minn. 380, where Gilfillan, C. J., said: "But if the proper official character appears upon the face of an affidavit, it is immaterial in what part of it. It may, and usually does, appear by the official designation being affixed to the signature subscribed to the jurat; but it may also be stated elsewhere in the affidavit; and if it appears anywhere on the face of the paper that the person before whom it was sworn was an officer authorized to take affidavits, it is sufficient." Thus it may appear in the titling, as, "State of Minnesota, County of Scott. In Justice's Court, before M. M. Shields, Esq., Justice," and the jurat is signed "M. M. Shields."

Judicial Notice.—In *California* and *Indiana* the courts take judicial notice of the names and signatures of their officers. Ede *v.* Johnson, 15 Cal. 53; Mountjoy *v.* State, 78 Ind. 172; Hipes *v.* State, 73 Ind. 39; Buell *v.* State, 72 Ind. 523; Brooster *v.* State, 15 Ind. 190.

Sufficiency of Title—Clerk.—Where the jurat to an affidavit for a writ of attachment showed that the affidavit was sworn to before "A. B.," but the writ, issued on the same day, was attested and signed by "A. B., Clerk of the Alexandria Circuit Court," it was held that the court would presume that the affidavit was sworn to before the clerk. Singleton *v.* Wofford, 4 Ill. 576. Likewise in a replevin suit where the jurat was signed simply "A. B., clerk," but the signature to the writ gave the full title of the clerk. Branch *v.* Branch, 6 Fla. 314. And where by statute the clerk of the county court acted also as clerk of the probate court, and the clerk of the county court alone could take the affidavits of subscribing witnesses to wills, an affidavit purporting to be made in the Probate Court of Montgomery County, the jurat of which was signed "A. B., Clk., P. C. M. C.," though no seal of office was added, sufficiently showed that it had been sworn to before the clerk of the county court. Russell *v.* Oliver, 78 Tex. 11.

Insufficient.—But the following paper purporting to be an affidavit for publication was held insufficient because it did not appear to have been sworn to by any one or before any officer: "The State of Texas, county of McLennan. This day personally came and appeared before A. J. E., clerk of the district court of said county, and says the names of the heirs of J. W., deceased, are unknown to affiant. J. R. H. A. J. E. D. C. McL. Co., Tex." Hardy *v.* Beaty, 84 Tex. 562.

Wrong Capacity.—Where an affidavit is taken before a special officer, it will be worthless if he signs the jurat in another capacity. Frost *v.* Hayward, 10 M. & W. 673.

Expiration of Commission.—Where a statute required that the notary public before whom an affidavit verifying a lien was made should annex to his subscription to the jurat the date of the expiration of his commission, and he failed to do so, it did not invalidate the affidavit, but merely subjected him to a penalty. Phelps, etc., Windmill Co. *v.* Baker, 49 Kan. 434.

Deputy.—In *Colorado* an affidavit which read, "A. B., who personally appeared before me, J. S. S., county clerk, deposes and says: . . . In witness whereof I have hereunto set my hand and seal this third day of August, 1889. J. S. S., County Clerk, by T. T., Deputy," was insufficient because it showed that the deponent appeared before the clerk, while the certificate was made by the deputy. Palmer *v.* McCarthy, 2 Colo. App. 422.

But in *Washington*, although it may be an irregularity for the deputy to sign the jurat in the name of his principal, by himself as deputy, it is not sufficient to destroy the force of the jurat. State *v.* Rosener, 8 Wash. 42.

And in *Minnesota* a jurat signed "F. W. E., Clerk of District Court, St. Louis County, per J. R. C., Deputy," is sufficient although not in the most approved form. Crombie *v.* Little, 47 Minn. 581.

1. **Abbreviations.**—The abbreviation "J. P." for "Justice of the Peace" is a sufficient designation of the official

Seal.—In the absence of statutory requirement the officer's seal, where he has one, need not be added ;[1] but in most states a notary public must affix his seal.[2]

f. DATE.—A date is not essential to an affidavit. If a mistake has been made in the date, it is competent to show it.[3]

2. Substance.—*a.* IN GENERAL.—If made in good faith and reasonably sufficient, an affidavit should be held good.[4]

character of the officer. Green *v.* Kindy, 1 Mich. (N. P.) 41; Hawkins *v.* State (Ind., 1894), 36 N. E. Rep. 419; Scudder *v.* Scudder, 10 N. J. L. 340; Larimer *v.* Knoyle, 43 Kan. 338; Shattuck *v.* People, 5 Ill. 477; Livingston *v.* Kettelle, 6 Ill. 116.

And "N. P." is a sufficient indication of the title "Notary Public." Rowley *v.* Berrian, 12 Ill. 198.

And an affidavit is not defective because the justice in attesting the jurat has so written his name that some of the letters extend over the printed letters "J. P." Sieckman *v.* Arwein, 10 Mo. App. 259. See article ABBREVIATIONS.

Demurrer.—And it seems that the omission to state the official title may not be taken advantage of by a general demurrer to the sufficiency of the affidavit, for the jurat is no part of the affidavit. Smith *v.* Walker (Ga., 1894), 18 S. E. Rep. 830.

1. Rosenstein *v.* State (Ind. App., 1894), 36 N. E. Rep. 652; Schaefer *v.* Kienzel, 123 Ill. 430. In Qualter *v.* State, 100 Ind. 92, where the record affirmatively showed that the affidavit had been sworn to, the absence of the seal did not constitute a good objection.

Treat, C. J.: "Clerks of courts are in the constant habit of taking affidavits without attaching the seal of the court to their jurats, and the validity of their acts and the propriety of the practice have never been questioned" Stout *v.* Slattery, 12 Ill. 162; Crombie *v.* Little 47 Minn. 581; Mountjoy *v.* State, 78 Ind. 172.

But the seal may be of service, for, in *Iowa*, where a clerk insufficiently stated his authority and the venue, it was held that the seal of the court attached should be taken into consideration to supplement the deficiency. Levy *v.* Wilson, 43 Iowa 605.

2. **Iowa, Indiana, Nebraska.**—The rule obtains in *Iowa*, *Indiana*, and *Nebraska*. Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117; Goodnow *v.* Litchfield, 67 Iowa 691; Miller *v.* State, 122 Ind. 355; Byrd *v.* Cochran (Neb., 1894), 58 N. W. Rep. 127.

In Illinois, a notary taking an affidavit to be used in the county of his residence need not add his seal to his attestation. But when the affidavit is to be used in another county, his seal of office, or some other evidence of his official character, is indispensable. Stout *v.* Slattery, 12 Ill. 162. In this case it was said that the seal is not required by the common law, for the power itself to administer oaths is given to notaries public by statute. Rowley *v.* Berrian, 12 Ill. 198. But see McKichan *v.* Follett, 87 Ill. 103.

In Georgia and Massachusetts the seal is not required. Jowers *v.* Blandy, 58 Ga. 379; Clement *v.* Bullens, 159 Mass. 193.

3. If an affidavit is untrue, "perjury may be assigned upon it, though it may have no date, or a wrong or impossible one, and the true time of making it may be averred and proved." Freas *v.* Jones, 15 N. J. L. 20. But see Chase *v.* Edwards, 2 Wend. (N. Y.) 283. A jurat is not insufficient because the day of the month is omitted, the year and month being given. Scudder *v.* Scudder, 10 N. J. L. 340. *Contra*, Duke of Brunswick *v.* Slowman, 8 C. B. 617, 65 E. C. L. 617. And the omission cannot be cured by reference to it in another affidavit. See also Archibald *v.* Hubley, 18 Can. Sup. Ct. Rep. 116.

4. Haight *v.* Arnold, 48 Mich. 512. An affidavit to a plea consisting only of the plea signed by the party and the jurat of the officer is sufficient. Chevallier *v.* Williams, 2 Tex. 239; Loeb *v.* Smith, 78 Ga. 504. And it is no objection to an affidavit that the jurat was on the back, and that thus the affidavit might have been written after the jurat. Noble *v.* U. S., Dev. Ct. of Cl. 83. And for further illustration of the proposition see State *v.* Central Pac. R. Co., 17 Nev. 259; Jamison *v.* Beecher, 4 Abb. Pr.

Where certain language is prescribed by statute, a substantial compliance therewith will suffice.[1]

It should be free from scandalous matter[2] and interlineations and erasures,[3] but clerical errors will not vitiate it.[4]

Statements should be made positively and not upon information

(N. Y.) 230; Fairbank *v.* Lorig, 4 Ind. App. 451; Merrielles *v.* State Bank, 5 Tex. Civ. App. 483.

Attachment.—Thus, the omission from an affidavit for an attachment of "the" from the proper phrase, "he says 'the' statements in the foregoing petition are true," is not a material defect. Clark *v.* Miller, 88 Ky. 108. But in City Nat. Bank *v.* Flippen, 66 Tex. 610, the court decided that the omission of "is" before the phrase "justly indebted" was a fatal defect. Also the omission of the word "justly." Evans *v.* Tucker, 59 Tex. 249; Thompson *v.* Towson, 1 Har. & M. (Md.) 504. *Contra*, Livengood *v.* Shaw, 10 Mo. 273.

Drawn up by Counsel.—Affidavits of witnesses drawn up by counsel and sworn to in the same words by different persons are suspicious and objectionable. Moore *v.* Ewing, 1 N. J. L. 144.

1. Thus a statement that a claim "is true and correct, and that the same is due and owing from said county to deponent," is a substantial compliance with the statutory requirement "that the amount claimed is justly due." Rhoda *v.* Alameda County, 65 Cal. 523; Gibbons *v.* Sheppard, 2 Brew. (Pa.) 1; Election Cases, 65 Pa. St. 20, 7 Phila. (Pa.) 41; Story *v.* Story, 32 Ind. 137; Fleming *v.* Wells, 65 Cal. 336; Large *v.* Keen's Creek Draining Co., 30 Ind. 263, 95 Am. Dec. 696; Russell *v.* Ralph, 53 Wis. 328; Scruggs *v.* Gibson, 40 Ga. 511.

Reference.—Where an affidavit complies in statement substantially with the statutory requirements, minor defects may be aided by reference to other parts of the record. Miller *v.* Eastman, 27 Neb. 408.

Insufficient Compliance.—But a statute requiring a statement in the affidavit for an attachment of some of the grounds upon which it is made is not satisfied by a statement "that affiant has good reasons aud does believe." Campbell *v.* Hall, McCahon (Kan.) 53, 1 Kan. 488; Cowles *v.* Hardin, 79 N. Car. 577. And "thinks" is not equivalent to "believes." Rittenhouse *v.* Harman, 7 W. Va. 380.

Recital.—Where a statutes requires that the residence of the deponent should be given, it will not be sufficient to give it merely by way of recital. Staples *v.* Fairchild, 3 N. Y. 41; Payne *v.* Young, 8 N. Y. 158.

2. Opdyke *v.* Marble, 18 Abb. Pr. (N. Y.) 375; Lewis *v.* Woolrych, 3 Dowl. Pr. Cas. 692; Cassen *v.* Bond, 2 Y. & J. 531; Balls *v.* Smythe, 2 M. & G. 350, 40 E. C. L. 406.

3. Didier *v.* Warner, 2 Edm. Sel. Cas. (N. Y.) 41, 1 Code Rep. (N. Y.) 42; Williams *v.* Clough, 1 Ad. & El. 376, 28 E. C. L. 106; Chambers *v.* Barnard, 9 Dowl. Pr. Cas. 557.

4. Ross *v.* Davis, 13 Ark. 293; Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566; Corrigan *v.* Nichols (Tex. Civ. App., 1894), 24 S. W. Rep. 952; Huffman *v.* Hardeman (Tex., 1886), 1 S. W. Rep. 575; Weis *v.* Chipman, 3 Tex. Civ. App. 106.

Thus the use of the word "national" instead of "notarial" in the phrase "I hereunto set my hand and national seal" in the attestation of a notary is only a clerical misprision of no importance. Schwarz *v.* Baird (Ala., 1893), 13 So. Rep. 947. And where an affidavit for publication against a non-resident stated that the residence of the defendant "was known" instead of "unknown" to the affiant. Pierpont *v.* Pierpont, 19 Tex. 227. Likewise where an affidavit for attachment stated that affiant was the agent of the plaintiff, and then continued "the said plaintiff makes oath," when it obviously should have been "the said affiant," and a printed form was used. Whipple *v.* Hill, 36 Neb. 720. And the failure of a justice of the peace before whom an affidavit for an attachment was made to insert in his certificate the word "dollars" in the amount of indebtedness sworn to, where the word appeared in the warrant issued by the justice, was merely a clerical error. De Bebian *v.* Gola, 64 Md. 262; Jean *v.* Spurrier, 35 Md. 110.

and belief,[1] or in the alternative.[2] An affidavit should not state inconsistent grounds for a remedy sought.[3]

Opinions and Conclusions.—An affidavit should not state matters of opinion or conclusions of law.[4]

1. Den *v.* Den, 10 N. J. L. 237; Thompson *v.* Higginbotham, 18 Kan. 42; Atchison *v.* Bartholow, 4 Kan. 124; Winson *v.* Farmers', etc., Nat. Bank, 81½ Pa. St. 304; Claflin *v.* Baere, 57 How. Pr. (N. Y. Supreme Ct.) 78.

But in Virginia it was held that the insertion by the affiant in an affidavit in support of a plea of *non est factum* of the words "to the best of his knowledge and belief" did not vitiate the affidavit; because no man can be required to swear positively (if at all) to legal inferences. Jackson *v.* Webster, 6 Munf. (Va.) 462.

And in New York the addition of the words "to deponent's best knowledge, information, and belief" does not modify or detract from the words previously employed. Pratt *v.* Stevens, 94 N. Y. 387. "The true rule seems to be that statements in affidavits will be presumed to have been made on personal knowledge unless stated to have been on information and belief, and unless it appears affirmatively and by fair inference that they could not have been and were not on such knowledge." Crowns *v.* Vail, 51 Hun (N. Y.) 204. Thus an allegation in an affidavit that representations were false, as deponent "had since learned," amounts to a positive averment of their falsity. Cummings *v.* Woolley, 16 Abb. Pr. (N. Y.) 297, note. And an affidavit in support of a requisition which positively charges a crime is not made insufficient by the addition to the statement "as deponent verily believes." *In re* Keller, 36 Fed. Rep. 681.

In **Georgia** an affidavit to an account which was positive as to a certain sum was not rendered defective by the expression by the affiant of his belief that a still larger sum was due than the balance exhibited. Howard *v.* Munford, 80 Ga. 166.

2. Wilke *v.* Cohn, 54 Cal. 212; Blum *v.* Davis, 56 Tex. 423; Leonard *v.* Bowman, 21 Civ. Pro. Rep. (N. Y. Supreme Ct.) 237, 15 N. Y. Supp. 822; Collins *v.* Beebe (Supreme Ct.), 7 N. Y. Supp. 442.

Thus an affidavit for removal of examination which states "that from prejudice or other cause" the person charged believed that the justice would not decide impartially is defective because in the alternative. Billings *v.* Noble, 75 Wis. 325.

Language of Statute.—But if the affidavit follows the language of the statute, it is no objection that it is in the alternative. Cunningham *v.* Doyle (C. Pl.), 25 N. Y. Supp. 476; Staubsandt *v.* Lennon (C. Pl.), 22 N. Y. Supp. 544; Schwartz *v.* Allen (Super. Ct.), 7 N. Y. Supp. 5.

3. Pearre *v.* Hawkins, 62 Tex. 434.

4. 3 Greenleaf Ev. § 381; The Constitution, 1 Newb. Adm. 107; Hodgman *v.* Barker (Supreme Ct.), 14 N. Y. Supp. 574; Westervelt *v.* Agrumaria Sicula Societata, etc., 58 Hun (N. Y.) 147, 11 N.Y. Supp. 340; Brown *v.* Keogh (City Ct.), 14 N. Y. Supp. 915; Cattaraugus Cutlery Co. *v.* Case (Supreme Ct.), 9 N. Y. Supp. 862; Moore *v.* Becker (Supreme Ct.), 13 N. Y. St. Rep. 567; Labalt *v.* Schulhof (Supreme Ct.), 4 N. Y. Supp. 819; Markey *v.* Diamond (City Ct.), 19 N. Y. Supp. 181; Wilmerding *v.* Cunningham, 65 How. Pr. (N. Y. Supreme Ct.), 344; Delaplain *v.* Armstrong, 21 W. Va. 211; Pemberton *v.* Hoosier, 1 Kan. 108; Baker *v.* Akerman, 77 Ga. 89.

"An affidavit must set forth facts specifically; mere general denials or general averments, which involve questions of law as well as of fact, are insufficient." Thus it is insufficient to state that defendant has a "just, full, and legal defense," or that "he is not legally indebted to the plaintiff in any sum of money whatever," without coupling with it any specific facts. Noble *v.* Kreuzhamp, 111 Pa. St. 68.

Conclusions of Fact.—The office of an affidavit is to set forth the evidence from which the court may draw conclusions of fact, differing in this respect radically from a complaint, which should only set forth conclusions of fact and not the evidence of the correctness of these conclusions." Mechanics', etc., Bank *v.* Loucheim (Supreme Ct.), 8 N. Y. Supp. 520; Thompson *v.* Best (Supreme Ct.), 4 N. Y. Supp. 229.

Inferences.—An affidavit should not

b. PARTIES.—The body of the affidavit should contain the names of the plaintiff and defendant and affiant, but it will be sufficient if shown by the whole instrument who they are.[1]

c. LANGUAGE.—It is immaterial in what language an affidavit is written, provided it appears that the affiant understood the oath he took.[2]

state facts inferentially. Feuchtwanger *v.* Dessar (Supreme Ct.), 5 N. Y. Supp. 129; Powell *v.* Kane, 5 Paige (N. Y.) 265.

Proof by Affidavit can only be made by a statement and verification of such facts as are requisite to establish the principal fact sought to be maintained. Duanesburgh *v.* Jenkins, 40 Barb. (N. Y.) 574.

1. **Plaintiff.**—An affidavit, properly entitled in the action, by a plaintiff that "he was the plaintiff above named" was sufficient although his name was not stated in the body of the affidavit. Morrison *v.* Watson, 23 N. Y. Wkly. Dig. 286.

In *Michigan* an affidavit for an attachment which must be annexed to the writ need not name the plaintiff if he is named in the writ, and reference is made thereto. Stringer *v.* Dean, 61 Mich. 196. The reverse is true in the justice's court, where the affidavit need not be annexed to the writ. Burnside *v.* Davis, 65 Mich. 74. But an affidavit for an attachment, which is not entitled, which nowhere shows who is the plaintiff or who the defendant, which does not name either individually, and does not state who "deponent" is, is entirely insufficient. Burgess *v.* Stitt, 12 How. Pr. (N. Y. Supreme Ct.) 401.

The fact that the plaintiff making an affidavit describes himself as "guardian" does not vitiate it if it is still his individual oath. Wade *v.* Roberts, 53 Ga. 26.

Partnership.—Although it is the better practice to set out the names of the individuals who compose a defendant firm, in an attachment case, the affidavit will not be void if the firm only be named. Johnson *v.* Smith, 83 Ga. 779; De Leon *v.* Heller, 77 Ga. 740. Where it appeared from an affidavit made for a company that it was located at a certain place, that V. was its agent, and that it was the concern with which the defendants had the dealings which were the basis of the suit, it was held that the affidavit sufficiently described who was the real plaintiff, although the names of the copartners of the company were not given. Emerson *v.* Detroit Steel, etc., Co. (Mich., 1894). 58 N. W. Rep. 659.

An affidavit the titling of which was simply "A. B. Co. *v.* C. & D.," but the body of which gave the individual as well as the firm names of the defendants, and described them as partners and defendants in the suit, sufficiently showed who were the plaintiffs. Munzesheimer *v.* Heinze, 74 Tex. 254.

Christian Names.—An error in the Christian name of a person, in a part of the affidavit which may be treated as surplusage, will not vitiate the affidavit. Selman *v.* Shackelford, 17 Ga. 615. But an affidavit for attachment by the attorney of the plaintiffs which states only their surnames is defective, although the affiant stated that their Christian names were unknown to him. It may, however, be amended. Barber *v.* Smith, 41 Mich. 138.

Affiant.—A verification subscribed by the affiant is sufficient although he is not named in the body thereof. Cunningham *v.* Doyle (C. Pl.), 25 N. Y. Supp. 476; People *v.* Sutherland, 81 N. Y. 1. See also Voorheis *v.* Eiting (Ky., 1893), 22 S. W. Rep. 80. Where a petition to a court of insolvency, purporting to be brought by the two assignees of the debtor, was signed only by "A. B.," a person of the same name as one of the assignees, without any official designation, and the affidavit attached to it recited that the above-named "A. B." appeared and made oath, etc., it was held that these considerations, without more, would have warranted the judge of the court of insolvency in finding that the affidavit was made by an assignee. Clement *v.* Bullens, 159 Mass. 193.

2. It is no objection to an affidavit sworn to in *Germany* that it was originally in the German language, if it is translated, and the translation is verified; and the oath may be administered in German if it is translated by an interpreter to the affiant. *In re* Eady, 6 Dowl. Pr. Cas. 615. Where the jurat to an affidavit made by a foreigner

d. OATH.—Although no particular ceremony, as raising the hand, is required, the circumstances must show that there was an oath or affirmation made to the statements of the affidavit.[1]

certified that the "affidavit was interpreted by F. C., professor of languages (he having first sworn that he understood the English and French languages), to the deponent, who was afterwards sworn to the truth thereof," it was held sufficient though it did not appear thereby that the deponent understood the language in which the affidavit was interpreted, or that the interpreter was sworn truly to interpret. Bosc *v.* Solliers, 4 B. & C. 358; 6 Dowl. & R. 514, 10 E. C. L. 356; Marzetti *v.* Comte du Jouffroy, 1 Dowl. Pr. Cas. 41.

But in California it has been held that, on a motion for a new trial, it is not error for the court to exclude affidavits written in a foreign language in support of it, for if admitted they would have been of no service to the plaintiff on his motion, and hence he was not prejudiced by their rejection. Spencer *v.* Doane, 23 Cal. 418.

1. **Form.**—From a jurat which states that deponent was "duly" sworn, it will be presumed, in the absence of proof to the contrary, that the oath was administered in a manner binding on the conscience of the deponent. Fryatt *v.* Lindo, 3 Edw. Ch. (N. Y.) 239.

The oath of a Hebrew to a bill must be according to the oath of the Jewish religion. Newman *v.* Newman, 7 N. J. Eq. 26.

Although the body of an affidavit recites that the affiant does solemnly promise and swear (or affirm), and the jurat reads, "affirmed before me," it is nevertheless sufficient. State *v.* Shreeve, 4 N. J. L. 297.

Where, in the presence of a justice of the peace, an affidavit was read over to the affiant and then handed to the justice, who asked the latter if he would swear to it, and he replied he would, but "did not hold up his right hand and swear," and by mistake neither affidavit nor jurat was signed, though both parties testified that they thought they were doing everything to make the oath binding —*held*, what was done was sufficiently formal. Dunlap *v.* Clay, 65 Miss. 454.

Insufficient.—The attorney for the plaintiff in a suit to foreclose a chattel mortgage wrote out the affidavit and signed his name to it as attorney for the plaintiff, then carried it to the clerk of the court, sitting at his desk, laid it thereon, and said to him: "Here is an affidavit I want to swear to. I have already signed it. The facts stated in it are true." It was not proved that the clerk heard him. No formal oath was administered, and the clerk did not until long afterward affix a jurat to the affidavit, and he testified that he had no recollection of administering the oath. *Held*, that the affidavit was not duly made. Matthews *v.* Reid (Ga., 1894), 19 S. E. Rep. 247.

An agent of a creditor went to a justice of the peace and asked him to prepare the papers for the issuance of an attachment against the debtor, stating to him the amount owed and the grounds for the attachment. The officer hurriedly prepared the affidavit, writ, and bond, and, handing them to the agent, asked "if that was what he wanted." The agent answered "Yes, that it was all right." The affidavit was not signed and no attempt was made to administer an oath, though the agent testified that he considered he was making affidavit. *Held*, that these circumstances did not constitute the taking of an affidavit; and that the question was determinable, not from what one of the parties considered he was doing, but from what was actually done. Carlisle *v.* Gunn, 68 Miss. 243.

A paper which reads: "State of West Virginia, Lewis County, to wit: A. C. this day personally appeared before me, W. G. H., clerk of the Circuit Court in and for the county and state aforesaid; that he has instituted an action of covenant in the Circuit Court of Lewis County against T. M., which action is now pending and undetermined," etc., and is signed, "Given under my hand this 21st day of June, 1884. W. G. H., Clerk," cannot be regarded as an affidavit, because it does not state that the deponent was duly sworn or stated anything under oath, and does not conclude with a jurat. Cosner *v.* Smith, 36 W. Va. 788.

Recital by Officer.—Where a statute

III. WHO MAY MAKE—Competency of Affiants.—The peculiar uses of affidavits necessitate rules for the competency of affiants differing from those of ordinary witnesses.[1]

Parties to Cause.—Affidavits required for the various stages of legal procedure may always be made by parties to the cause.[2]

requires as grounds for an attachment that certain material facts shall appear by affidavit, it is not sufficient that a recital of them is made in the body of the affidavit by the notary before whom the affidavit was made, when it does not appear that all the facts were also sworn to by the affiant. Hudkins *v.* Haskins, 22 W. Va. 645.

1. Interested Parties.—Parties who, by reason of interest, would have been incompetent witnesses were allowed to make affidavits for some purposes; as on motions, U. S. *v.* Twenty-eight Packages, Gilp. (U. S.) 311; and in proof of a lost paper, Tayloe *v.* Riggs, 1 Pet. (U. S.) 591. But see M'Bride *v.* Floyd, 2 Bailey (S. Car.) 209.

Negro.—In 1850 it was held by the Circuit Court for Indiana that the affidavit of a negro was admissible in *habeas corpus* proceedings, though he was not a competent witness under the state law. Norris *v.* Newton, 5 McLean (U. S.) 92. Likewise the affidavit of a free negro. DeLacy *v.* Antoine, 7 Leigh (Va.) 438. And in *Kentucky*, when a party to the suit, his affidavit was admissible in any case where the affidavit of a party was required or admissible, although he could not in all cases be a witness. Com. *v.* Oldham, 1 Dana (Ky.) 466.

Wife.—The affidavit of a wife prosecuting or defending as a *feme sole* in a suit for divorce will be received. Kirby *v.* Kirby, 1 Paige (N. Y.) 261.

Atheist.—The affidavit of a party to a suit cannot be excluded by virtue of the filing of counter-affidavits alleging that he is an atheist. Leonard *v.* Manard, 1 Hall (N. Y.) 200.

Witness.—Where an affidavit is admissible upon *certiorari* no legal objection can exist to such affidavit being made by the witness who was before the justice. Goldsmith *v.* Bane, 8 N. J. L. 87. But the affidavits of persons who would have been competent witnesses and might have been called are not admissible. Patterson *v.* Fagan, 38 Mo. 70.

An affidavit admitted in evidence at the hearing of an application for an injunction, no objection being made on the ground of the incompetency of the affiant and no motion being made to rule it out, may be considered, whether the affiant was competent or not. Putney *v.* Kohler, 84 Ga. 528.

Felon.—In New York a person convicted of forgery and not pardoned is not competent to make an affidavit, and does not become competent by serving out his term. People *v.* Robertson, 26 How. Pr. (N Y. Supreme Ct.) 90. If made after indictment, although before conviction, the affidavit still cannot be received, for the incompetency relates back to the indictment. Webster *v.* Mann, 56 Tex. 119, 42 Am. Rep. 688.

Lunatic.—An affidavit sworn to in a lunatic asylum without the statement in the jurat of the circumstances, whereby the mental condition of the affiant may be inquired into, was ordered to be stricken from the files. Spittle *v.* Walton, L. R. 11 Eq. 420, 40 L. J. Ch. 368.

Young Child.—The affidavit of the loss and contents of a bond, which by statute is required to be made by one having knowledge of the facts, cannot be made by one who at the time of its execution was only a child between five and eight years old. Cheek *v.* James, 2 Heisk. (Tenn.) 170.

Guardian.—A guardian of a minor, whether natural or specially appointed, may make an affidavit in replevin for him. Wilson *v.* Menechas, 40 Kan. 648.

Printer.—A statute requiring an affidavit by the "printer" of a paper is satisfied by that of a person who describes himself as "the proprietor." Quivey *v.* Porter, 37 Cal. 458; Menard *v.* Crowe, 20 Minn. 448; Bunce *v.* Reed, 16 Barb. (N. Y.) 347; Sharp *v.* Daugney, 33 Cal. 513.

Juror.—The affidavit of a juror, sworn to be true by another person, may be treated as the original affidavit of the latter. Wilson *v.* Berryman, 5 Cal. 44, 62 Am. Dec. 78.

2. Marshall, C. J.: "Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the

Attorneys.—And they may also often be made by the attorney or solicitor of the parties.[1]

preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take his deposition, or an affidavit of his inability to attend, is usually made by the party and received without objection. So affidavits in support of a motion for a new trial are often received." Tayloe *v.* Riggs, 1 Pet. (U. S. 591.)

A party's affidavit may be received in support of a motion for judgment, as in case of nonsuit. Ames *v.* Merriman, 9 Wend. (N. Y.) 498. An affidavit may be made by a party in interest even if not a party to the record. Fraley *v.* Steinmetz, 22 Pa. St. 437; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177; Hunter *v.* Reilly, 36 Pa. St. 509; Miller *v.* Hooker, 2 How. Pr. (N. Y.) 124.

California.—Under § 446, Code of Civil Procedure of California, which prescribes that pleadings shall be verified by the plaintiff or his attorney, it is sufficient if one of two codefendants, alone, makes the affidavit. Claiborne *v.* Castle, 98 Cal. 30.

Representatives.—Statutes requiring the affidavits of parties are fulfilled by the affidavits of the legal representatives of such parties, if they themselves are under disability to take an oath.

Corporation.—Thus the chief officer of a corporation may make its affidavits. *Ex p.* Sargeant, 17 Vt. 425. And they can be made not only by the president or attorney, but also by the secretary, or any officer or agent of the corporation. St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458. For a municipality the affidavit may be made as well by the city attorney as by the mayor and other chief officers. Corpenny *v.* Sedalia, 57 Mo. 88. An affidavit by a bank which stated that M. was the president of the bank, and was signed simply "M., Pres.," was sufficient. First Nat. Bank *v.* Graham (Tex. App., 1889), 22 S. W. Rep. 1101; West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407. An affidavit which read, "The said plaintiff, the Moline, Milburn and Stoddard Co., makes oath, and the said S. W. Croy, agent of the Moline, Milburn and Stoddard Co., also makes oath," etc., and was signed by the agent, sufficiently showed from an examination of the whole paper that it was the affidavit of the agent, although the first clause purported to be the affidavit of the corporation itself. Moline, etc., Co. *v.* Curtis (Neb., 1893), 57 N. W. Rep. 161.

But in Wisconsin an affidavit for a corporation of another state cannot be made by the "general agent" or "managing agent" in that state. It must be made by an officer of the corporation, and not by a mere attorney or agent. Wheeler, etc., Mfg. Co. *v.* Lawson, 57 Wis. 400; Western Bank *v.* Tallman, 15 Wis. 92.

Secretary.—And under the statute of Congress (14 U. S. Sts. at Large, 559) providing for the removal of cases from a state to a federal court upon the affidavit of the party seeking it, an affidavit cannot be made on behalf of a corporation by its secretary, unless he is specially authorized to make it. Dodge *v.* Northwestern Union Packet Co., 13 Minn. 458.

A Partnership, as such, cannot make an affidavit. Gaddis *v.* Durashy, 13 N. J. L. 324; Norman *v.* Horn, 36 Mo. App. 419. But it may do so by its agent, who may sign the firm name "by" his own. Bennett *v.* Gray, 82 Ga. 592.

Number of Affiants.—Peters, J.. "As many persons as choose to do so may swear in the identical same words and verify their oaths by their signatures, and whether the oath is written on one or many pieces of paper makes no difference." Taylor *v.* State, 48 Ala. 180.

1. Thus, for an appeal, Coppock *v.* Smith, 54 Miss. 640; to a plea in abatement, Atwood *v.* Higgins, 76 Me. 423; for a certiorari, McAlpin *v.* Finch, 18 Tex. 831; for an attachment, Weaver *v.* Roberts, 84 N. Car. 493; Clark *v.* Miller, 88 Ky. 108; Hardie *v.* Colvin, 43 La. Ann. 851; Fulton *v.* Brown, 10 La. Ann. 350.

Betts, J.: "The courts of law, as a general rule, require affidavits to the merits of a cause, and in those instances where the diligence and good faith of a party are in question, to be made by the party himself. Still the rule in those cases is not inflexible, for the deposition of an attorney or other

Agents may, in many cases, make affidavits for their principals.[1]

person may be substituted when good cause is shown for the change. Williams *v.* Magill, 1 H. Bl. 637; Peake's N. P. 97; Geib *v.* Icard, 11 Johns. (N. Y.) 82; Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581; Chase *v.* Edwards, 2 Wend. (N. Y.) 283." A proctor in admiralty can make an affidavit for the party. The Harriet, Olc. Adm. 222. See AFFIDAVITS OF MERITS.

Knowledge of Facts.—If the attorney has personal knowledge of the facts, he may generally make the affidavit. Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412; Will *v.* Lytle Creek Water Co., 100 Cal. 344. And an affidavit of an attorney or agent making positive statements need not give his source of knowledge. Anderson *v.* Wehe, 58 Wis. 615. And see Doll *v.* Mundine, 84 Tex. 315.

But in New York, if he has not the knowledge, and no excuse is given for the failure of the party to make the affidavit, his affidavit is generally insufficient. Cross *v.* National F. Ins. Co., 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 199, 6 N. Y. Supp. 84; Clark *v.* Sullivan (Supreme Ct.), 8 N. Y. Supp. 565; Pach *v.* Geoffroy (Supreme Ct.), 19 N. Y. Supp. 583; Talbert *v.* Storum, 66 Hun (N. Y.) 635, 21 N. Y. Supp. 719; Van Ingen *v.* Herold (Supreme Ct.), 19 N. Y. Supp. 456; Cohn *v.* Baldwin (Supreme Ct.), 26 N. Y. Supp. 457. And an attorney who makes an affidavit in respect of a transaction of his client will not be presumed to have any personal knowledge of the facts as to which he affirms. Crowns *v.* Vail, 31 Hun (N. Y.) 204.

In Missouri an affidavit for change of venue in civil cases must be made by the party himself and not by his attorney. Lewin *v.* Dille, 17 Mo. 64; Huthsing *v.* Maus, 36 Mo. 101; Norvell *v.* Porter, 62 Mo. 309; *In re* Whitson's Estate, 89 Mo. 58; Squires *v.* Chillicothe, 89 Mo. 226. See CHANGE OF VENUE.

In Colorado, under a statute which requires that an affidavit for publication of summons shall be made by a party to the action, it cannot be made by the attorney, except possibly in a very exceptional case, and then by reason of his interest. Davis *v.* John Mouat Lumber Co., 2 Colo. App. 381; Morton *v.* Morton, 16 Colo, 358.

Absent Plaintiff.—Where a statute authorized an affidavit to be made by the attorney or agent of the plaintiff when the latter was absent, it could not be made for an absent plaintiff by the attorney usually employed by the plaintiff, but who at the time of making the affidavit had not consulted with the plaintiff in reference to instituting the particular proceedings, though his acts were ratified by the plaintiff upon coming to his knowledge. Johnson *v.* Johnson, 31 Fed. Rep. 700.

The Affidavits of Two Attorneys, swearing to different facts, will be sufficient if, taken together, they cover all the facts. Lewis *v.* Stewart, 62 Tex. 352.

In Indiana attorneys may make affidavits for their clients, as other agents. Abbott *v.* Zeigler, 9 Ind. 511. But see Shattuck *v.* Myers, 13 Ind. 46.

The Attorney's Clerk cannot, in general, make the affidavit. Ames *v.* Merriman, 9 Wend. (N. Y.) 498; Pittsburgh Bank *v.* Murphy (Supreme Ct.), 18 N. Y. Supp. 575.

Counsel for the party may not make affidavits unless he has personal knowledge or gives a sufficient excuse for the failure of the party himself to make it. People *v.* Spalding, 2 Paige (N. Y.) 326; Marshall *v.* Witte, 1 Phila. (Pa.) 117; Gross *v.* Painter, 1 W. N. C. (Pa.) 154; Philadelphia *v.* Devine, 1 W. N. C. (Pa.) 358. But in Deshay *v.* Persse, 9 Abb. Pr. (N. Y.) 289, note, an affidavit by counsel was allowed to be supplemented at the hearing by his statement that the party was absent.

And in Iowa the professional statement of counsel, when received by the court, is to be regarded as an affidavit. Rice *v.* Griffith, 9 Iowa 539.

1. McWorter *v.* Reid, 1 Hill (S. Car.) 368; Allen *v.* Champlin, 32 La. Ann. 511; Deering *v.* Warren, 1 S. Dak. 35.

But not in all cases. Thus:

In Georgia an affidavit to be allowed to make a claim in *forma pauperis* may not be made by an agent. Hadden *v.* Larned, 83 Ga. 636.

And in Kansas an affidavit for an execution may not be made by a mere agent. *In re* Heath, 40 Kan. 333.

In Missouri, Minnesota, Michigan, Alabama, and Texas it is proper but not indispensable that an affidavit by an agent should expressly swear to the existence of the agency. Recital of

Third Person.—And sometimes even a third person may make the affidavit.[1]

IV. WHO AUTHORIZED TO TAKE—1. Within the State.—Affidavits must be made before some officer authorized either generally or specially to administer oaths and affidavits.[2]

it will suffice. Remington Sewing Machine Co. *v.* Cushen, 8 Mo. App. 528; Smith *v.* Victorin, 54 Minn. 338; Wetherwax *v.* Paine, 2 Mich. 557; Murray *v.* Cone, 8 Port. (Ala.) 252; Evans *v.* Lawson, 64 Tex. 199. But see Willis *v.* Lyman, 22 Tex. 268. In *Missouri* the agency may appear *aliunde*. Ring *v.* Chas. Vogel Paint, etc., Co., 46 Mo. App. 374.

In Louisiana, New York, and Wisconsin the contrary has been held. Lithgow *v.* Byrne, 17 La Ann. 8; *Ex p.* Bank of Monroe, 7 Hill (N. Y.) 177; *Ex p.* Aldrich, 1 Den. (N. Y.) 662; Cunningham *v.* Goelet, 4 Den. (N. Y.) 71; *Ex p.* Shumway, 4 Den. (N. Y.) 258; People *v.* Perrin, 1 How. Pr. (N. Y.) 75; Wiley *v.* Aultman, 53 Wis. 560; Sloane *v.* Anderson, 57 Wis. 123, 135; Miller *v.* Chicago, etc., R. Co., 58 Wis. 310. See also Hill *v.* Hoover, 5 Wis. 354.

Behalf of Principal. — An affidavit made by an agent should show that it is made on behalf of the principal. Mackey *v.* Hyatt, 42 Mo. App. 443; Gilkeson *v.* Knight, 71 Mo. 403; Stringer *v.* Dean, 61 Mich. 196; Nicolls *v.* Lawrence, 30 Mich. 395.

In *Arkansas* the affidavit need not state that the affiant made it for the plaintiff, as the court will not presume he was unauthorized. Mandel *v.* Peet, 18 Ark. 236.

1. As in the absence or sickness of the party himself. James *v.* Young, 1 Dall. (Pa.) 248; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177.

But an affidavit for supplementary proceedings which was not made by the judgment creditor or his attorney, but by one who failed to show that he was authorized to make it in behalf of the creditor, is insufficient. Brown *v.* Walker (Supreme Ct.), 8 N. Y. Supp. 59.

"The correct rule would seem to be that when a defendant puts in a stranger's affidavit, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability existed which prevented him from making it, and the circumstances giving rise to the disability." Griel *v.* Buckins, 114 Pa. St. 187.

2. State *v.* Green, 15 N. J. L. 88; Ladow *v.* Groom, 1 Den. (N. Y.) 429; Greenvault *v.* Farmers, etc., Bank, 2 Doug. (Mich.) 498.

General Authority.—Where an affidavit is required and no particular officer is designated, it may be made before any officer having general authority to administer oaths and affidavits. Dunn *v.* Ketchum, 38 Cal. 93; Christman *v.* Floyd, 9 Wend. (N. Y.) 340; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194.

Under Acts of Congress.—For use in the courts of the United States, affidavits must be made before some person authorized by act of Congress or rule of court to take them. Haight *v.* Morris Aqueduct, 4 Wash. (U. S.) 601; Gray *v.* Tunstall, Hempst. (U. S.) 558. Or by regulation of the head of a department. U. S. *v.* Bailey, 9 Pet. (U. S.) 238. Or by the custom of a department. U. S. *v.* Winchester, 2 McLean (U. S.) 135.

An act of Congress may authorize a state magistrate to take affidavits in support of claims against the United States. U. S. *v.* Bailey, 9 Pet. (U. S.) 238.

As to what affidavits for use in United States courts may be made before notaries public, see *In re* McKibben, 12 Nat. Bank Reg. 97, 2 Cent. L. J. 277. A notary public appointed by a state had not, prior to the passage of the act of Congress, Feb. 26, 1881, power to administer an oath to an officer of a national bank, making a report under § 5211 of the Revised Statutes. U. S. *v.* Curtis, 107 U. S. 671.

An affidavit upon which a requisition was sought, the venue of which reads, "State of Wisconsin, Municipal Court, City and County of Milwaukee," and the jurat of which is signed "J. M., Clerk of the Municipal Court," sufficiently conforms to the act of Congress providing that the affidavit shall be sworn to before "a magistrate." *In re* Keller, 36 Fed. Rep. 681.

Judges and clerks of courts,[1] justices of the peace,[2] notaries public,[3]

1. **Judges.**—In the absence of statutory provision to the contrary, affidavits to be read in common-law courts upon any trial or argument may be taken in open court or before a judge thereof at chambers. English *v.* Bonham, 15 N. J. L. 431.

In *New York* the judges of the Courts of Common Pleas were by statute *ex officio* commissioners for taking affidavits to be read in the Supreme Court, and could take affidavits in any county. Hopkins *v.* Menderback, 5 Johns. (N. Y.) 234.

Clerks.—Under the Code of *Virginia* of 1860, ch. 176, § 27, which bestowed upon "any court, or the clerk of any court," authority to administer affidavits, the clerk of the District Court of the United States for the Dictrict of West Virginia was included. Parker *v.* Clark, 7 W. Va. 467. But see Robinson *v.* Gregg, 57 Fed. Rep. 186.

In *West Virginia* the provision of the Code (1868, p. 585, ch. 117, § 6) that "a clerk of a court or his deputy may administer an oath in any case wherein an affidavit is necessary or proper" does not limit their authority to cases in which, without regard to circumstances, the making the affidavit is a necessary prerequisite to the performance of an official act which the clerk is called upon to perform, but extends it to all cases wherein an affidavit is necessary. Chesapeake, etc., R. Co. *v.* Patton, 5 W. Va. 234.

In *Tennessee* an affidavit to the loss of an instrument upon which suit has been brought must be made before the clerk of the court, or before the court where the suit was commenced or is pending. Baker *v.* Grigsley, 7 Heisk. (Tenn.) 627.

In *Illinois* a clerk of the Circuit Court is authorized to administer an oath to a party making affidavit upon which to found a *ca. sa.* Fergus *v.* Hoard, 15 Ill. 357.

An affidavit for an attachment need not be made before the same clerk who issues the writ. Wright *v.* Smith, 66 Ala. 545. See also Wicker *v.* Schofield, 59 Ga. 210.

Beyond Jurisdiction.—But a clerk for one county may not administer an affidavit in another. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

2. But they are not authorized *ex officio*. Munn *v.* Merry, 14 N. J. L. 183; Matter of Highway, 16 N. J. L. 91.

In New Jersey before the act of Feb. 14, 1839, Rev. Sts. 871, a justice could not administer an oath except upon proceedings before him. Smith *v.* Abbott, 17 N. J. L. 358. See also Anonymous, 8 N. J. L. 176; Vanderveer *v.* Conover, 16 N. J. L. 490; Hunt *v.* Langstroth, 9 N. J. L. 223.

Kentucky.—Nor were they authorized in Kentucky. Trabue *v.* Holt, 2 Bibb (Ky.) 393; Green *v.* Breckinridge, 4 T. B. Mon. (Ky.) 541.

In New York they were authorized by the act of 1840. People *v.* Brooks, 1 Den. (N. Y.) 457, 43 Am. Dec. 704. And see People *v.* Tioga, 7 Wend. (N. Y.) 516.

But in Delaware and Alabama they may take affidavits. Shute *v.* Gould, 4 Harr. (Del.) 203; Bloodgood *v.* Smith, 14 Ala. 423.

In Missouri the act of 1847, providing that affidavits taken under it could be made before any court of record within the United States, did not take from justices of the peace the power to take affidavits. Glasgow *v.* Switzer, 12 Mo. 395.

In Arkansas they may administer oaths anywhere within the limits of their respective counties, although they are not authorized to act judicially in civil proceedings beyond their respective townships. Humphries *v.* McCraw, 5 Ark. 61.

3. They did not necessarily have the power at common law, but it is universally granted by statute. Proffat on Notaries, sec. 24; Keefer *v.* Mason, 36 Ill. 406.

In Missouri they have the same power to administer oaths as any judicial officer. State *v.* Boland, 12 Mo. App. 74.

Alabama.—Under the law of Alabama a notary public is a justice of the peace, and as such he may administer an oath. Taylor *v.* State, 48 Ala. 180.

In Illinois a notary public who has authority to administer oaths generally may take the affidavit of the service of a summons by a special deputy sheriff. Edwards *v.* McKay, 73 Ill. 570.

In New York the statute conferring on notaries the authority to certify

and commissioners[1] are the officers usually empowered.

Deputy.—Except in the absence of a competent officer, his deputy, unless also authorized by statute, should not take affidavits.[2]

Attorney.—In general, the attorney of record of the party may not take affidavits offered by him.[3]

affidavits was not construed as restricted to affidavits in actions pending only. Mosher *v.* Heydrich, 1 Abb. Pr. N. S. (N. Y.) 258, 30 How. Pr. (N. Y.) 161.

1. Wire *v.* Browning, 20 N. J. L. 364.

In New York commissioners to take affidavits to be read in the Supreme Court might take affidavits to be read in a justice's court. Whitney *v.* Warner, 2 Cow. (N. Y.) 499.

The act of March 24, 1818, authorizing the appointment of commissioners to perform certain special duties, did not supersede the authority of the commissioners appointed by the court to take affidavits. Jones *v.* Smith, 16 Johns. (N. Y.) 232. But the office of commissioners to take affidavits, under the act of 1818, in the cities, became vacant by the appointment of new commissioners for the cities under the act of 1823. Brown *v.* Osborne, 2 Cow. (N. Y.) 457.

Proof of Commission.—To validate an affidavit taken before a public commissioner, his commission need not be proved. Rex *v.* Howard, 1 M. & R. 187. See also Parker *v.* Baker, 8 Paige (N. Y.) 428.

Others.—In *New York* a state senator could take affidavits. Craig *v.* Briggs, 4 Paige (N. Y.) 548. But a master in chancery could not take an affidavit of the publication of a notice for creditors to appear. Stanton *v.* Ellis, 16 Barb. (N. Y.) 319. And a coroner cannot in that state administer oaths. Berrien *v.* Westervelt, 12 Wend. (N. Y.) 194. Nor an assistant justice of a ward court, as a judge of a court of record. Wood *v.* Williams, 1 N. Y. Leg. Obs. 154.

In *Kansas* affidavits may be made before a register of deeds. Thompson *v.* Higginbotham, 18 Kan. 42.

Pennsylvania.—The recorder of the city of Philadelphia may take affidadavits. Election Cases, 65 Pa. St. 20, 2 Brew. (Pa.) 1, 7 Phila. (Pa.) 41; Schumann *v.* Schumann, 6 Phila. (Pa.) 318.

Arkansas.—An affidavit made "in the County of Sebastian, State of Arkansas, before John F. Wheeler, mayor," was made before one utterly unknown to the laws of that state. Edmondson *v.* Carnall, 17 Ark. 284. But where the statute gives a mayor the powers of a justice of the peace he may take an affidavit. Robinson *v.* Benton County, 49 Ark. 49.

2. In general a deputy clerk may not take them. Norton *v.* Colt, 2 Wend. (N. Y.) 250; Murdock *v.* Hillyer, 45 Mo. App. 287. Nor a clerk *pro tem.* State *v.* Bayonne, 35 N. J. L. 476.

In *Pennsylvania* the deputy of the prothonotary may take them. Election Cases, 7 Phila. (Pa.) 41, 2 Brew. (Pa.) 1, 65 Pa. St. 20.

And an oath required to be administered by a collector of customs may also be administered by his legal deputy. U. S. *v.* Barton, Gilp. (U. S.) 439.

In *Minnesota* and *Michigan* a deputy clerk is authorized to administer oaths. Crombie *v.* Little, 47 Minn. 581. In the latter state whether his principal is absent or not. Dorr *v.* Clark, 7 Mich. 310.

In *New York*, under a statute allowing a deputy clerk to administer oaths in the "absence" of the clerk, the latter must be absent not only from the office, but from the neighborhood. Lucas *v.* Ensign, 4 N. Y. Leg. Obs. 142.

In *Washington* also he is authorized by statute, and should sign the jurat in his own capacity without mentioning his principal. State *v.* Doe, 6 Wash. 587.

The certificate to the verification of a complaint which read, "Sworn and subscribed to before me, etc., A. J. R., Clerk of the Circuit Court of the United States for the Eastern District of North Carolina, in the Fourth Circuit, by Wm. H. Shaw, Deputy Clerk," was held insufficient because "some one else than the clerk states that the affiant came before the clerk, and was sworn, presumably by him, and subscribed the oath. This statement cannot bind the clerk and is but secondary evidence of the facts stated." Robinson *v.* Gregg, 57 Fed. Rep. 186.

3. King *v.* Wallace, 3 T. R. 403;

2. Foreign Affidavits may generally be made before any officer of another state or county authorized by its laws to administer

Hopkinson *v.* Buckley, 8 Taunt. 74, 4 E. C. L. 23; 1 Lee Dic. Pr. 28; 1 Petersd. Ab. 368, 9; 2 Paine & Duer Pr. 54.

Kansas.—Tottle *v.* Smith, 34 Kan. 27; Foreman *v.* Carter, 9 Kan. 681; Warner *v.* Warner, 11 Kan. 121; Schoen *v.* Sunderland, 39 Kan. 758.

Colorado.—Anderson *v.* Sloan, 1 Colo. 33; Martin *v.* Skehan, 2 Colo. 614.

In Arkansas an attorney in the cause cannot even take an affidavit of the service of a notice, though not made by the party. Hammond *v.* Freeman, 9 Ark. 62.

New York.—Anonymous, 4 How. Pr. (N. Y. Supreme Ct.), 290; Kuh *v.* Barnett (Super. Ct.), 6 N. Y. Supp. 881; Murray *v.* Hefferman, 2 Month L. Bull. 67; Bliss *v.* Molter, 58 How. Pr. (N. Y. Supreme Ct.) 112. In this case the attorney did not indorse his name on the paper until after the affidavits were taken, but the court decided that he was throughout acting as attorney. In Vary *v.* Godfrey, 6 Cow. (N. Y.) 587, it was implied that the affidavit would have been excluded even if the attorney had been merely retained.

"The rule which excludes an affidavit taken before the attorney is merely technical and has never in this state been extended beyond the case of the attorney or solicitor on record. In Willard *v.* Judd (15 Johns. (N. Y.) 531), the Supreme Court refused to extend the principle to the counsel in the cause. And in Hallenback *v.* Whitaker (17 Johns. (N. Y.) 2) the same court decided that it did not extend to the partner of the attorney on record, although he was interested in the profits of the business. The Supreme Court reluctantly consented to adopt the rule in the case of Taylor *v.* Hatch (12 Johns. (N. Y.) 340), because they found the practice to be thus settled in the Court of King's Bench. But the latter court has never extended the rule beyond the attorney on record." People *v.* Spalding, 2 Paige (N. Y.) 326.

Suit Not Pending.—The rule, however, applies only to affidavits made before an attorney in a suit pending, not to those preparatory to the commencement of one. Vary *v.* Godfrey, 6 Cow. (N. Y.) 587; Willard *v.* Judd, 15 Johns. (N. Y.) 531; Hallenback *v.* Whitaker, 17 Johns. (N. Y.) 2; Gilmore *v.* Hempstead, 4 How. Pr. (N. Y. Supreme Ct.) 153; Howard *v.* Nalder, Barnes' Notes, 60; Adams *v.* Mills, 3 How. Pr. (N. Y. Supreme Ct.) 219.

An attorney may take the oath of admeasurers of dower. Griffin *v.* Borst, 4 Wend. (N. Y.) 195.

The Attorney's Partner may take. Duke of Northumberland *v.* Todd, 7 Ch. Div. 777; Turner *v.* Bates, 10 Q. B. 292, 59 E. C. L. 290; Hallenback *v.* Whitaker, 17 Johns. (N. Y.) 2.

Attorney's Clerk.—In England, formerly, the affidavit might be taken before the clerk of the attorney of record. Goodtitle *v.* Badtitle, 8 T. R. 638. But not now. 3 Chit. Gen. Pr. 492. It may be taken by a clerk of a firm of solicitors, where one of the solicitors was a party, but the firm not solicitors of record. Foster *v.* Harvey, 4 De G., J. & S. 59. And in *Nebraska* a notary who is a clerk of an attorney may administer an oath to verify a pleading prepared by such attorney. Schuyler Nat. Bank *v.* Bollong, 24 Neb. 821.

In Wisconsin the attorney may take the affidavit of his client, though it is said to be an obvious impropriety. Dawes *v.* Glasgow, 1 Pin. (Wis.) 171.

Attorney and Notary.—In most states where the attorney is also a notary public he may take the affidavit. Reavis *v.* Cowell, 56 Cal. 588; Kuhland *v.* Sedgwick, 17 Cal. 128; McCaslin *v.* Camp, 26 Mich. 390; Sullivan *v.* Hall, 86 Mich. 7; Young *v.* Young, 18 Minn. 90; Ryburn *v.* Moore, 72 Tex. 85. A notary is not disqualified by the fact of being the prosecuting attorney from taking affidavits to be used by the state. State *v.* Noland, 111 Mo. 473.

In *Kansas* the affidavit is voidable only and may be amended. Swearingen *v.* Howser, 37 Kan. 126.

In *Colorado* and *Missouri*, although notary, he may not take. Frybarger *v.* McMillan, 15 Colo. 349; Smith *v.* Ponath, 17 Mo. App. 262.

Attorney and Justice.—In *Massachusetts* a justice of the peace, also the attorney, may administer an oath to his client. McDonald *v.* Willis, 143 Mass. 452. *Contra*, Hammond *v.* Freeman, 9 Ark. 62.

Objection to an affidavit because made before the attorney should be

an oath,[1] and are generally duly authenticated if they are subscribed by such officer, and there is annexed to them a certificate of the clerk or other officer of a court of record of such state or county, under an official seal, verifying the genuineness of the signature of the first-mentioned officer, and his authority to administer an oath. But, although this is the usual form, nearly all

made promptly or it will be disregarded. Gilmore *v.* Hempstead, 4 How. Pr. (N. Y. Supreme Ct.) 153; Linck *v.* Litchfield, 141 Ill. 469; Smith *v.* Ponath, 17 Mo. App. 262.

Solicitor.—The affidavit may not be made before the solicitor of the party. Pullen *v.* Pullen, 46 N. J. Eq. 318.

Counsel.—But if made before the counsel of the party, it may be read, as there is not the same objection. Willard *v.* Judd, 15 Johns. (N. Y.) 531; People *v.* Spalding, 2 Paige (N. Y.) 326; Atchison *v.* Glenn, 4 Cranch. (C. C.) 134; State *v.* Bergen, 24 N. J. L. 548. *Contra*, Den *v.* Geiger, 9 N. J. L. 225.

1. Hays *v.* Bouthalier, 1 Mo. 346; Fox *v.* Lawson, 44 Ala. 319.

In New York it is usual to allow affidavits in support of collateral matters arising during the progress of a suit, as on a motion for a commission to examine witnesses abroad, to be taken before magistrates or public officers out of the state. Marshall *v.* Mott, 13 Johns. (N. Y.) 423.

For Use in Pennsylvania an affidavit of debt might be made before a justice of the peace in England. Walker *v.* Bamber, 8 S. & R. (Pa.) 61; Burandon *v.* Flindt, 5 Haz. Pa. Reg. 382.

Where an affidavit which purported to have been sworn to before "Thom. Williamson, Alderman, Bo. of Norfolk," was objected to because it did not appear that it had been taken before any one authorized by law to administer an oath, the court held that although they might not judicially know that an alderman of Norfolk had the power to administer an oath, yet, in the absence of any evidence to the contrary, it was sufficient. Noble *v.* U. S., Dev. Ct. of Cl. 83.

A Number of Early Cases held that affidavits might not be made outside the state before officers of another state. Scull *v.* Alter, 16 N. J. L. 147; Anonymous, 8 N. J. L. 176; Trenton Bank *v.* Wallace, 9 N. J. L. 83; Reid *v.* Brummitt, 1 Brev. (S. Car.) 16.

In Kentucky such affidavits were not admissible except upon an answer in chancery. Ramy *v.* Kirk, 9 Dana (Ky.) 267.

Notary Public.—Nor were they admitted even when made before a notary public. Benedict *v.* Hall, 76 N. Car. 113; Spragella *v.* Bruno, 1 Mill (S. Car.) 281. *Contra*, Tucker *v.* Ladd, 4 Cow. (N. Y.) 47.

Ohio.—An affidavit for use in Ohio cannot be made in another state before a clerk of a court of record of that state. Fitch *v.* Campau, 31 Ohio St. 646.

Commissioners are very generally appointed by the various states to take affidavits outside the state. Irving *v.* Edrington, 41 La. Ann. 671; Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169.

Consul.—Under the act of March 10, 1853 (Nix. Dig. 132, pl. 57), a consul of the United States may take. Seidel *v.* Peschkaw, 27 N. J. L. 427. A consul of the United States, in attesting an affidavit made before him in his capacity of notary public, bestowed upon him by the act of Congress, should give his title of office not simply as "Consul," but as "Notary Public," or "Consul and *ex-officio* Notary Public." Bruce *v.* Gibson, 5 Cin. L. Bull. (Ohio) 101.

Where an agreement was made between solicitors that an answer to be given in France might be taken and sworn to by any person authorized to administer oaths by the laws of France, and the answer was sworn to before the American consul, *held*, not within the agreement. Herman *v.* Herman, 4 Wash. (U. S.) 555.

An affidavit of a plaintiff residing in Havana, taken before the commercial and naval agent of the United States resident there, may be read on a motion for a commission to take the examination of witnesses abroad. Welsh *v.* Hill, 2 Johns. (N. Y.) 373.

Lord Mayor.—In Pennsylvania, in 1785, an affidavit of debt sworn to before the Lord Mayor of London was held to be sufficient. Taylor *v.* Knox, 1 Dall. (Pa.) 158. And see Rogers *v.* Spalden, Jeff. (Va.) 58.

the states prescribe a method of authenticating foreign affidavits, with which there must be a substantial compliance, or they will generally be void.[1]

V. Use of Affidavits.—In practice affidavits are most frequently used to initiate legal proceedings, and to further the various stages therein; to certify and prove the service of process, or other matters relating to the proceedings in a cause; and to support or oppose motions, in cases where a court determines matters in a summary way;[2] and for various other purposes.[3]

1. Phelps *v.* Phelps, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 117; Cream City Furniture Co. *v.* Squier, 2 Misc. Rep. (N. Y.) 438, 21 N. Y. Supp. 972. See also Wood *v.* St. Paul City R. Co., 42 Minn. 411; Hyatt *v.* Swivel, 52 N. Y. Super Ct. 1.

For illustration of a substantial compliance with such statutes, see Ross *v.* Wigg, 34 Hun (N. Y.) 192, 6 Civ. Pro. Rep. (N. Y.) 277; Manufacturers', etc., Bank *v.* Cowden, 3 Hill (N. Y.) 461; National Exchange Bank *v.* Stelling, 32 S. Car. 102.

Georgia.—An affidavit taken outside the state and lacking the authentication of the official character of the person administering the oath cannot be recognized in Georgia. Behn *v.* Young, 21 Ga. 207.

In Missouri the official character of a judge of another state, before whom an affidavit is made, is sufficiently proved by a certificate of the clerk of the court under the seal of the court. Hays *v.* Bouthalier, 1 Mo. 346. Likewise that of a justice of the peace. Posey *v.* Buckner, 3 Mo. 604.

North Carolina.—An affidavit made before a commissioner of North Carolina, resident outside the state, is sufficiently verified when authenticated by his official signature and seal. Young *v.* Rollins, 85 N. Car. 485. When taken by the clerk of a court of another state, the affidavit must be accompanied by a certificate of the judge concerning the identity and authority of the clerk. Miazza *v.* Calloway, 74 N. Car. 31.

In Illinois and New York an affidavit taken before a notary public of another state, to be admissible in evidence, must show that the notary was authorized by his state to administer oaths. Keefer *v.* Mason, 36 Ill. 406; Bowen *v.* Stilwell, 9 Civ. Pro. Rep. (N. Y. City Ct.) 277; Williams *v.* Culhane (C. Pl.), 22 N. Y. St. Rep. 42, 3 N. Y. Supp. 241.

Maryland, Texas, Iowa.—Under the *Maryland* attachment law, when the affidavit is made outside the state and before a judge of a court of record it must be accompanied by a certificate of the clerk of the court, under its seal, stating that the court is a court of record. It will not be presumed from the seal that the court is a court of record. Evesson *v.* Selby, 32 Md. 340; Coward *v.* Dillinger, 56 Md. 59. *Contra*, Moore *v.* Carson, 12 Tex. 66.

In *Iowa* it may be proved *aliunde*. Levy *v.* Wilson, 43 Iowa 605.

Judicial Record.—An affidavit made in another state is not a judicial record within the meaning of the act of Congress providing a method for the authentication of such, but is sufficiently certified when in accordance with the requirements of the state in which it is offered. Dillon *v.* Rand, 15 Colo. 372; Gibson *v.* Tilton, 1 Bland (Md.) 352, 17 Am. Dec. 306.

The Term "Foreign Affidavits" embraces those made in foreign countries as well as those made in other states.

2. 1 Burr. L. Dict. *tit.* "Affidavit." For the use of affidavits in particular proceedings see various titles in this work, as Attachment, Change of Venue, etc.

3. Affidavits may be introduced tending to prove partiality or misbehavior of arbitrators, but not mistake in law or fact. Pleasants *v.* Ross, 1 Wash. (Va.) 157, 1 Am. Dec. 449.

Pedigree.—An *ex parte* affidavit is good evidence to prove the identity of a person so far as it respects his marriage or pedigree. Winder *v.* Little, 1 Yeates (Pa.) 152. See also Douglass *v.* Sanderson, 2 Dall. (Pa.) 116, 1 Yeates (Pa.) 15. Depositions of deceased witnesses (whether made in or out of the state) taken in another cause between other parties may be admitted as declarations of pedigree, whether made after or before the question of pedigree became a subject

As Evidence.—Upon the trial of a material question at issue, they of controversy. Boudereau *v.* Montgomery, 4 Wash. (U. S.) 186. But an affidavit made in another state nearly half a century previous to the trial is not admissible to prove pedigree, there being no proof that affiant is dead. Peterson *v.* Ankrom, 25 W. Va. 56; Kellar *v.* Nutz, 5 S. & R. (Pa.) 246.

As Pleadings.—The records of courts cannot be proved by affidavits; nor can an affidavit be made to take the place or serve the purpose of an answer in abatement or in bar. Kellogg *v.* Sutherland, 38 Ind. 154.

In Virginia, according to the settled doctrine of the court, when an account of the transactions of a fiduciary has been ordered upon a proper bill, if additional objections to the settled *ex parte* accounts are discovered in the progress of the cause, the plaintiff, to save the expense and delay of an amended bill, is permitted to present the matter before the commissioner with proper specifications in writing, and the defendant is allowed to meet these by affidavit, which has the same weight as would be given to an answer in chancery. Davis *v.* Morriss, 76 Va. 21; Corbin *v.* Mills, 19 Gratt. (Va.) 465.

Argument.—On a motion for a final order to confirm a report of commissioners for opening streets, it is within the discretion of the court to include in the motion an affidavit, which was nothing but an argument of counsel in the form of proof, in opposition to the motion. *In re* Board of Street Opening, 65 Hun (N. Y.) 625, 20 N. Y. Supp. 563.

An Extra-judicial Affidavit to a vote of the stockholders of a corporation is sufficient authentication to make it admissible evidence. Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178.

An **Affidavit by a Club** given to a sheriff for the purpose of notifying him of their claim to certain property, not made as the basis of a replevy, is a mere private paper, not required to be made by law, and may thus be proved by the testimony of the affiant. Lavretta *v.* Holcombe, 98 Ala. 503.

Before Justice.—On a proceeding before a justice of the peace, affidavits cannot be used to oust his jurisdiction. Essler *v.* Johnson, 25 Pa. St. 350; Montgomery *v.* Snowhill, 2 N. J. L. 362.

Made in Another Suit.—On an application for an order of publication, it is allowable to read affidavits used and entitled in another suit. Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62, 2 Abb. Pr. N. S. (N. Y.) 47. Such evidence has been allowed in England on certain applications. Langston *v.* Wetherall, 14 M. & W. 104. But see Lumbrozo *v.* White, Dick. 150. In *Iowa*, where the parties were the same and the motion similar, the affidavit, though made at a previous term, was admitted. Scholes *v.* Murray Iron Works Co., 44 Iowa 190.

The courts will not consider affidavits read and filed in a case upon which nothing is asked and which are not applicable to any motion, issue, or proceeding in the case. State *v.* Allen, 5 Kan. 213.

Counter-affidavits are often used to defeat suits, as for a new trial. Finch *v.* Green, 16 Minn. 355. But not a motion for a continuance. Eslinger *v.* East, 100 Ind. 434. See various titles.

Preliminary Proof.—Where an insurance policy requires the insured to give, in case of loss, an account thereof, under oath, in a suit on a policy, the affidavit of the insured is admissible to prove a compliance with the requirement, but for no other purpose. Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521. An affidavit of publication by the printer or publisher of a newspaper is a mere matter of preliminary proof, and accomplishes its functions as soon as it is filed and passed upon by the court. After judgment rendered, it cannot be attacked in a collateral action. Freeman *v.* Thompson, 53 Mo. 183.

To Supplement Record.—On appeal matters which should have been of record cannot be supplied by affidavits. Stannard *v.* Graves, 2 Call (Va.) 369. Nor can they be used to correct material facts untruthfully stated in the record. Struber *v.* Rohlfs, 36 Kan. 202.

But in *New Jersey* an affidavit may properly be used to bring before the Supreme Court the evidence which a particular witness gave before a justice, where such evidence can be correctly had, for the purpose of showing that such evidence was incompetent or that the justice erred in admitting it. Goldsmith *v.* Bane, 8 N. J. L. 87.

are generally not admissible as evidence,[1] especially when purely *ex parte*,[2] except as admissions against the affiant.[3]

1. Lummis *v.* Stratton, 2 N. J. L. 245; Newton *v.* West, 3 Metc. (Ky.) 24; Talbot *v.* Pierce, 14 B. Mon. (Ky.) 158.

In Indiana an affidavit made in support of an application for a change of venue is not admissible as evidence. Ohio, etc., R. Co. *v.* Levy (Ind. Sup., 1893), 34 N. E. Rep. 20.

An affidavit of a surveyor, not the county surveyor, and not being any officer of the court or the county, is not admissible in evidence on an action for the purchase-money of a tract of land. Maples *v.* Hoggard, 58 Ga. 315.

In an action against a railroad for killing a horse, it is not error to allow to be read in evidence an affidavit made at a previous term by an employé of the defendant in support of a continuance and describing the circumstances of the death of the horse. Asbach *v.* Chicago, etc., R. Co. (Iowa, 1892), 53 N. W. Rep. 90.

On a Claim to Property Levied on in proceedings to foreclose a lien the plaintiff may offer in evidence the affidavit of foreclosure. Dixon *v.* Williams, 82 Ga. 105.

2. Plankinson *v.* Cave, 2 Yeates (Pa.) 370; Lewis *v.* Bacon, 3 Hen. & M. (Va.) 89; Blincoe *v.* Berkeley, 1 Call (Va.) 405; Braxton *v.* Lee, 4 Hen. & M. (Va.) 376; Clutch *v.* Clutch, 1 N. J. Eq. 474; Egerton *v.* Egerton, 17 N. J. Eq. 419; Layton *v.* Cooper, 2 N. J. L. 61. In a *certiorari* case notice of the taking of an affidavit must be given to the opposite party although he has not appeared. Warford *v.* Smith, 25 N. J. L. 212.

Dickey, J.: "As to matter directly in issue, the testimony of witnesses must be so taken as to subject the witness to cross-examination, but as to some collateral or ancillary matters, and among such as to the loss of a document, affidavits taken *ex parte* are competent." Taylor *v.* McIrvin, 94 Ill. 488; Baldwin *v.* Flagg, 43 N. J. L. 495, where it was said that the practice of taking affidavits *ex parte*, to be used on the argument of a motion, is peculiar to the court of chancery and has never been adopted in the courts of law.

Ex parte depositions cannot be read in evidence to establish an independent title; but they are admissible to establish mere boundary, or by way of corroboration of other testimony given in the cause. Sturgeon *v.* Waugh, 2 Yeates (Pa.) 476; Lilly *v.* Kitzmiller, 1 Yeates (Pa.) 28.

Weight.—Earle, J.: "A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case, be had." Patterson *v.* Maryland Ins. Co., 3 Har. & J. (Md.) 71, 5 Am. Dec. 419. *Ex parte* affidavits may be read in opposition to and in support of awards in cases at law, but they will be given much less weight than testimony taken in court or on notice and subject to cross-examination. Tennant *v.* Divine, 24 W. Va. 387; Pleasants *v.* Ross, 1 Wash. (Va.) 156, 1 Am. Dec. 449; Adams *v.* Hubbard, 25 Gratt. (Va.) 129.

They are not conclusive. Lane *v.* Schomp, 20 N. J. Eq. 82.

3. State *v.* Lazarus, 1 Mill (S. Car.) 34; Morrell *v.* Cawley, 17 Abb. Pr. (N. Y.) 76; Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123.

One party may introduce in evidence the affidavits of the other made during the progress of the cause if they are relevant; but they can have no effect on the merits unless so introduced. Wyser *v.* Calhoun, 11 Tex. 323. And an admission made in an affidavit used in a suit between other parties is admissible against the affiant. Hall *v.* Cannon, 4 Harr. (Del.) 360.

Laying Foundation.—But an affidavit used in a litigation by a deceased defendant cannot, merely by reason of such use, be introduced at a subsequent stage of the case, to affect the credibility of a witness, by whom it was made, for a new party defendant, brought in by the plaintiff, without laying the foundation for it as impeaching evidence. Gardner *v.* Granniss, 57 Ga. 539.

An affidavit, although contained in a record read by plaintiff, was held not to be evidence against him, because it was *ex parte*, and the affiant was present as a witness in the case on trial. Hargis *v.* Price, 4 Dana (Ky.) 79.

Explain Circumstances.—The affiant should be allowed to explain the circumstances. Yale *v.* Edgerton, 14 Minn. 194; Snydacker *v.* Brosse, 51 Ill. 357.

As Part of Record.—Unless specially made so, affidavits do not constitute a part of the record.[1] See also APPEALS.

Filing.—The originals of all affidavits upon motions should be filed.[2]

Stale Affidavits.—Affidavits for certain purposes must not lie unused too long or they become "stale."[3]

VI. AMENDMENT.—In nearly all the states formal defects[4] in affidavits, and in many even more substantial ones, may now be amended.[5]

1. Clifford, J.: "Neither depositions nor affidavits, though appearing in the transcript of a common-law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions." Baltimore, etc., R. Co. *v.* Sixth Presbyterian Church, 91 U. S. 127.

Appeal.—For consideration on appeal affidavits must be embraced in a bill of exceptions. Garland *v.* Bugg, 1 Hen. & M. (Va.) 374; Goldsmith *v.* State, 30 Ohio St. 208; Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437; Tiffin *v.* Forrester, 8 Mo. 644; McDonald *v.* Arnout, 14 Ill. 58; Altschiel *v.* Smith, 9 Kan. 90; Jenks *v.* School Dist., 18 Kan. 356; Faulkner *v.* Wilcox, 2 Litt. (Ky.) 369; Kirby *v.* Cannon, 9 Ind. 371; Murphy *v.* Tilly, 11 Ind. 511; Round *v.* State, 14 Ind. 493; Cochran *v.* Dodd, 16 Ind. 476; Merritt *v.* Cobb, 17 Ind. 314; Matlock *v.* Todd, 19 Ind. 130; Whiteside *v.* Adams, 26 Ind. 250; Bell *v.* Rinker, 29 Ind. 267; Potter *v.* Stiles, 32 Ind. 318; Blizzard *v.* Phebus, 35 Ind. 284; Taulby *v.* State, 38 Ind. 437; Blackwell *v.* Acton, 38 Ind. 425; Wray *v.* Tindall, 45 Ind. 517; Martin *v.* Harrison, 50 Ind. 270; Kimball *v.* Loomis, 62 Ind. 201; Fryberger *v.* Perkins, 66 Ind. 19; Iles *v.* Watson, 76 Ind. 359; Chambers *v.* Kyle, 87 Ind. 83; Harrison School Township *v.* McGregor, 96 Ind. 185; Shields *v.* McMahon, 101 Ind. 591; Kleespies *v.* State, 106 Ind. 383; McClure *v.* State, 116 Ind. 169; Smith *v.* Wilson, 26 Ill. 186; State *v.* McGinniss, 17 Oregon 332; Patee *v.* Parkinson, 18 Kan. 465. Nor will the fact that they have been copied into the record by the clerk avail if not introduced by a bill of exceptions. Schultz *v.* State, 32 Ohio St. 276; Taylor *v.* Fletcher, 15 Ind. 80; Horton *v.* Wilson, 25 Ind. 316; Whaley *v.* Gleason, 40 Ind. 405; Williams *v.* Potter, 72 Ind. 354; Kellenberger *v.* Perrin, 46 Ind. 282; Turnbull *v.* Ellis, 35 Ind. 422; Corey *v.* Russell, 8 Ill. 366; Edwards *v.* Patterson, 10 Ill. 126; Lucas *v.* Farrington, 21 Ill. 31; Smith *v.* Wilson, 26 Ill. 186.

Affidavits not referred to in any decree or order entered in the cause are no part of the record. Hilleary *v.* Thompson, 11 W. Va. 113.

An order to transmit to the court above "original exhibits" will not include affidavits. Craig *v.* Smith, 100 U. S. 226.

2. Anonymous, 5 Cow. (N. Y.) 13.

An affidavit used on a motion, but not filed until after the motion was heard, may nevertheless be entered in the order as read, when it does not interfere with the date of the order, as when it is filed on the same day that the motion was heard. *In re* King & Co.'s Trademark (1892), 2 Ch. 462.

3. In Clarke *v.* Stilwell, 8 Ad. & El. 645, 35 E. C. L. 480, it was held that this rule applied to affidavits of debt only.

The time within which they must be used is one year. Ramsden *v.* Maugham, 4 Dowl. Pr. Cas. 403; Burt *v.* Owen, 1 Dowl. Pr. Cas. 691, 1 Tidd Pr. 190.

4. Thus the omission of the signature of the affiant may be supplied by amendment. Schumann *v.* Schumann, 6 Phila. (Pa.) 318; Watts *v.* Womack, 44 Ala. 605. *Contra*, Cohen *v.* Manco, 28 Ga. 27. A mistake in the middle name of the affiant may be amended. State *v.* Giles, 103 N. Car. 391.

In **Missouri** an affidavit for attachment, although it did not state the venue and was made nearly three months before the writ was sued out, might have been amended. Avery *v.* Good, 114 Mo. 290. And where blanks were left where the words "his" and "is" should have appeared, they were allowed to be filled, it not appearing that the defendant was thereby prejudiced. Stewart *v.* Cabanne, 16 Mo. App. 517.

5. An affidavit so drawn as to ap-

Where the jurat is defective through the negligence of the officer, it is freely allowed to be amended.[1]

Statutes.—Many states expressly provide by statute for the amendment of affidavits.[2]

pear to be made on hearsay may be amended. Cutler *v.* Rathbone, 1 Hill (N. Y.) 204. Or upon information and belief. Cook *v.* Whipple, 55 N. Y. 150.

An affidavit by a printer of the publication of a summons may be amended so that it will show the date on which the publication began. Weaver *v.* Roberts, 84 N. Car. 493.

In Nebraska a defective affidavit for replevin may be amended and filed *nunc pro tunc*. Lewis *v.* Connolly, 29 Neb. 222.

In Illinois, no matter how defective the affidavit is, it may be amended by filing another. Thus, it may be amended although made before the wrong officer. Campbell *v.* Whetstone, 4 Ill. 361.

In Georgia an affidavit for a distress warrant is amendable as other declarations. The right includes the supplying of essential averments. Reese *v.* Walker, 89 Ga. 72; Bryant *v.* Mercier, 82 Ga. 409.

But in Florida substantial defects in affidavits, where jurisdictional, as in attachment, cannot be amended. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391; Roulhac *v.* Rigby, 7 Fla. 336.

In Maryland, before the act of 1888, an affidavit for attachment could not be amended by striking out one of the defendants. Halley *v.* Jackson, 48 Md. 254.

Resworn.—An affidavit amended by permission of the court must, in *North Carolina*, be resworn to, or it will be a nullity. Atlantic Bank *v.* Frankford, Phil. (N. Car.) 199.

Filing Nunc Pro Tunc.—Where the want of an affidavit was not promptly objected to, it was allowed to be filed *nunc pro tunc*. Jones *v.* U. S. Slate Co., 16 How. Pr. (N. Y. Supreme Ct.) 129.

Failure to Amend after Leave.—After leave has been obtained to amend an affidavit of merits and there has been a failure to do so, defendant cannot insist on the sufficiency of the affidavit. McKichan *v.* Follett, 87 Ill. 103.

1. Where the names of the defendants were omitted from the jurat through the negligence of the judge's clerk, it was allowed by the judge to be amended. *Ex p.* Smith, 2 Dowl. Pr. Cas. 607.

Signature of Officer.—Where the officer neglects to sign the jurat, the affidavit may be amended. West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407; Pierson *v.* Hendrix, 88 Ill. 34; Peterson *v.* Fowler, 76 Mich. 258. His signature may be added *nunc pro tunc*. Veal *v.* Perkerson, 47 Ga. 92; Williams *v.* Stevenson, 103 Ind. 243; Hart *v.* Jones, 6 Kulp (Pa.) 326; Sims *v.* Redding, 20 Tex. 386; State *v.* Cordes (Wis., 1894), 58 N. W. Rep. 771; Lederer *v.* Chicago, etc., R. Co., 38 Wis. 244; Bergesch *v.* Keevil, 19 Mo. 127. And the affidavit may be amended even though by accident both the subscription of the affiant and the attestation of the officer were omitted. Stout *v.* Folger, 34 Iowa 71. Likewise where the officer neglected to sign and date an affidavit for an appeal. Green *v.* Boon, 57 Miss. 617. Where the affidavit was authenticated by both the signature and the seal of a notary, but the jurat did not refer to his notarial seal, it was amendable in that respect. Hallett *v.* Chicago, etc., R. Co., 22 Iowa 259, 92 Am. Dec. 393.

Official Title.—And where the officer neglects to give his official title the affidavit may be amended. Stone *v.* Miller, 60 Iowa 243; Dickson *v.* Thurmond, 57 Ga. 153; Hudson *v.* Fishel, 17 R. I. 69.

Foreign Affidavit.—Where an affidavit was made before a notary public of another state, it was not error for the court to allow the filing, by way of amendment, of an additional certificate by such notary that he was authorized by the laws of such state to administer oaths. Goldie *v.* McDonald, 78 Ill. 605.

Absence of Jurat.—An affidavit which is merely defective from absence of the jurat may be reformed upon proof that it was properly made before the proper officer. *Re* Cussick's Appeal, 136 Pa. St. 459, 10 L. R. A. 228.

2. § 1483 of the Code of *Mississippi* of 1871. Fitzpatrick *v.* Flannagan, 106 U. S. 648.

Act of *Georgia* of Oct. 25, 1889 (Acts 1888–9, p. 110).

AFFIDAVITS OF MERITS OR DEFENSE.

By F. A. CARD.

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I. **DEFINITION.**—An affidavit of merits represents that, upon the substantial facts of the case, justice is with the affiant.[1]

1. Anderson's Law Dict.; Abb. Law Dict.

When a Party Swears he has a Defense on the merits it is understood as a real, genuine, and *bona-fide* defense, as distinguished from a frivolous or groundless one; not a defense which will be successful at all events, but good in the sense of *bona fide*, a defense to the merits which he ought to be allowed to present and have investigated. McDonnell *v.* Olwell, 17 Ill. 376.

Merits signify the legal rights of the parties, as distinguished from questions of practice and discretion.[1]

II. IN GENERAL.—The requirement of an affidavit of merits in certain cases was an old rule of practice in *England*,[2] which has been very generally adopted in the *United States*. In some of the states the practice in relation to it is governed by rules of court,[3] in others by statutes,[4] which in some cases have considerably enlarged and changed the old rule.

III. CONSTITUTIONALITY.—The provisions of rules and statutes requiring a defendent to make an affidavit of merits have frequently been attacked as unconstitutional, but they have been sustained by the courts.[5] In *Pennsylvania* such provisions were attacked as being an infringement of the right of trial by jury, but the objection was not sustained.[6] In *Massachusetts* they were sustained as

1. St. John *v.* West, 4 How. Pr. (N. Y. Supreme Ct.) 329; Megrath *v.* Van Wyck, 3 Sandf. (N. Y.) 750; Tracy *v.* New York Steam Faucet Mfg. Co., 1 E. D. Smith (N. Y.) 349; Bowman *v.* De Peyster, 2 Daly (N. Y.) 203.

2. Tidd Pr., vol. 1, p. 302; 3 Chitty Genl. Pr., p. 543; Bourne *v.* Walker, 2 C. & M. 338; Hilton *v.* Jackson, 1 Chit. Rep. 677, 18 E. C. L. 201; Court Rule of 1808, 3 Johns. (N. Y.) 535.

3. Rules 23 & 28, *New York* Supreme Ct.; Rule 99, *Michigan* Supreme Ct.; Rule 73, *District of Columbia* Circuit Ct.

4. Laws of 1844, p. 2, § 11, *Michigan;* § 980, *New York* Code of Civil Procedure; Sts. of 1874 (10 Session 61), *Colorado;* Laws of 1874, ch. 248, § 3, *Massachusetts;* § 697 *Mississippi* Code of 1892; Act of May 25, 1887, of *Pennsylvania*, p. 8271; Laws of *Illinois* as amended June 2, 1877, Hurd's Ill. Sts., p. 1047, § 37, ed. of 1891.

Uniformity of Practice.—The practice of the various states is not uniform as to the cases in which such an affidavit is required or as to its contents, and is subject to frequent changes. But in the application of the rules a certain uniformity exists which appears from an examination of the decisions on the subject.

5. Vanatta *v.* Anderson, 3 Binn. (Pa.) 423; Hoffman *v.* Locke, 19 Pa. St. 57; Lord *v.* Ocean Bank, 20 Pa. St. 387, 59 Am. Dec. 728; Lawrence *v.* Born, 86 Pa. St. 225; Randall *v.* Weld, 86 Pa. St. 357; Lawrence *v.* Smedley 6 W. N. C. (Pa.) 42; Honeywell *v.*, Toney, 5 Kulp (Pa.) 360; Krause *v.* Pennsylvania R. Co., 20 W. N. C. (Pa.) 111; Kauffman *v.* Jacobs, 4 Pa. Co. Ct. Rep. 462; Hunt *v.* Lucas, 99 Mass. 404; Merchants' Nat. Bank *v.* Glendon Co., 120 Mass. 97; McDonnell *v.* Olwell, 17 Ill. 375; Roberts *v.* Thomson, 28 Ill. 79; Honore *v.* Home Nat. Bank, 80 Ill. 489.

6. **In Pennsylvania.**—In the case of Vanatta *v.* Anderson, 3 Binn. (Pa.) 422, the question was raised as to the constitutionality of a rule of the Court of Common Pleas of *Philadelphia*, which provided that "in all actions on contract or debt the plaintiff shall be at liberty to enter judgment unless the defendent or some person for him shall make and file an affidavit that to the best of his or her knowledge and belief there is a just defense in the said case." It was contended for defendant that the rule infringed the right of trial by jury, and was a species of judicial legislation which the court had no power to make. Both contentions were overruled, and the rule was held constitutional and within the power of the court. In the course of the opinion it was said: "The rule makes no alteration in the right of trial by jury, but only provides that previous to the trial the defendant shall swear or affirm that to the best of his knowledge and belief he has a just cause of defense." A similar question was raised and decided in the same way in Harres *v.* Com., 35 Pa. St. 416.

In Hoffman *v.* Locke, 19 Pa. St. 59, the question was raised as to the constitutionality of an act of the legislature requiring a defendant to make an affidavit of defense in certain actions, disclosing the facts of his defense. In

in accordance with the common law;[1] and in *Illinois* they were considered as mere provisions of practice entirely within the control of the legislature.[2]

holding the act constitutional the court said: "The clause of the constitution which forbids it is not pointed out, and I am ignorant of any provision which secures to the good people of this commonwealth the privilege of making false defenses to just claims. The law is not only constitutional, but eminently wise and necessary. It is no tyranny to require that a good defense should be fully and fairly stated on the record, and no hardship to verify it on oath."

The constitutionality of a similar act of the legislature was again vigorously attacked in Lawrence *v.* Borm, 86 Pa. St. 225, on the ground that it infringed the right of trial by jury. In holding the act constitutional it was said: "While the sacredness of this reserved right cannot be impaired by the legislature, we are unable to see that the law in question does infringe it. Clearly if a defendent in an action presents no defense to be tried by a jury, he cannot claim that his privilege is denied him. The affidavit of defense is but a special plea made on oath by which the defendant presents the facts of his case for the consideration of the court. At no time in the history of civil proceedings has it been held that the right of trial by jury involves the right of the jury to decide the law of the case. A plea in abatement and in other cases * * * must be put in under oath. * * * There cannot be an objection to the fact that a party is obliged to state his plea or his defense under oath. This is but a means to prevent delay by falsehood and fraud. * * * It is a misconception of the right of trial by jury to suppose that it draws the pleadings, no matter what their form, from the court to the jury. The affidavit of defense is only a modern but vuluable mode of making up the issue for the jury; and when, on a statement of all the facts a defendant can conscientiously swear to, the court finds the law upon these facts is against him, he has no right to go before a jury."

1. **Massachusetts.** — An act of the legislature of *Massachusetts* provided that in all actions at law plaintiff could enter judgment by default unless defendant or some one on his behalf filed an affidavit to the effect "that he verily believes that the defendant has a substantial defense to the action on its merits and intends to bring the same to trial." In sustaining the constitutionality of said act it was said in Hunt *v.* Lucas, 99 Mass. 404: "The system of pleading was intended to require of parties written statements of what they believed to be true. In some cases the common law required a defendant not only to state his defense, but to make oath to it. In actions of debt and several other species of action the plaintiff might require him to wage his law, and this must be done upon oath. In suits in equity a defendant has always been required to make oath to the truth of his answer. * * * These provisions were more stringent than that of our statute requiring an affidavit of defense. But when our Constitution was framed they had never been regarded as any infringement on those rights which are declared in the clauses referred to. Nor is there any reason to believe that the Constitution was designed to prohibit the legislature from enacting reasonable laws in regard to pleadings in civil actions, or from requiring averments to be supported by affidavit."

2. **Illinois.** — A statute of *Illinois* provided that in certain actions plaintiff should be entitled to judgment unless defendant, his agent or attorney, shall file with his plea an affidavit stating "that he verily believes he has a good defense to said suit upon the merits, to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount according to the best of his judgment and belief." In holding this statute constitutional it was said: "The General Assembly has the undoubted right and ample power to prescribe the practice of our courts, and to alter and change the same as they may think the promotion of practice requires. We have never heard it questioned that the General Assembly has the power to require any and all pleadings to be sworn to as a condition precedent to their being

IV. **When Required—1. To Prevent Inquests or Judgments by Default.**—Rules of practice have required an affidavit of merits to prevent an inquest in cases where it is allowed.[1] And rules of practice and statutes require an affidavit of merits to prevent the plaintiff taking judgment by default when defendant's demurrer to the plaintiff's declaration is overruled;[2] in all actions at common law;[3] in actions of contract, debt, or assumpsit upon a money bond, promissory note, or bill of exchange, where defendant is sued in his individual capacity;[4] in actions on contract, express or implied, for the payment of money, where plaintiff files with his declaration an affidavit showing the nature of his demand and the amount due to him from the defendant;[5] and in all actions of assumpsit where the plaintiff files with his declaration copies of the contract or notes, etc., sued on or a reference to a record upon which suit is brought.[6]

a. To Prevent Inquests.—In *New York* inquests may be taken for want of a sufficient affidavit of merits in all common-law actions.[7] The rule does not apply to actions in equity,[8] nor where the only defense is a set-off to which there is no reply,[9] nor to a plaintiff,[10] nor where a case is called in its order on the calendar.[11]

..ed in a case, and this is the effect of this statute, and its only effect." Honore *v.* Home Nat. Bank, 80 Ill. 489.

1. Rule 28, New York Supreme Court; 3 Wait's Practice (N. Y.) 44; 3 Johns. (N. Y.) 535.

2. Mississippi Code (1892), § 697; Ogden *v.* Slidewell, 5 How. (Miss.) 181.

3. Hunt *v.* Lucas, 99 Mass. 404.

4. Rule 99, Michigan Supreme Court; 1 Greene's New Practice (Mich.) p. 239.

5. Hurd's Revised Statutes of Illinois (ed. of 1891, p. 1047, § 37); Young *v.* Browning, 71 Ill. 44; Kassing *v.* Griffith, 86 Ill. 265; Rule 73, Circuit Court of the District of Columbia; Cogley's Dig. Dist. of Columbia 512, § 7; Rule 121, Supreme Court Dist. of Columbia, ch. 184, §§ 170 and 171; Laws of 1886 of Maryland.

6. Laws of Penn. passed May 25th, 1887, P. L. p. 272, No. 158; Marlin *v.* Waters, 127 Pa. St. 177; Fritz *v.* Hathaway, 135 Pa. St. 274; Newbold *v.* Pennock, 154 Pa. St. 591; Flegal *v.* Hoover, 156 Pa. St. 276.

7. New York.—Rule 28 of *New York* Supreme Court provides that inquests may be taken in actions out of their order on the calendar in cases in which they are allowed on any day after the first day of court, provided a sufficient affidavit of merits shall not have been filed and served, and provided the answer shall not been verified. This was a repetition of an old rule made in 1808. 3 Johns. (N. Y.) 535. It was held to apply to all common-law actions. 3 Wait's Practice (N. Y.) 44. But in actions at law the plaintiff can take an inquest for want of a sufficient affidavit of merits. Brainard *v.* Hanford, 6 Hill (N. Y.) 368; Richmond *v.* Cowles, 2 Hill (N. Y.) 359; Sandland *v.* Adams, 2 How. Pr. (N. Y.) 98; Jones *v.* Russell, 3 How. Pr. (N. Y. Supreme Ct.) 324; Howe *v.* Hasbrouck, 1 How. Pr. (N. Y.) 168; Miller *v.* Hooker, 2 How. Pr. (N. Y.) 124; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199; Clark *v.* Parker, 19 Wend. (N. Y.) 125; Cutler *v.* Biggs, 2 Hill (N. Y.) 409; Anderson *v.* Hough, 1 Sandf. (N. Y.) 721.

8. It does not apply to actions in equity in which there is no jury trial and can be no inquest, 3 Wait's Practice (N. Y.) 45; Devlin *v.* Shannon, 8 Hun (N. Y.) 531.

9. Potter *v.* Smith, 9 How. Pr. (N. Y. Supreme Ct.) 162.

10. Regan *v.* Priest, 3 Den. (N. Y.) 163.

11. The rule allowing inquests to be taken in cases out of their order on the calendar does not apply where a case is called in its order on the calendar. When that is done the defendant

A verified answer is equivalent to an affidavit of merits.[1]

b. ON OVERRULING A DEMURRER.—In *Mississippi* when a demurrer is overruled the party demurring must make an affidavit of merits to prevent judgment.[2] The rule does not apply where the demurrer is withdrawn or confessed.[3] Where the defendant's demurrer is sustained and plaintiff wishes to amend it is held that he must file an affidavit of merits.[4] An affidavit "that the plea is true," or one "setting out the grounds of a legal defense," is sufficient.[5]

c. IN ACTIONS AT COMMON LAW.—In *Massachusetts* an affidavit of merits was formerly necessary to prevent judgment by default in common-law actions.[6] But it is required now only in cases of money demands, where the plaintiff verifies his claim and swears there is no defense.[7]

can appear and defend, although he has not filed or made an affidavit of merits. Starkweather *v.* Carswell, 1 Wend. (N. Y.) 77. But in such a case, if defendant fail to appear and defend, he cannot object to an inquest taken. Kerker *v.* Carter, 1 Hill (N. Y.) 101.

1. Formerly a verified answer would not take the place of an affidavit of merits for the purpose of preventing an inquest. Sheldon *v.* Martin, 1 Code Rep. (N. Y.) 81; Anderson *v.* Hough, 1 Sandf. (N. Y.) 721, 1 Code Rep. (N. Y.) 50; Jones *v.* Russell, 3 How. Pr. (N. Y. Supreme Ct.) 324, 1 Code Rep. (N. Y.) 113. But now § 980 of the *New York* Code of Civil Procedure provides that "An inquest for want of an affidavit of merits cannot be taken where the answer is verified."

2. **Mississippi.**—§ 697 of the *Mississippi* Code of 1892 provides "that if the demurrer of the defendant to the plaintiff's declaration be overruled, the court shall give judgment for the plaintiff for the amount due and interest, and a plea shall not be admitted unless the defendant make oath that he has a good and substantial defense, setting forth fully the nature of the defense, that the court may judge whether the plea ought to be admitted or not." This was a substantial reenactment of a statute passed in 1840. Ogden *v.* Glidewell, 5 How. (Miss.) 181. Under this provision plaintiff can obtain leave to plead when his demurrer is overruled only upon filing an affidavit of merits. Robertson *v.* Banks, 1 Smed. & M. (Miss.) 666; Drane *v.* Board of Police, 42 Miss. 264.

3. Ogden *v.* Glidewell, 5 How. (Miss.) 181; Shaw *v.* Brown, 42 Miss. 309.

4. If defendant's demurrer is sustained and plaintiff amends his declaration, it has been held that the plaintiff must file an affidavit of merits. Ross *v.* Sims, 27 Miss. 359.

5. Johnson *v.* Beard, 7 Smed. & M. (Miss.) 214; Shaw *v.* Brown, 42 Miss. 309.

6. **Massachusetts.**—A statute of *Massachusetts* provided that in all actions at common law the plaintiff could take judgment by default unless the defendant or some one in his behalf should file an affidavit stating "that he verily believes that the defendant has a substantial defense to the action on its merits and intends to bring the same to trial." Hunt *v.* Lucas, 99 Mass. 404.

This statute was repealed in 1870.

7. In 1874 an act was passed providing substantially "that in all actions where plaintiff seeks to recover a debt or liquidated demand in money, payable by defendant with or without interest, if defendant appears, plaintiff, on an affidavit verifying his cause of action and swearing that in his belief there is no defense, may enter an order for defendant to show cause why he should not consent to judgment by default, or describe by affidavit, or in such manner as the court directs, such facts as shall constitute a defense, or such as the court may think sufficient to entitle him to defend, and the court shall advance such action for speedy trial. The court shall require defendant to disclose specifically and clearly the substantive facts on which he re-

d. IN ACTIONS ON MONEY DEMANDS.—In *Michigan* an affidavit of merits is necessary to prevent judgment by default in actions on money demands where defendant is sued in his individual capacity.[1]

e. IN ACTIONS ON CONTRACT, WHERE PLAINTIFF FILES AN AFFIDAVIT OF THE AMOUNT DUE.—In several of the states defendant is required to make an affidavit of merits to prevent judgment by default in actions on contract where the plaintiff files an affidavit of the amount due him from the defendant.[2]

lies." Laws of Mass. 1874, ch. 248, § 3.

Under this statute it was held that it rested in the discretion of the court whether to open a judgment taken against a defendant for failure to comply with an order entered thereunder, and that the appellate court would not on appeal interfere with such discretion. Rogers *v.* Ladd, 117 Mass. 334. It was also held that the plaintiff's affidavit of no defense need not comply strictly with the statute in stating the nature of the cause of action, and that independently of the statute the court has power to advance causes for speedy trial. Merchants' Nat. Bank *v.* Glendon Co., 120 Mass. 97.

1. **Michigan.**—Rule 99 of the Supreme Court of *Michigan* provides "that in action of covenant, debt, or assumpsit, upon a money bond, promissory note, or bill of exchange, where defendant is sued in his individual capacity, the plaintiff may notice the cause for trial as an inquest, and an inquest may be taken therein at the opening of the court on any day in term after the first, unless the defendant or his attorney shall, before the first day of the term, have filed an affidavit of merits and served a copy thereof on plaintiff's attorney." 1 Green's New Pr. 239. A statute of 1844 of *Michigan* allowed inquests for default of an affidavit of merits in all actions on contracts. Brown *v.* Cowee, 2 Dougl. (Mich.) 432. But rule 99 has superseded it. Rule 59 of the *Michigan* Supreme Court prescribes the form of the affidavit of merits, and in the absence thereof an inquest and judgment by default for plaintiff may be taken. 1 Green's New Pr. 239–241. Rule 63 of *Michigan* Chancery provides that when a case is to be heard on pleadings, or pleadings and proofs, it will be entitled to a preference on the calendar unless defendant files an affidavit that he has a good and meritorious defense, and that his answer was not put in for the purpose of delay.

2. **Illinois.** — A statute of *Illinois* passed in 1872, and amended in 1877, provides "that if the plaintiff in any suit upon contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant after allowing to the defendant all his just credits, deductions, and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant or his agent or attorney (if the defendant is a resident of the county in which the suit is brought) shall file with his plea an affidavit stating 'that he verily believes he has a good defense to said suit upon the merits, to the whole or a portion of the plaintiff's demand, and, if a portion, specifying the amount according to the best of his judgment and belief.' Upon good cause shown the time for filing such affidavit may be extended for such reasonable time as the court shall order. No affidavit of merits need be filed with a demurrer or motion. Provided that this section shall not apply to any case where an executor or administrator shall defend on behalf of an estate, and provided further that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits, and that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court, but expects to produce by next term, the court shall continue such cause until the next term." Hurd's Rev. Sts. of *Illinois*, ed. of 1891, p. 1047, § 37.

A rule of the Superior Court of Chicago provides that, in actions on contract, plaintiff, by making an affidavit

Under such provisions the plaintiff must file the affidavit of amount due if he wishes to compel defendant to file an affidavit that he believes the defense is put in only for delay, may compel the defendant to state the facts of his defense in an affidavit, or have the cause tried out of its order on the calendar. Wallbaum *v.* Haskin, 49 Ill. 313. But such a rule is void as contrary to the provisions of the Constitution providing that practice in courts of the same grade shall be uniform, and the statute furnishes the rule for plaintiff to follow if he would compel defendant to make an affidavit or obtain judgment by default. Angel *v.* Plume, etc., Mfg. Co., 73 Ill. 412.

Maryland.—Ch. 184 of the Laws of 1886 of *Maryland* in relation to actions in the Superior Court of Baltimore, the Court of Common Pleas, and the Baltimore City Court provides as follows: "§ 170. In any suit where the cause of action is a contract, whether in writing or not, or whether express or implied, the plaintiff, if affidavit or affirmation be made as hereinafter stated, shall be entitled to judgment to be entered by the court or the clerk thereof on motion in writing at any time after fifteen (15) days from the return day to which the defendant shall have been summoned, although the defendant may have pleaded, unless such plea contains a good defense, and unless the defendant or some one in his behalf shall under oath or affirmation state that every plea so pleaded by the defendant is true, and shall further state the amount of the plaintiff's demand, if anything, admitted to be due or owing, and the amount disputed; and further, that the affiant verily believes the defendant will be able at the trial of the cause to produce sufficient evidence to support the said plea as to the portion disputed, and that he is advised by counsel to file the said plea; and such plea shall be accompanied by a certificate of counsel that he so advised the party making such oath or affirmation; and if the copartnership or incorporation of any of the parties to the suit shall be alleged in the declaration and the affidavit to be pleaded therewith as hereinafter provided, or if there shall be filed with the declaration in said cause any paper purporting to be signed by any defendant therein, the fact of said alleged copartnership or incorporation, and the genuineness of such signature, shall be deemed admitted for the purposes of said cause, unless the said affidavit shall further state that the affiant knows or has good reason to believe such allegation of copartnership or incorporation to be untrue, or that such signature was not written by or by the authority of the person whose signature it purports to be." "§ 171. The plaintiff shall not be entitled to judgment under the preceding section unless at the time of bringing his action he shall file with his declaration an affidavit or affirmation —if the affiant is conscientiously scrupulous as to taking an oath—stating the true amount the defendant is indebted to him over and above all discounts, and shall also file the bond, bill of exchange, promissory note, or other writing or account by which the defendant is so indebted; or, if the action be founded upon a verbal or implied contract, shall file a statement of the particulars of the defendant's indebtedness thereunder; if there are two or more plaintiffs the affidavit or affirmation may be made by any one of them, or if all the plaintiffs be absent from the state at the time of the bringing of the said suit, or if the plaintiff be a corporation, the said affidavit or affirmation may be made by any agent of plaintiff or plaintiffs, or any of them, who will make further oath or affirmation that he has personal knowledge of the matter therein stated."

Under this statute it was held that the purpose of the act was to prevent a defendant from putting in a plea of the general issue and swearing to the truth of it, where *a part* of plaintiff's demand was due, and his declaration was true as to that part, and to compel a defendant in such a case to admit on the record that part of the demand was due—if such was the truth. Hence, where, to an action on a note, defendant pleaded that he never promised as alleged, and was never indebted as alleged, and made affidavit that his plea was true, *held*, bad for not stating the amount of plaintiff's demand admitted, and amount denied. Adler *v.* Crook, 68 Md. 494.

District of Columbia.—Rule 73 Cir-

of merits.[1] By pleading over it has been held that plaintiff does not waive the right to require an affidavit of defense from defendant.[2] In *Illinois* the defendant's affidavit should be filed with his plea, [3] but it is not necessary on motions, demurrers, or pleas in

cuit Court of the *District of Columbia* provides: "That in actions arising in contract, if plaintiff or his agent shall have filed at the time of bringing his action an affidavit setting out distinctly his cause of action and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to judgment for the amount claimed with interest and costs, unless the defendant shall file along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. And where the defendant shall have acknowledged in his affidavit of defense his liability for a part of the plaintiff's claim as aforesaid, the plaintiff, if he so elect, may have judgment entered in his favor for the amount so confessed to be due. The provisions of this rule shall not apply to defendants who are representatives of decedents' estates, except where the affidavit filed with the declaration sets forth that the contract sued on was directly with such representative, or that a promise to pay was made by him. When the defendant is a corporation the affidavit of defense may be made by an officer, agent, or attorney of such corporation." Cogley's Digest, *District of Columbia*, 512, § 7. Under this rule it was held that, where defendant admits part of plaintiff's claim to be due, and but one cause of action is sued on, if plaintiff elects to take judgment for the part admitted to be due, that ends the controversy, and the court, on motion of defendant, will discontinue plaintiff's suit for the balance over the amount admitted by defendant. If plaintiff does not want to accept the amount admitted due, he can join issue on the defense and go to trial. But he cannot accept judgment for the amount admitted, and go to trial as to the balance of his claim. Kennedy *v.* Poal, 5 Wash. L. Rep., 129.

1. **Plaintiff's affidavit.**—Under the statute it rests with the plaintiff whether to file an affidavit with his declaration or not; the only effect of his not doing so is that the defendant can plead without an affidavit of merits. Kern *v.* Strasberger, 71 Ill. 303.

But if plaintiff wants to compel defendant to file an affidavit of merits, or wants to obtain judgment by default, he can only do so by complying with the statute, and filing an affidavit with his declaration. Fisher *v.* National Bank, 73 Ill. 34; Kidder *v.* Rand, 73 Ill. 38; Angel *v.* Plume, etc., Mfg. Co., 73 Ill. 412. Plaintiff need not file *his own* affidavit; the statute says *an* affidavit. Young *v.* Browning, 71 Ill. 44; Honore, *v.* Home Nat. Bank, 80 Ill. 489.

An affidavit by one of several plaintiffs showing the nature and amount of the demand is sufficient. Haggard *v.* Smith, 71 Ill. 226.

Default.—Where plaintiff has complied with the statute, and filed with his declaration such an affidavit as the statute requires, he can take judgment by default unless the defendant files an affidavit of merits, as required by the statute. Young *v.* Browning, 71 Ill. 44; Goldie *v.* McDonald, 78 Ill. 605; Filkins *v.* Byrne, 72 Ill. 101; Mestling *v.* Hughes, 89 Ill. 389; Pierson *v.* Hendrix, 88 Ill. 34; Chicago, etc., R. Co. *v*, Bank of N. A., 82 Ill. 493; Kassing *v.* Griffith, 86 Ill. 265; Mayberry *v.* Van Horn, 83 Ill. 289; Coursen *v.* Browning, 86 Ill. 57; Wayne *v.* Stern, 75 Ill. 313; Truesdell *v.* Hunter, 28 Ill. App. 292.

To prevent default where plaintiff has filed the required affidavit, the defendant must file an affidavit of merits, although he files with his plea a motion to strike the plaintiff's affidavit from the files. Kassing *v.* Griffith, 86 Ill. 265.

2. Williams *v.* Richland, 16 Ill. App. 333; McDowell *v.* Hunter, 22 Ill. 28. *Contra*, Hutton *v.* Marx, 69 Md. 258.

3. Defendant must file his plea with his affidavit; the affidavit of merits without a plea will not prevent judgment by default. Scammon *v.* McKey, 21 Ill. 554. But a plea will not take the place of the affidavit; and where,

abatement.[1] The defendant must file an affidavit of merits in actions on distress warrants, appeal bonds, and on appeal from justice courts.[2] In *Maryland* it is held that the defendant's affidavit must clearly show to what part of plaintiff's demand it applies in order to prevent judgment;[3] while in *Illinois* it is sufficient if it follows the statute.[4] Where the affidavit of merits concedes part of plaintiff's claim it has been held that plaintiff might take judgment for that part without regard to the defense to the balance of the claim.[5]

in an action on a promissory note, defendant filed a verified plea denying the execution of the note, *held*, not a compliance with the statute, and that it was properly stricken from the files. Bank of N. A. *v.* Chicago, etc., R. Co., 82 Ill. 493. But where several were sued as partners, verified pleas denying joint liability were held equivalent to an affidavit of merits under the statute. Fergus *v.* Cleveland Paper Co., 3 Ill. App. 629.

Leave to file an amended affidavit of plaintiff's claim extends the time to file an affidavit of merits. Healy *v.* Charnley, 79 Ill. 592.

1. The statute provides that an affidavit of merits is not necessary on motion or on demurrer. The statute of 1874 provided also that it was not necessary on filing a plea in abatement; and although the provision as to plea in abatement is omitted from the present statute, an affidavit of merits is not required with such a plea, but it must be verified, viz., sworn to be true. Chicago, etc., Co. *v.* Congdon, etc., Mfg. Co., 111 Ill. 309; Ricker *v.* Scofield, 28 Ill. App. 32.

But when a plea to the merits is put in, it must be accompanied by an affidavit of merits. Kassing *v.* Griffith, 86 Ill. 265. The affidavit is part of the plea and part of the record on appeal. Whiting *v.* Fuller, 22 Ill. 33; Williams *v.* Reynolds, 86 Ill. 263.

2. **Distress Warrant.**—Where plaintiff files an affidavit of claim with a distress warrant, the defendant must file an affidavit of merits, for this proceeding is made by statute a suit in contract, and is for the payment of money. Bartlett *v.* Sullivan, 87 Ill. 219.

Appeal Bond.—Where an action is brought on an appeal bond, it is an action on contract for the payment of money; and if plaintiff files the affidavit required by the statute, defendant must file an affidavit of merits to prevent judgment by default. Mestling *v.* Hughes, 89 Ill. 389; Coursen *v.* Browning, 86 Ill. 57; Myers *v.* Shoneman, 90 Ill. 80.

Appeals from Justice Courts.—Where an action, begun before a justice court with an affidavit of claim is appealed, defendant need not file an affidavit of merits until the case is reached for trial. Martin *v.* Hochstadter, 27 Ill. App. 166; World's Soap Mfg. Co. *v.* Woltz, 27 Ill. App. 302.

3. Where, in an action on an open account, the plea of the statute of limitations was interposed, with an affidavit of its truth, it was held not sufficient to prevent a judgment by default because it did not state to what items of the account it applied, and hence did not show what part of plaintiff's claim was admitted and what denied. Hutton *v.* Marx, 69 Me. 252; *Maryland* Court of Appeals, June 13, 1888. But where a defendant, sued in assumpsit, pleads payment and full satisfaction of plaintiff's claim, and makes affidavit that his plea is true, *held*, sufficient, and that he need not state the amount admitted and the amount disputed, as this would be surplusage where full payment is alleged. And *quære*, whether the statute applies to actions against executors on debts of their testator, as they could not have knowlenge of the facts, and the apparent intent of the act is to have the affidavit of a person having knowledge of the facts. May *v.* Wolvington, 69 Md. 117; *Maryland* Court of Appeals, June 13, 1888.

4. An affidavit of merits is sufficient if it states that defendant has a defense upon the merits in the language of the statute. McCormick *v.* Wells, 83 Ill. 239.

5. Where the affidavit of merits filed with a plea goes only to a part of the plaintiff's demand, it is a virtual admission that the part excepted is due, and plaintiff may concede the defense to

f. ACTIONS ON JUDGMENTS.—In the *District of Columbia* an affidavit of merits is required in actions on judgments to render defendant's plea valid.[1]

g. IN ACTIONS OF ASSUMPSIT ACCOMPANIED BY STATEMENT OF PLAINTIFF'S DEMAND.—In *Pennsylvania* by statute an affidavit of defense is necessary to prevent judgment by default in actions of assumpsit, where the plaintiff files or serves a statement of his claim or demand.[2] Prior to the passage of this act various statutes on the subject existed, which are repealed so far as inconsistent therewith, and a uniform rule is established.[3]

the part alleged and take judgment for the balance without regard to a plea to the entire cause of action. Henry *v.* Meriam, etc., Paraffine Co., 83 Ill. 461; Watt *v.* Allen, 69 Ill. 655; Mayberry *v.* Van Horn, 83 Ill. 289; Williams *v.* Reynolds, 86 Ill. 263; Haggard *v.* Smith, 71 Ill. 226. *Contra*, Kennedy *v.* Poal, 5 Wash. L. Rep. 129.

Where defendant's affidavit of merits discloses to only a part of the entire cause of action, and plaintiff concedes such defense, defendant cannot put in a different defense to the entire cause of action. Allen *v.* Watt, 69 Ill. 655.

1. Rule 121 of the Supreme Court of the *District of Columbia* provides that in cases of *scire facias* on judgments, and in actions on judgments of a state court or a court of the *United States*, any plea thereto shall be treated as a nullity unless an affidavit accompanies the plea, showing a defense to the action. *Held*, that this rule applied to all judgments, however rendered, if the court which rendered it had jurisdiction, and that, unless want of jurisdiction was shown, such an affidavit of defense must be made to prevent a judgment. Loeber *v.* Moore, 19 Wash. L. Rep. 194.

2. **Pennsylvania Statute.**—An act of the legislature of *Pennsylvania*, passed May 25, 1887, P. L., p. 271, No. 158, provides, § 3: "The plaintiff's declaration shall consist of a concise statement of plaintiff's demand . . . and in the action of assumpsit shall be accompanied by copies of all notes, contracts, book entries, or a particular reference to the records of any court within the county in which the action is brought (if any) upon which the plaintiff's claim is founded; and a particular reference to such record, or to the records of any deed or mortgage or other instrument of writing recorded in such county, shall be sufficient in lieu of the copies thereof. The statement shall be signed by the plaintiff or his attorney, and in the action of assumpsit shall be replied to by affidavit. § 4. The plaintiff shall be at liberty, in each of said actions, to serve copies of his statement upon the defendants. If such service be made not less than fifteen (15) days before the return day of the writ, it shall be the duty of the defendant in the action of assumpsit to file an affidavit of defense on or before the return day. § 5. In the action of assumpsit judgment may be moved for, for want of an affidavit of defense, or for want of a sufficient affidavit for the whole or part of the plaintiff's claim, as the case may be, in accordance with the present practice in debt and assumpsit. § 6. If the plaintiff shall neglect to serve his statement at least fifteen (15) days before the return day of the writ, he may file it on or at any time after the return day; and in the action of assumpsit, unless the defendant shall file a sufficient affidavit of defense within fifteen (15) days after notice that said statement has been filed, the plaintiff may move for judgment for want thereof. § 9. That all laws or parts of laws inconsistent herewith be and the same hereby are repealed."

3. **Previous Statutes—Effect of Latter Act.**—Prior to the passage of this statute there existed various statutory provisions relating to an affidavit of defense in certain actions, providing substantially that in all actions on bills, notes, bonds, or other instruments in writing for the payment of money or for the recovery of book debts, or on judgments on mechanics' liens or contracts for the loan of money, or on bonds or recognizances, etc., when the plaintiff filed copies of the instrument or contract sued on, or referred to the record

To What Actions Applicable.—The provisions requiring an affidavit of defense have been held to apply to all actions of assumpsit, to actions against married women, to foreign attachments, actions against public officers and corporations, and to appeals;[1] and

thereof, the plaintiff could enter judgment by default unless the defendant filed an affidavit of defense *stating therein the nature and character of the same.* Act of March 28, 1835, P. L. 89; Act of March 11, 1836, P. L. 79; Act of March 12, 1842, P. L. 66; Act of April 4, 1846, P. L. 328; Act of May 4, 1874, P. L. 159.

These acts were not expressly repealed by the act of 1887, but so far as inconsistent with it they are repealed thereby, and the act of 1887 now governs the practice in relation to an affidavit of defense. Gould *v.* Sage, 118 Pa. St. 559; Marlin *v.* Waters, 127 Pa. St. 177; Fritz *v.* Hathaway, 135 Pa. St. 274; Newbold *v.* Pennock, 154 Pa. St. 591; Flegal *v.* Hoover, 156 Pa. St. 276. And a rule of court allowing judgments contrary to such statute is of no force and void. Marlin *v.* Waters, 127 Pa. St. 177. But it did not change the former practice where not inconsistent therewith, and not provided for in the act of 1887. Flegal *v.* Hooner, 156 Pa. St. 276; Stedman *v.* Paterie, 139 Pa. St. 101. Thus the defendant is still required to state the facts constituting his defense as under the former provisions. Flagg *v.* Taylor (Del., 1888), 14 Atl. Rep. 26; Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634; Newbold *v.* Pennock, 154 Pa. St. 591; Clarke *v.* Allen, 132 Pa. St. 40. The act of 1887 was held constitutional, Honeywell *v.* Toney, 5 Kulp (Pa.) 360; Kauffman *v.* Jacobs, 4 Pa. Co. Ct. Rep. 462; and to apply to actions pending when it was passed, Krause *v.* Pennsylvania R. Co., 20 W. N. C. (Pa.) 111; Insurance Co. *v.* Reinoehl, 5 Lancaster Law Rev. (Pa.) 3.

1. **The Act Applies to all Actions of Assumpsit** where a proper statement is filed by the plaintiff, whether the action is founded on a book account or on contract, and whether the contract, etc., is in writing or oral. Blanchard *v.* Hunter, 7 Pa. Co. Ct. Rep. 552; Frederici *v.* Insurance Co., 1 Monahan (Pa.) 493.

Married Women.—The act extends to an action against a married woman for a debt contracted by her *dum sola*, Wanamaker *v.* Gray, 15 W. N. C. (Pa.) 112; Sharpler *v.* Elliot, 17 W. N. C. (Pa.) 478; also to an action on a claim for which on its face it appears she or her estate is liable, Alworth *v.* Alworth, 4 Law Times N. S. (Pa.) 188; Steinman *v.* Henderson, 94 Pa. St. 313. But not to a suit against her for necessaries. Cooper *v.* Wallace, 7 W. N. C. (Pa.) 468. Nor to a suit against her and her husband on a book account, where it is not averred that the goods were sold to the wife or purchased on her credit. Sheedy *v.* Tinker, 40 Leg. Int. (Pa.) 360. See Scott *v.* Wilmer, 1 W. N. C. (Pa.) 41; Eisenbery v. Negus, 2 W. N. C. (Pa.) 445; Schlecht *v.* Watson, 3 W. N. C. (Pa.) 43; Defrahan *v.* Walker, 3 W. N. C. (Pa.) 26.

Foreign Attachments.—Under the act of 1887 it has been held that an affidavit of defense is necessary in a case of foreign attachment. Hubbard *v.* Dorman, 7 Pa. Co. Ct. Rep. 384; Smith *v.* Eyre, 26 W. N. C. (Pa.) 214. The *contrary* was held in Paff *v.* North Bangor Co., 5 Lancaster Law Rev. (Pa.) 301; and also under the former law, Roberts *v.* Hugg, 2 Miles (Pa.) 283.

Public Officers.—The act does not apply to proceedings against public officers who have given bonds, with sureties, and no affidavit of defense is necessary in such cases. Com. *v.* Morris, 5 Kulp (Pa.) 488., *Contra*, Bailey *v.* Com. (Pa., 1887), 10 Atl. Rep. 764.

Corporations.—In actions of assumpsit against corporations an affidavit of defense must be filed, although a receiver has been appointed therefor. Hays *v.* Pittsburgh, etc., R. Co., 27 Pittsb. L. J. (Pa.) 105.

Municipal Corporation.—Whether an affidavit of defense must be made in an action against a municipal corporation was not decided. Malone *v.* Philadelphia, 132 Pa. St. 209.

Appeals.—When plaintiff makes a statement on appeal defendant must file an affidavit of merits. Lanfer *v.* Landis, 23 W. N. C. (Pa.) 460. The act applies to appeals from a justices' judgment, and defendant must file an affidavit of defense thereon. Connelly

not to apply to actions for torts, against lunatics, on implied contracts, on judgments, against infants, executors, administrators, or heirs.[1]

Plaintiff's Statement.—To compel the defendent to present an affidavit of defense the plaintiff must serve or file a proper statement showing a *prima-facie* liability on the part of the defendant.[2] The

v. Wilson, 6 Pa. Co. Ct. Rep. 421; Horner *v.* Horner, 145 Pa. St. 258, 29 W. N. C. 420.

1. **Actions for Torts.**—But it does not apply to actions for torts. Borlin *v.* Com., 99 Pa. St. 42; Reed *v.* Bush, 5 Binn. (Pa.) 457.

An action against a national bank to recover penalties for taking usury is an action *ex delicto*, and hence no affidavit of defense is necessary therein, although the action is in the form of assumpsit. Osborn *v.* First Nat. Bank, 154 Pa. St. 134. And see Boyd *v.* Turner, 1 Browne (Pa.) 133; Union Glass Co. *v.* First Nat. Bank, 10 Pa. Co. Ct. Rep. 565.

Lunatics.—The act does not apply to a defendant found by inquisition to have been a lunatic at the time the contract sued on was executed. Philadelphia Trust Co. *v.* Kneedler, 13 Phila. (Pa.) 421, 35 Leg. Int. (Pa.) 234. The former act held not to apply to an action against a lunatic or his committee. Alexander *v.* Ticknor, 1 Phila. (Pa.) 120.

Implied Contracts.—Under the former law it was held to apply not to implied, but only to express, contracts. Sylva *v.* Bond, 2 Miles (Pa.) 421; Barr *v.* Duncan, 76 Pa. St. 395.

Scire Facias sur Judgment is not an action of assumpsit under the act of 1887, requiring an affidavit of defense. Cowden *v.* Kennedy, 7 Pa. Co. Ct. Rep. 312. The former law applied to such actions. Act of March 28. 1835, P. L. 89.

Infants.—The former act was held not to apply to an action against an infant. Reed *v.* Bush, 5 Binn. (Pa.) 455. The infancy should be set up by affidavit. Walker *v.* Morgan, 2 W. N. C. (Pa.) 173. See Charlton *v.* Allegheny, 1 Grant's Cas. (Pa.) 208.

Executors and Administrators.—The statute does not apply to an action against an executor or administrator on a contract made by decedent. Kennedy *v.* Kennedy, 7 Pa. Co. Ct. Rep. 311; Wiseman *v.* Insurance Co., 20 W. N. C. (Pa.) 299; Cowden *v.* Kennedy, 7 Pa. Co. Ct. Rep. 312; Orne *v.* Ritchie, 4 W. N. C. (Pa.) 477; Malone *v.* Philadelphia, 7 Pa. Co. Ct. Rep. 613. And it was so held under the former act. Edwards *v.* Ewing, 4 Yeates (Pa.) 235; Parker *v.* Farr, 2 Browne (Pa.) 39; Siebert *v.* Hoeker, 1 Miles (Pa.) 263; Vandusen *v.* Graham, 1 W. N. C. (Pa.) 103; Seymour *v.* Hubert, 83 Pa. St. 346; Umberger *v.* Zearing, 8 S. & R. (Pa.) 163. In *scire facias* on a mechanic's lien claim, where the contractor is dead, his administrator (defendant) is not required to make an affidavit of defense. And see Richards *v.* Reed, 1 Phila. (Pa.) 220; Com. *v.* McKinney, 1 Sack. Jur. (Pa.) 107.

But where an executor executed a mortgage as executor, an affidavit of defense is required to a *scire facias sur mortgage*. Palaiset *v.* Fidelity Co., 16 W. N. C. (Pa.) 146. So also such an affidavit is required to a *scire facias* on a judgment obtained against an executor. Umberger *v.* Zearing, 8 S. & R. (Pa.) 163. Where an executor has voluntarily submitted to arbitration, he must file an affidavit of defense to an action of debt on the award. Bayard *v.* Gillasspy, 1 Miles (Pa.) 256.

Heirs.—No affidavit of defense is required where heirs are sued on the contract of the decedent. Boas *v.* Birmingham, 2 Pears. (Pa.) 334; Wright *v.* Cheyney, 10 Phila. (Pa.) 469; Hall *v.* Wiggins, 15 W. N. C. (Pa.) 112. Nor is it required on *scire facias* against heirs to show cause why execution should not be levied of their lands. Stadelman *v.* Pennsylvania Trust Co., 6 W. N. C. (Pa.) 134.

2. In order that plaintiff may compel a defendant to make an affidavit of defense in a proper case, he must file a sufficient statement of his claim; for if a sufficient statement is not filed, judgment cannot be taken for want of an affidavit of defense. Barr *v.* McGarry, 131 Pa. St. 401. It is error to give judgment on account of the insufficiency of an affidavit of defense, where the case is one in which an affidavit of

defendant does not waive his right to a proper statement by filing an affidavit of defense.[1]

Judgment by Default.—Where a proper statement has been made by plaintiff, and defendant omits to make an affidavit of defense, or the one made is insufficient, the plaintiff is entitled to judgment by default.[2]

Waiver of Defects.—If plaintiff does not take advantage of any defect in the affidavit at the first opportunity, he waives objections thereto.[3]

defense cannot be required. Bartoe *v.* Guckert (Pa., 1893), 27 Atl. Rep. 845.

Sufficiency of Plaintiff's Statement.—To entitle plaintiff to judgment for want of an affidavit of defense, his statement must show a *prima-facie* liability on the part of defendant. Karthaus Coal, etc., Co. *v.* Given, 1 W. N. C. (Pa.) 366; Van Dyke *v.* McConnell, 1 W. N. C. (Pa.) 276. And he must file a copy of the contract sued on, or refer to its record. Jordan *v.* Keller, 5 W. N. C. (Pa.) 341; Laird *v.* Potts, 6 W. N. C. (Pa.) 56. A statement is not sufficient if it alleges necessary facts in such a way that it amounts simply to the expression of affiant's opinion that they are facts; they should be specifically stated as facts. Bank *v.* Fair, 127 Pa. St. 324. Where the items of a claim were stated to be "nearly as follows," *held*, insufficient to require an affidavit of defense. Ide *v.* Booth, 8 Pa. Co. Ct. Rep. 499. Where, in an action on book entries, it is stated that the charges made in the books "were intended as personal charges against the defendant," *held*, defective, and not to require an affidavit of defense. Fritz *v.* Hathaway, 135 Pa. St. 274.

In an action by a depositor against a banking company to recover an alleged balance of deposit, where the plaintiff's statement sets forth a copy of an entry "to balance" made by the defendant in plaintiff's book, giving the date and amount, *held*, sufficient to call for an affidavit of defense by defendant. Such an entry constitutes a sufficient instrument of writing under the affidavit of defense law. Schoononer *v.* Jones, 11 Pa. Co. Ct. Rep. 63. It is the duty of a plaintiff to present such a record as entitles him, under the act of May 25, 1887, and the rules of court, to a judgment before he can call on defendant for an affidavit of defense. Medlar *v.* Wadlinger, 2 Pa. Dist. Rep. 688. To compel defendant to file an affidavit of defense, plaintiff's statement must show a *prima-facie* liability on the part of defendant. Hence, where the plaintiff's statement set out a written instrument in which the receipt of the consideration was admitted, and then averred demand for and the refusal of defendant to pay such consideration, but did not aver any mistake, or that the consideration was unpaid *held*, not sufficient to require an affidavit of defense. Grist *v.* Mundell (Pa., 1888), 13 Atl. Rep. 319.

1. **Filing Affidavit of Defense not a Waiver of Objection to Statement.**—The defendant, by filing an affidavit of defense, does not waive the objection that plaintiff's statement is insufficient to call for such affidavit or to entitle plaintiff to judgment. Ferguson *v.* Anglo-American Tel. Co., 151 Pa. St. 211; Hutchinson *v.* Woodwell, 107 Pa. St. 509; Mifflin *v.* R. Co., 10 Lanc. Bar (Pa.) 128; Brown *v.* Street, 6 W. & S. (Pa.) 222; Fenst *v.* Fell, 6 W. N. C. (Pa.) 43; Hill *v.* Gaw, 4 Pa. St. 495.

2. **Judgment for Want of Affidavit or Defect in.**—If no affidavit of defense is filed where one is required, or if the affidavit filed is defective, plaintiff can take judgment as by default. Lancaster Bank *v.* McCall, 2 Clark (Pa.) 498; West *v.* Simmons, 2 Whart. (Pa.) 261; Taylor *v.* Nyce, 3 W. N. C. (Pa.) 433; Pennock *v.* Kennedy, 153 Pa. St. 577; Moore *v.* Phillips, 154 Pa. St. 204. Such a judgment has been held to be final, and not interlocutory. McClung *v.* Murphy, 2 Miles (Pa.) 177.

3. Chew *v.* Griffith, 1 Ashm. (Pa.) 18. So, taking any step in the cause has been held to be a waiver by plaintiff of the right to take judgment for want of an affidavit of defense. O'Neal *v.* Rupp, 22 Pa. St. 395; Johnston *v* Ballentine, 1 W. N. C. (Pa.) 626.

Admission of Part of Claim.—If the defendant admits part of the claim, judgment may be taken for that part.[1]

How Sufficiency Tested.—The sufficiency of an affidavit of defense should be tested by a motion for judgment,[2] although the affidavit must allege all the facts necessary to make a legal answer to plaintiff's claim. On such a motion the affidavit is considered true, and if, so considered, a defense in law or equity is stated, the motion should be denied.[3]

Admissions Binding.—Admissions contained in the statement of claim and affidavit of defense are binding on the parties.[4]

1. **Judgment for Part of Claim.**—Where part of plaintiff's claim is admitted by or not denied in the affidavit of defense, the practice is to allow plaintiff to take judgment for that part, and to litigate as to the balance. So also, where the defense set up in the affidavit is insufficient as to part of plaintiff's claim, the court has power to and will direct judgment for the part as to which the affidavit is insufficient, and allow plaintiff to proceed for the balance. Drake *v.* Irvine, 10 Pa. Co. Ct. Rep. 487. The act of May 25, 1887, did not affect the practice of the courts as to entering judgment for part of a claim, and such practice of the lower courts will not be interfered with on appeal. Stedman *v.* Paterie, 139 Pa. St. 110.

2. **Necessity for Affidavit—How Question Raised.**—The proper way to raise the question whether an affidavit of defense is needed in reply to plaintiff's statement under the act of May 25, 1887, is for plaintiff to enter a rule for judgment for want of it; a rule by defendant to show cause why he should not be relieved from filing it is not proper. Com. *v.* Payton, 1 Pa. Dist. Ct. Rep. 609. The question may properly be raised by a demurrer by defendant to plaintiff's declaration. Fox *v.* Brinton, 1 Pa. Dist, Ct. Rep. 608.

3. Class *v.* Kingsley, 142 Pa. St. 636, 28 W. N. C. (Pa.) 321, 22 Pitts. L. J. N. S. 67, 48 Leg. Int. (Pa.) 364.

Sufficiency of Affidavit — Inferences.—In considering the question of the sufficiency of an affidavit of defense, all the material averments thereof must be treated by the court as true. The court should not infer from anything appearing therein that defendant will not be able to prove his case. Shoemaker Piano Co. *v.* Owens, 9 Lanc. L. Rev. (Pa.) 74. A motion for judgment for want of a sufficient affidavit of defense is in the nature of a demurrer to the affidavit of defense, and the question raised by it is whether the amendments of fact in the affidavit are sufficient to carry the case to the jury. In considering that question every material averment of fact in the affidavit must be accepted as true, and if any of the averments contain what either in law or in equity amounts to a substantial defense to plaintiff's claim, the affidavit must be sustained and judgment on plaintiff's claim refused. Third Reformed Dutch Church *v.* Jones, 132 Pa. St. 465, 25 W. N. C. (Pa.) 396, 47 Leg. Int. (Pa.) 131.

Where the refusal to give judgment for want of a sufficient affidavit of defense is assigned as the ground of plaintiff's appeal, the decision will not be reversed unless plaintiff's right to such judgment as shown by the case presented is very clear; for, notwithstanding such refusal, plaintiff has still a right to submit his case to a jury, and a fair chance to obtain a verdict if he is entitled to it. Garis *v.* Fish, 133 Pa. St. 559.

When, at the time of a motion for judgment for want of a sufficient affidavit of defense, there is anything on the record which for any reason shows that plaintiff is not entitled to it, it is the duty of the court to deny the motion and send the case to the jury. Hence, where a supplemental affidavit which showed a defense was, as plaintiff alleged, improperly filed, *held*, plaintiff was not entitled to judgment as long as such affidavit was on file, and should move to strike it off the file before moving for judgment. Wilkinson *v.* Brice, 3 W. N. C. (Pa.) 30, 1 Pa. Adv. Rep. 481.

4. While the affidavits of claim and defense are not ordinarily intended as evidence for the jury, they constitute part of the pleadings, and their prov-

2. To Open Judgments or Inquests.—It is the almost universal practice to require an affidavit of merits in order to open a judgment regularly taken by default, or to set aside an inquest.[1]

ince is to reduce the contest to the points actually in dispute; and the courts should take notice of the admissions in the record, and confine the contest to the matters in dispute. Whitehead *v.* North School Dist., 145 Pa. St. 428; Neely *v.* Bair, 144 Pa. St. 256; South Bethlehem *v.* Samper, 11 Pa. Co. Ct. Rep. 65. Thus, where the rules of court provided that in actions on written instruments, etc., where a copy thereof is filed with the declaration, plaintiff need not prove its execution unless defendant denies it by an affidavit filed with his plea, plaintiff cannot be compelled to prove its execution where no affidavit denying it is filed by defendant. Whitehead *v.* North School Dist., 145 Pa. St. 418, 48 Leg. Int. (Pa.) 537; 22 Pitts. L. J. N. S. 174.

1. *Alabama.* — Mayfield *v.* Allen, Minor (Ala.) 274.

Arkansas.—Browning *v.* Roane, 9 Ark. 354; 50 Am. Dec. 218; Nelson *v.* Hubbard, 13 Ark. 253.

California.—Francis *v.* Cox, 33 Cal. 323; Parratt *v.* Den., 34 Cal. 79; Bailey *v.* Taaffe, 29 Cal. 424; Reese *v.* Mahoney, 21 Cal. 315; Woodward *v.* Backus, 20 Cal. 137; People *v.* Rains, 23 Cal. 129; Nevada Bank *v.* Dresback, 63 Cal. 324.

Colorado.—Martin *v.* Skehin, 2 Colo. 614; Colorado Springs Co. *v.* Hewitt, 3 Colo. 375; Leaky *v.* Dunlap, 6 Colo. 552.

Florida.—Tidwell *v.* Witherspoon, 18 Fla. 282; Rouss *v.* Gilbert, 19 Fla. 54.

Georgia.—Beall *v.* Marietta, etc., Co., 45 Ga. 28.

Illinois.—Hitchcock *v.* Herzer, 90 Ill. 543; Pith *v.* Magee, 24 Ill. 610; Springfield, etc., R. Co. *v.* Ross, 88 Ill. 179; Moir *v.* Hopkins, 21 Ill. 557; Constantine *v.* Weeks, 83 Ill. 192; Little *v.* Arlington, 93 Ill. 253; Slack *v.* Casey, 22 Ill. App. 412; Holmes *v.* Parker, 125 Ill. 478; Terry *v.* Eureka College, 70 Ill. 236; Trefts *v.* Stahl, 46 Ill. App. 462; Dunn *v.* Keegin, 4 Ill. 292.

Indiana.—Stevens *v.* Helm, 15 Ind. 183; Sturges *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440; Nutting *v.* Losance, 27 Ind. 37; Blake *v.* Stewart, 29 Ind. 318; Yancy *v.* Teter, 39 Ind. 305; Phelps *v.* Osgood, 34 Ind. 150; Bristor *v.* Galvin, 62 Ind. 352; Ratliff *v.* Baldwin, 29 Ind. 16, 92 Am. Dec. 330.

Iowa.—Smith *v.* Watson, 28 Iowa 218; McDonald *v.* Donaghue, 30 Iowa 568; King *v.* Stewart, 48 Iowa 334; District Tp. *v.* White, 42 Iowa 608; Palmer *v.* Rogers, 70 Iowa 381.

Kansas.—McPherson *v.* Kingsbaker, 22 Kan. 646; Haight *v.* Schenck, 6 Kan. 192.

Mich[illegible]—Loree *v.* Reeves, 2 Mich. 133.

Minnesota.—Woods *v.* Woods, 16 Minn. 81; Hilderbrandt *v.* Robecke, 20 Minn. 100; Weymouth *v.* Gregg, 40 Minn. 45; St. Paul, etc., R. Co. *v.* Blackmar, 44 Minn. 514.

Mississippi.—Shields *v.* Taylor, 13 Smed. & M. (Miss.) 127; Porter *v.* Johnson, 2 How. (Miss.) 736; Fore *v.* Folsom, 4 How. (Miss.) 282; Maury *v.* Roberts, 5 Cush. (Miss.) 225.

Missouri.—Campbell *v.* Garton, 29 Mo. 343; Adams *v.* Heckman, 43 Mo. 168; Doan *v.* Holly, 27 Mo. 256; Stout *v.* Lewis, 11 Mo. 438.

Montana.—Lamb *v.* Gastoy, etc., Min. Co., 1 Mont. 57; Donnelly *v.* Clark, 6 Mont. 135.

Nebraska.—Mills *v.* Miller, 3 Neb. 95; Mulhollan *v.* Scoggin, 8 Neb. 202; Bernstein *v.* Brown, 23 Neb. 64.

Nevada.—State *v.* Consolidated Virginia, etc., Co., 13 Nev. 194; Ewing *v.* Jennings, 15 Nev. 379; Jones *v.* San Francisco Sulphur Co., 14 Nev. 172.

New Hampshire.—Ela *v.* Goss, 20 N. H. 52.

New Jersey.—Miller *v.* Alexander, 1 N. J. L. 400; Gulick *v.* Thompson, 4 N. J. L. 292; Bell *v.* Kelly, 17 N. J. L. 270; Hendrickson *v.* Herbert, 38 N. J. L. 296.

New York.—Gage *v.* Lessler, 19 Alb. L. J. (N. Y.) 400; Horne *v.* Montgomery, 5 How. Pr. (N. Y.) 238; Stewart *v.* McMartin, 2 How. Pr. (N. Y.) 38; Robinson *v* Sinclair, 1 How. Pr. (N. Y.) 106; Alberth *v.* Peck, 1 How. Pr. (N. Y.) 230; Bogardus *v.* Doty, 2 How. Pr. (N. Y.) 75; Tallmadge *v.* Stockholm, 14 Johns. (N. Y.) 342; Quinn *v.* Case, 2 Hilt. (N. Y.) 467; Clark *v.* Lyon, 2 Hilt. (N. Y.) 91; Giles *v.* Caines, 3 Cai. (N. Y.) 107; Allen *v.* Thompson, 1 Hall (N. Y.) 54; Hunter *v.* Lester, 18 How. Pr. (N. Y.) 347; Tryon *v.* Jennings, 22 How. Pr. (N. Y. C. Pl.) 421; Randall *v.* United Life, etc., Ins. Assoc., 39 N. Y. St. Rep. 155, Kitson *v.* Blake, 39

This is the rule in equity as well as at law.[1]

In Equity such an affidavit is required to state the facts of the defense,[2] and the proposed answer should also be served.[3]

At Law a general affidavit of merits is usually sufficient,[4] al-

N. Y. St. Rep. 45; Duche *v.* Voisin, 18 Abb. (N.Y.) 358; Bruen *v.* Adams, 3 Cai. (N. Y.) 97; Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Fink *v.* Bryden, 3 Johns. (N. Y.) 245; Howe *v.* Hasbrouck, 1 How. Pr. (N. Y.) 68; Fake *v.* Edgerton, 6 Duer (N. Y.) 653; Davenport *v.* Ferris, 6 Johns. (N. Y.) 131.

Ohio.—Messick, etc., Co. *v.* Roxbury, 1 Handy (Ohio) 190; Wayne *v.* Washington, etc., Co., 3 West. L. J. (Ohio) 305; Havard *v.* Abbey, 1 West. L. Month. (Ohio) 278.

Oregon.—Marsh *v.* Perrin, 10 Oregon 364; Mitchell *v.* Campbell, 14 Oregon 454.

Pennsylvania.—Reichenback *v.* Hummell, 6 Pa. Co. Ct. Rep. 661; Barber *v.* Dans, 1 Miles (Pa.) 118; Martin *v.* Hall, 1 Phila. (Pa.) 233; Emerson *v.* Knight, 1 Phila. (Pa.) 121; Nicholson *v.* Fitzpatrick, 2 Phila. (Pa.) 205; Scranton Supply Co. *v.* Cooper, 4 Com. Pleas Rep. (Pa.) 103; Kittle *v.* Compton, 4 Com. Pleas Rep. (Pa.) 117; Brandle *v.* Jones, 2 Woodward (Pa.) 7; Bright *v.* McLaughlin, 1 Pa. Co. Ct. Rep. 296; Keenan *v.* Dugan, 6 Lancaster Rev. (Pa.) 408.

South Carolina.—Williamson *v.* Cummings, 2 McCord (S. Car.) 250.

Texas.—Auston *v.* Burke, 55 Tex. 331; Goodhue *v.* Meyers, 58 Tex. 405.

Wisconsin.—Mowry *v.* Hill, 11 Wis. 146; Butler *v.* Whitehall, 15 Wis. 355; Omro *v.* Ward, 19 Wis. 232; Babcock *v.* Perry, 4 Wis. 31; Johnson *v.* Eldred, 13 Wis. 482; Wicke *v.* Lake, 21 Wis. 410; Sayles *v.* Davis, 22 Wis. 225; Butline *v.* Bouer, 25 Wis. 486; Cleveland *v.* Hopkins, 55 Wis. 598.

United States.—Den *v.* McAllister, 4 Wash. (U. S.) 393; Scott *v.* Propeller Young America, Newb. Adm. 110.

England.—Neesom *v.* Whytock, 3 Taunt. 403; Morris *v.* Hunt, 1 Chit. Rep. 93, 18 E. C. L. 37; Bonner *v.* Hemp, 1 C. & J. 287, 288.

1. Mowry *v.* Hill, 11 Wis. 146; Grubb *v.* Crane, 5 Ill. 156; Stockton *v.* Williams, Harr. (Mich.) 241; Thayer *v.* Swift, Walk. (Mich.) 384; Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424; Hunt *v.* Wallis, 6 Paige (N. Y.) 371; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173; Goodhue *v.* Churchman, 1 Barb. Ch. (N. Y.) 596; Babcock *v.* Perry, 4 Wis. 31; Dale *v.* Bugh, 16 Ind. 233; Powers *v.* Trenor, 3 Hun (N. Y.) 3; Wells *v.* Cruger, 5 Paige (N. Y.) 164; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Meach *v.* Chappell, 8 Paige (N. Y.) 135.

2. Meach *v.* Chappell, 8 Paige (N. Y.) 135; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Wells *v.* Cruger, 5 Paige (N. Y.) 164; Hunt *v.* Wallis, 6 Paige (N. Y.) 371; Thayer *v.* Swift, Walk. (Mich.) 384; Mowry *v.* Hill, 11 Wis. 146; Babcock *v.* Perry, 4 Wis. 31; Lansing *v.* McPherson, 3 Johns. Ch. (N. Y.) 424; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173; Goodhue *v.* Churchman, 1 Barb. Ch. (N. Y.) 596; Ferussac *v.* Thorn, 1 Barb. (N. Y.) 42; Stockton *v.* Williams, Harr. (Mich.) 241; Hunt *v.* Lindsay, Walk. (Mich.) 72; Grubb *v.* Crane, 5 Ill. 156; Dale *v.* Bugh, 16 Ind. 233.

It is the settled practice in chancery to require that an affidavit of merits shall state what the merits are. Thayer *v.* Swift, Walk. (Mich.) 384. By the well-settled practice of chancery a general affidavit of merits is not sufficient to open a default, but the affiant is required to state what the merits are, so that the court can see that the defense is not imaginary, and that the affiant can be punished for perjury if it is false. Meach *v.* Chappell, 8 Paige (N. Y.) 135. But see Burch *v.* Scott, 1 Bland (Md.) 112.

3. The proposed answer as well as the special affidavit is usually required to be served to open the default. Grubb *v.* Crane, 5 Ill. 156; Stockton *v.* Williams, Harr. (Mich.) 241; Russell *v.* Waite, Walk. (Mich.) 31.

Answer not a Substitute.—But a verified answer will not take the place of an affidavit of merits stating the facts of the defense. Mowry *v.* Hill, 11 Wis. 146.

4. Van Horne *v.* Montgomery, 5 How. Pr. (N. Y. Supreme Ct.) 238; Dix *v.* Palmer, 5 How. Pr. (N. Y. Supreme Ct.) 233; Ellis *v.* Jones, 6 How. Pr. (N. Y. Supreme Ct.) 296; Bower *v.* Kemp, 1 C. & J. 287; Lane *v.* Isaacs, 3 Dowl. Pr. Cas. 652; Tate *v.* Bodfield, 3 Dowl. Pr. Cas. 218; Page *v.* South, 7 Dowl. Pr. Cas. 412; Burrows *v.* Hill-

though the rule is not uniform, and many authorities require the facts constituting the defense to be stated.[1]

Verified Answer.—In some jurisdictions a verified answer is held to take the place of an affidavit of merits for the purpose of opening a default;[2] while in others both the proposed answer and an affidavit of merits must be served.[3]

house, 6 Johns. (N. Y.) 132; McKinstry *v.* Edwards, 2 Johns. Cas. (N. Y.) 113; Coggswell *v.* Vandenburg, 1 Cai. (N. Y.) 156; Briggs *v.* Briggs, 3 Johns. (N. Y.) 258; Francis *v.* Cox, 33 Cal. 323; Woodward *v.* Backus, 20 Cal. 137; Howe *v.* Caldren, 4 Nev. 171; State *v.* Consolidated Virginia, etc., Min. Co., 13 Nev. 194; Butler *v.* Mitchell, 17 Wis. 52.

1. When suspicious circumstances exist, a special affidavit of merits, stating the facts of the defense, has been required. Dix *v.* Palmer, 5 How. Pr. (N. Y. Supreme Ct.) 233; Ellis *v.* Jones, 6 How. Pr. (N. Y. Supreme Ct.) 296; Sheldon *v.* Campbell, 5 Hill (N. Y.) 508; Merchant's Bank *v.* Mills, 3 E. D. Smith (N. Y.) 210; McGaffigan *v.* Jenkins, 1 Barb. (N. Y.) 31.

Where the defendant had admitted the debt and asked time in which to pay it *held*, that his default should not be opened on a general affidavit, but that he should be compelled to disclo e the facts of his defense. Sheldon *v.* Campbell, 5 Hill (N. Y.) 508. A special affidavit should be required, stating the facts of the defense, to open default where defendant has used improper continuances to gain time. Gregory *v.* Stout, 6 Hill (N. Y.) 380.

And without regard to the circumstances, it seems to be the rule in many of the states to require a statement of the facts of the defense in the affidavit in order to open a default. Miller *v.* Alexander, 1 N. J. L. 400; Bell *v.* Kelly, 17 N. J. L. 270; Gibboney *v.* Gibboney, 2 Ill. App. 322; Holmes *v.* Parker, 125 Ill. 428; Rich *v.* Hathaway, 18 Ill. 548; Hitchcock *v.* Heizer, 90 Ill. 543; Pitts *v.* Magie, 24 Ill. 610; Treftz *v.* Stahl, 46 Ill. App. 462; Frost *v.* Dodge, 15 Ind. 139; Goldsberry *v.* Carter, 28 Ind. 59; Toledo, etc., R. Co. *v.* Gates, 32 Ind. 238; Yancy *v.* Teter, 39 Ind. 503; Phelps *v.* Osgood, 34 Ind. 297; Lake *v.* Jones, 49 Ind. 297; Buck *v.* Havens, 40 Ind. 221; Hays *v.* State Bank, 21 Ind. 154; Nord *v.* Marty, 56 Ind. 531; King *v.* Stewart, 48 Iowa 334; Jaeger *v.* Evans, 46 Iowa 188; McGrew *v.* Downs, 67 Iowa 687; McPherson *v.* Kingsbaker, 22 Kan. 646; Barry *v.* Johnson, 3 Mo. 372; Green *v.* Goodloe, 7 Mo. 25; Lamb *v.* Nelson, 34 Mo. 501; Campbell *v.* Garton, 29 Mo. 343; Florez *v.* Uhrig, 35 Mo. 517; Donnelly *v.* Clark, 6 Mont. 135; Goodhue *v.* Meyers, 58 Tex. 405; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Tullis *v.* Scott, 38 Tex. 537; Scott *v.* The Young America, Newb. Adm. 110.

2. It is sometimes held that a verified answer will take the place of an affidavit of merits for the purpose of opening a default. Kupferle *v.* Merchants' Nat. Bank, 32 Ark. 717; McPherson *v.* Kingsbaker, 22 Kan. 646; Haggerty *v.* Walker, 21 Neb. 596; Omro *v.* Ward, 19 Wis. 232; Levy *v.* Goldberg, 40 Wis. 308; Howey *v.* Clifford, 42 Wis. 561; Louchime *v.* Strouse, 49 Wis. 623; Laws Wis. 1861, ch. 211.

That a verified answer will not take the place of an affidavit of merits on such motion, see Parrott *v.* Den, 34 Cal. 79; Martin *v.* Skehan, 2 Colo. 614; Butler *v.* Whitehell, 15 Wis. 355; Jones *v.* Russell, 3 How. Pr. (N. Y. Supreme Ct.) 324.

New York.—Although § 980 of the *New York* Code allows a verified answer to take the place of an affidavit of merits for the purpose of preventing an inquest, it does not seem to have changed the rule in other respects. State Bank *v.* Gill, 23 Hun (N. Y.) 406.

3. Reynolds *v.* Palen, 13 Civ. Pro. Rep. (N. Y.) 200; Palmer *v.* Van Orden, 4 Civ. Pro. Rep. (N. Y.) 44; Hale *v.* Bender, 13 Neb. 665; Spencer *v.* Thistle 13 Neb. 201; Fritz *v.* Grosnicklaus, 20 Neb. 413. Where the affidavit of merits stated the nature of the defense, *held*, that service of the proposed answer was excused. Palmer *v.* Van Orden, 4 Civ. Pro. Rep. (N. Y.) 44, 49 N. Y. Super. Ct. 89.

Where the proposed answer is frivolous or bad the motion has been denied. Hunt *v.* Mails, 1 Code Rep.

When Defaults Opened.—Where probable merits are shown, defaults are usually opened.[1]

Irregular Default.—It is only where a judgment by default has been regularly taken that an affidavit of merits is required to open it; if irregular, no merits need be shown.[2]

3. To Extend Time to Answer or Demur.—An affidavit of merits is sometimes required to obtain an extension of time to answer or demur.[3]

4. To Change Venue.—On a motion to change the venue of an

(N. Y.) 118; Potter *v.* Clark, 6 Abb. Pr. (N. Y.) 74, note. But the answer must be clearly bad in order to defeat the motion. Excise *v.* Hallister, 2 Hilt. (N. Y.) 588.

1. Andrews *v.* Davane, 2 Hayw. (N. Car.) 373. See DEFAULTS.

Justice's Judgment — New York.—§ 3064 *New York* Code of Civil Procedure provides that a justice's judgment by default may be set aside on appeal if excused and shown that injustice has been done. *Held*, that to set aside such a judgment the appellant must show that he has a meritorious defense, and should state what the defense is. Young *v.* Conklin, 3 Misc. Rep. (N. Y.) 122.

Technical Defense.—Where only a technical defense is shown, viz., alleged defects appearing on the face of the complaint, *held*, no ground for opening the judgment. People *v.* Rains, 23 Cal. 127. *Same effect*, Jones *v.* San Francisco Sulphur Co., 14 Nev. 172; Ewing *v.* Jennings, 15 Neb. 379; Howard *v.* Abbey, 1 West. L. Month. (Ohio) 278.

Plaintiff Admitting Partial Defense.—Motion to open a default should not be denied because plaintiff concedes a defense as to part of his claim, and consents to exclude that part from his judgment. Francis *v.* Cox, 33 Cal. 323.

2. Norton *v.* Atchison, etc., R. Co., 97 Cal. 388; Browning *v.* Roane, 9 Ark. 354, 50 Am. Dec. 218; Howell *v.* Denniston, 3 Cai. (N. Y.) 96; Thomas *v.* Douglass, 2 Johns. Cas. (N. Y.) 226; DePeyster *v.* Warne, 2 Cai. (N. Y.) 45; Gulick *v.* Thompson, 4 N. J. L. 292; Rice *v.* Griffith, 9 Iowa 539; Findley *v.* Johnson, 1 Overt. (Tenn.) 344.

Where the *Ohio* Code, § 538, provided "that a judgment should not be vacated on motion until it was adjudged there was a good defense," *held*, that this provision did not apply to a judgment obtained on a warrant of attorney which applied only to another and distinct cause of action, or where the court had obtained no jurisdiction of the person of the defendant. Knox County Bank *v.* Doty, 9 Ohio St. 505, 75 Am. Dec. 479. So where a default was obtained through misapprehension or mistake occasioned by the plaintiff or his attorney, it was opened without showing merits, although it was regularly obtained. Stewart *v.* Atkins, 3 Cow. (N. Y.) 67; Olney *v.* Bacon, 3 Cai. (N. Y.) 132.

Merits Although Irregular.—Although a judgment has been irregularly entered it will not be opened unless the petitioner shows he might have succeeded in the merits, and that injustice has been done. Ela *v.* Goss, 20 N. H. 52.

3. Rule 24 of the *New York* Supreme Court provides that "no order extending a defendant's time to answer or demur shall be granted unless the party applying for such order shall present to the justice or judge to whom the application shall be made an affidavit of merits, or proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint or to some part thereof." An order made extending the time to answer or demur without an affidavit of merits is irregular and may be disregarded. Ellis *v.* Van Ness, 14 How. Pr. (N. Y. Supreme Ct.) 313; Graham *v.* Pinckney, 7 Robt. (N. Y.) 147; Davenport *v.* Sniffen, 1 Barb. (N. Y.) 223. The affidavit or copy must be served. Corning *v.* Roosevelt (Supreme Ct.) 10 N. Y. Supp. 93. See also Pingar *v.* Van Click, 36 Wis. 141; Scammon *v.* McKey, 21 Ill. 554; Ball *v.* Geoch, 78 Wis. 355.

action an affidavit of merits is required by the practice of some jurisdictions.[1]

5. On Motions Generally.—An affidavit of merits is frequently required to be made by a defendant on making motions, especially if the motion be one which tends to delay the action.[2] Such an affidavit has been required on a motion to stay proceedings on a bail bond;[3] to set aside proceedings for irregularity;[4] to obtain a stay of proceedings on a commission to examine witnesses;[5] to obtain leave to answer after a demurrer has been overruled as frivolous;[6] to resist a motion to strike out a plea as false;[7] to obtain a continuance.[8] But where the complaint has not been

1. Nicoll *v.* Nicoll, 4 West Coast Rep. (Cal.) 219; Watkins *v.* Degener, 63 Cal. 500; Buell *v.* Dodge, 63 Cal. 553; Rathget *v.* Tiscornia, 66 Cal. 96; Rowland *v.* Coyne, 55 Cal. 1; Johnson *v.* Nevison, 2 Dowl. Pr. Cas. 260; Chemung Canal Bank *v.* Chemung County, 1 How. Pr. (N. Y.) 162; Swartwout *v.* Hooge, 16 Johns. (N. Y.) 3; Mills *v.* Adsit, 2 How. Pr. (N. Y.) 83; Brittain *v.* Peabody, 4 Hill (N. Y.) 61; Brownell *v.* Marsh, 22 Wend. (N. Y.) 636; Johnson *v.* Rogers, 3 Cow. (N. Y.) 14; Cromwell *v.* Van Rensselaer, 3 Cow. (N. Y.) 346; Onondaga County Bank *v.* Shepherd, 19 Wend. (N. Y.) 10, 1 Green's New Pr. (Mich.) 516; Wharton *v.* Barry, 1 How. Pr. (N. Y.) 62; Anonymous, 1 Hill (N. Y.) 668; Jordan *v.* Garrison, 6 How. Pr. (N. Y. Supreme Ct.) 6; Bleecker *v.* Storms, 2 How. Pr. (N. Y.) 161; State Bank *v.* Gill, 23 Hun (N. Y.) 406; Carpenter *v.* Continental Ins. Co., 31 Hun (N. Y.) 78; Noys Mfg. Co. *v.* Whitmore, 23 N. Y. Wkly. Dig. 424; Chapin *v.* Overin, 55 N. Y. St. Rep. 130. *Contra*, Sherman *v.* Gregory, 42 How. Pr. (N. Y. Supreme Ct.) 481.

Rule 48 of the *New York* Supreme Court provides that, in addition to what has usually been stated in affidavits on motions to change the place of trial, either party may state the nature of the controversy, and show how his witnesses are material, and where the cause of action or defense arose.

§ 396 of the *California* Code of Civil Procedure provides that on motions to change the venue the defendant must file an affidavit of merits at the time he appears and answers or demurs. Under this provision it has been held that the affidavit of merits should accompany the answer or demurrer, and that one filed before is inconsequential and would not be sufficient on such motion. Nicoll *v.* Nicoll, 4 West Coast Rep. (Cal.) 219.

2. Bourne *v.* Walker, 2 C. & M. 338; Hilton *v.* Jackson, 1 Chit. Rep. 677, 18 E. C. L. 201; 3 Chitty Genl. Pr. 543.

Rule 23 of *New York* Supreme Court provides that, when an affidavit of merits has once been served and filed, no other shall be necessary, but that on making a motion such filing and serving shall be shown by affidavit. Prior to the making of such a rule it was held that an affidavit of merits made for the purpose of one motion could not be used on another motion. Robinson *v.* Sinclair, 1 How. Pr. (N. Y.) 106; Cutler *v.* Biggs, 2 Hill (N. Y.) 409; Popham *v.* Baker, 1 How. Pr. (N. Y.) 166. But the court would not presume without proof that an attempt was being made to use the same affidavit twice. Mygatt *v.* Garrison, 18 Abb. Pr. (N. Y.) 292, note.

A Defendant who makes a Motion before Answering is still required to make an affidavit of merits. Bingham *v.* Bingham, 1 Civ. Pro. Rep. (N. Y.) 166.

3. Bourne *v.* Walker, 2 C. & M. 138; Hilton *v.* Jackson, 1 Chit. Rep. 677, 18 E. C. L. 201; Tidd Pr., vol. 1, p. 302.

4. Chitty Genl. Pr.; Tate *v.* Bodfield, 3 Dowl. Pr. Cas. 218.

5. Meech *v.* Calkins, 4 Hill (N. Y.) 534; Seymour *v.* Strong, 19 Wend. (N. Y.) 98; Warner *v.* Harvey, 9 Wend. (N. Y.) 444.

6. Appleby *v.* Elkins, 2 Sandf. (N. Y.) 673, 2 Code Rep. (N. Y.) 80; Harlow *v.* Hamilton, 6 How. Pr. (N. Y. Super. Ct.) 475.

7. On such a motion an affidavit of merits is required, but a general affidavit is sufficient where there is no intricacy in the plea interposed. Bowen *v.* Bissell, 6 Wend. (N. Y.) 511.

8. **On a Motion for a Continuance a**

filed or served and the defendant has not had a chance to examine into the nature of the cause of action, it has been held not necessary on any motion relating to the complaint.[1]

V. At What Time Made.—An affidavit of merits is not required to be made until after the plaintiff has filed or served his declaration or complaint.[2] One made before that time is premature and of no effect.[3] It is usually required to be made on or before the time of joining issue,[4] or before trial,[5] but should be made before if defendant takes proceedings before joinder of issue.[6]

One Affidavit of merits is usually sufficient ;[7] and if a second one is

general affidavit of merits made by the defendant, and swearing to the advice of counsel as to a meritorious defense, was held a sufficient affidavit of merits to support such motion. Sutton *v.* Wegner, 72 Wis. 294; Engs *v.* Overing, 2 Code Rep. (N. Y.) 79.

1. Engs *v.* Overing, 2 Code Rep. (N. Y.) 79.

2. Engs *v.* Overing, 2 Code Rep. (N. Y.) 79; Laws of *Illinois*, 1877, Hurd Rev. Sts. 1891, 1047, § 37; Laws of *Pennsylvania* 1887, P. L., 271; *California* Code of Civil Procedure, § 396; *Mississippi* Code of 1892, § 697; Johnston *v.* Beard, 7 Smed. & M. (Miss.) 214.

3. An affidavit of merits made before the filing or service of the complaint is not sufficient to warrant the setting aside of an inquest. A defendant cannot swear to merits until he knows what the claim of plaintiff is. Geib *v.* Icard, 11 Johns. (N. Y.) 82. And see Nicall *v.* Nicall, 4 West Coast Rep. (Cal.) 219.

4. Laws of *Illinois*, 1877, Hurd Rev. Sts. 1047, § 37; *Pennsylvania* Laws 1887, P. L., 271; Code of Civ. Proc. *California*, § 396; *Mississippi* Code 1892, § 396.

Under the *Pennsylvania* act of May 25, 1889, such affidavit should be filed on or before the return day of the writ, or within fifteen days after notice of the filing of plaintiff's statement. Newbold *v.* Pennock, 154 Pa. St. 591. Under the former statute it was held that it might be filed at any time before motion for judgment, Gillespie *v.* Smith, 13 Pa. St. 65; or even after such motion, West *v.* Simmons, 2 Whart. (Pa.) 261.

Under § 396 of the *California* Code requiring the filing of an affidavit of merits with the appearance of defendant, or when he joins issue on a motion to change the venue, *held*, that it must be filed when issue is joined, and that one filed before was of no effect. Nicall *v.* Nicall, 4 West Coast Rep. (Cal.) 219.

5. Although the statute of *Illinois* requires defendant to file an affidavit of merits with his plea in certain cases, it has been held sufficient if he files it before the case is reached for trial. Barnes *v.* Sisson, 44 Ill. App. 327. So, on appeal from a justice court, it was held that the affidavit of merits need not be filed until the action is reached for trial. Martin *v.* Hochstadter, 27 Ill. App. 166; World's Soap Mfg. Co. *v.* Woltz, 27 Ill. App. 302. To prevent an inquest such an affidavit should be made and served before the first day of the term. Rule 28, *New York* Supreme Court; Rule 99, *Michigan* Supreme Court; Brainard *v.* Hanford, 6 Hill (N. Y.) 368.

6. Rule 23, *New York* Supreme Court; Bingham *v.* Bingham, 1 Civ. Pro. Rep. (N. Y.) 166.

7. **More than one Affidavit.**—Rule 23, *New York* Supreme Court, provides that when an affidavit of merits has once been filed and served, no other shall be necessary, but that on making a motion such service and filing shall be shown by affidavit. Prior to the making of such a rule it had been held that an affidavit of merits made for one purpose could not be used for another purpose. Cutler *v.* Biggs, 2 Hill (N.Y.) 409; Popham *v.* Baker, 1 How. Pr. (N.Y.) 166; Colegate *v.* Marsh, 2 How. Pr. (N. Y.) 137. But an affidavit of merits made for one purpose was always held sufficient for that purpose, and no second affidavit was required. Prescott *v.* Roberts, 6 Cow. (N. Y.) 45; Van Rensselaer *v.* Hamilton, 4 Cow. (N.Y.) 539; Colver *v.* Van Walen, 6 How. Pr. (N. Y. Supreme Ct.) 102. Changing the place of trial does not affect the validity of an affidavit of merits once made and filed, or make

made, the first is considered abandoned.[1]

VI. By Whom Made—Defendant.—The affidavit of merits should in general be made by the defendant in the action, unless his failure to make it is properly excused.[2]

Real Party in Interest.—It may be made by the real party in interest, although he is not a defendant on the record.[3]

a second one necessary. Prescott *v.* Roberts, 6 Cow. (N. Y.) 46. Nor is it necessary to note the filing thereof upon each calendar or docket of the court in order to protect defendant's rights. Worthington *v.* Pierson, 3 Edw. Ch. (N. Y.) 297.

1. Where, on objection to his first affidavit of merits, the defendant files a second one, it has been held that he thereby abandons the first one, and that the court cannot consider the first, but must determine defendant's defense solely on the second affidavit. Stuber *v.* Schack, 83 Ill. 191; Hays *v.* Loomis, 84 Ill. 18; Eberhart *v.* Page, 89 Ill. 550; Culver *v.* Johnson, 90 Ill. 91. But in *Pennsylvania* it seems that the first and second, or supplemental, affidavits are both considered by the court. Callan *v.* Lukens, 7 W. N. C. (Pa.) 28; Hill *v.* Gaw, 4 Pa. St. 495; West *v.* Simmons, 2 Whart. (Pa.) 261.

2. Morris *v.* Hunt, 1 Chit. Rep. 97, 18 E. C. L. 37; Neesom *v.* Whytock, 3 Taunt. 403; Rowbotham *v.* Dupree, 5 Dowl. Pr. Cas. 557; Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199; Mason *v.* Bidleman, 1 How. Pr. (N. Y.) 62; Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Bailey *v.* Taaffe, 29 Cal. 422; Bernstien *v.* Brown, 23 Neb. 64; Bank of Michigan *v.* Williams, Harr. (Mich.) 219; Griel *v.* Buckins, 114 Pa. St. 187; Reisky *v.* Gilman, 13 W. N. C. (Pa.) 282; Cowperthwait *v.* Roney, 10 W. N. C. (Pa.) 482; Krauer *v.* Cameron, 17 W. N. C. (Pa.) 223; Clymer *v.* Fitler, 1 W. N. C. (Pa.) 626; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177; Philadelphia *v.* Peterson, 3 W. N. C. (Pa.) 298; Cumberland B'ld'g, etc., Assoc. *v.* Brown, 4 W. N. C. (Pa.) 494; Burkhart *v.* Parker, 6 W. & S. (Pa.) 480; James *v.* Young, 1 Dall. (Pa.) 248; Evans *v.* Boon, 27 W. N. C. (Pa.) 574; Wilkinson *v.* Brice, 30 W. N. C. (Pa.) 30.

Illinois.—The statute of *Illinois* provides that the affidavit may be filed by the defendant or his agent or attorney. Hurd Rev. Sts. 1047, § 37, ed. of 1891; Bancroft *v.* Eastman, 7 Ill. 259.

Marriage Pending Action.—One who marries a *feme sole* during the pendency of an action is substantially a party to the record, and can make an affidavit of merits. Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581.

Corporations Defendant. — Where a corporation is defendant, the affidavit of merits may be made by an officer of the corporation. Billington *v.* Gautier Steel Co., 19 W. N. C. (Pa.) 339. But should not be made by a mere stockholder unless good reason is shown why it is not made by an officer or director. Erie Boot, etc., Co. *v.* Eichenlaub, 127 Pa. St. 169.

3. Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581; Miller *v.* Hooker, 2 How. Pr. (N. Y.) 124; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177; Fraley *v.* Steinmetz, 22 Pa. St. 437; Hunter *v.* Reilly, 36 Pa. St. 509.

Guarantor.—One who has bound himself to pay a judgment which may be recovered on a claim against another is entitled to file an affidavit of defense in a suit against his principal. Urich *v.* Zern, 2 Pa. Dist. Rep. 55.

Stranger.—But a mere stranger to the contest, who shows no interest in it, cannot make an affidavit of defense, and one made by him will be disregarded. Bancroft *v.* Sterr, 1 W. N. C. (Pa.) 132; Gross *v.* Painter, 1 W. N. C. (Pa.) 154; Stallaker *v.* Lardner, 1 W. N. C. (Pa.) 169; Philadelphia *v.* Devine, 1 W. N. C. (Pa.) 358; Russell *v.* Foran, 1 W. N. C. (Pa.) 470; Philadelphia *v.* Gross, 2 W. N. C. (Pa.) 429.

Where, in an action brought against the endorsers of a note, an affidavit of defense was made by the maker of the note (not a party to the suit) averring on information and belief failure to give notice of nonpayment, *held*, that it should be disregarded, as the maker showed no interest in the action. Blew *v.* Shock, 1 W. N. C. (Pa.) 612.

Several Defendants.—Where several defendants have the same defense, the affidavit of merits may be made by one of them, and has been held sufficient for them all.[1] Where joint defendants plead jointly, one affidavit of merits accompanying the plea has been held sufficient.[2] But where they sever in pleading, each plea has been required to be supported by an affidavit of merits.[3]

Agent or Attorney.—An affidavit of merits may be made also by the defendant's agent or attorney in fact,[4] the attorney or counsel of a party,[5] or the attorney's clerk.[6] In such cases an excuse

1. Ontario Bank *v.* Baxter, 6 Cow. (N. Y.) 395; Clark *v.* Parker, 19 Wend. (N. Y.) 125; Rowland *v.* Coyne, 55 Cal. 1; People *v.* Larne, 66 Cal. 235. But it must be made clearly to appear that the defense of the other defendants is the same as that of the defendant making the affidavit, or it will not be sufficient. Clark *v.* Parker, 19 Wend. (N. Y.) 125.

Maker and Endorsers.—Where several suits were brought against the maker and endorsers of a note, they being sued in separate actions, an affidavit of merits made by the maker in all the suits was held sufficient to open the defaults therein, he swearing that he was acquainted with the facts, and that the defense was the same in all the actions. It was objected that the maker was only a party to the record of one of the suits, but his affidavit was sustained by reason of his being a party to the instrument sued on, and acquainted with the facts and the identity of the defenses in each action. Ontario Bank *v.* Baxter, 6 Cow. (N. Y.) 395.

Submission of Controversy.—The Revised Statute of *Indiana*, 1881, § 553, relating to the submission of controversies in an agreed statement of facts, provides that it must appear by affidavit that the controversy is real, and that the proceedings are brought in good faith. Under this statute it was held that it was not necessary that such an affidavit should be made by both parties, and that an affidavit by one was sufficient. Booth *v.* Cottingham, 126 Ind. 431. See AGREED CASE.

Sheriff and Sureties.—In an action brought against a sheriff and his sureties, it was held that an affidavit of merits made by the sheriff was sufficient for all the defendants, on a motion to change the venue. Rowland *v.* Coyne, 55 Cal. 4.

2. Hurd *v.* Burr, 22 Ill. 29; Smith *v.* Bateman, 79 Ill. 531.

3. Whiting *v.* Fuller, 22 Ill. 33.

4. Morris *v.* Hunt, 1 Chit. Rep. 97, 18 E. C. L. 37; Rowbotham *v.* Dupree, 5 Dowl. Pr. Cas. 577; Schofield *v.* Huggins, 3 Dowl. Pr. Cas. 427; Reisky *v.* Gilman, 13 W. N. C. (Pa.) 282; Cowperthwait *v.* Roney, 10 W. N. C. (Pa.) 482; Krauer *v.* Cameron, 17 W. N. C. (Pa.) 223; Mason *v.* Bidleman, 1 How. Pr. (N. Y.) 62; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199. An agent in London of the defendant's attorney in the country has been allowed to make an affidavit of merits. Schofield *v.* Huggins, 3 Dowl. Pr. Cas. 427. So a person so connected with the matter as to be fully acquainted with the facts of the case has been allowed to make the affidavit of merits. Rowbotham *v.* Dupree, 5 Dowl. Pr. Cas. 577; James *v.* Young, 1 Dall. (Pa.) 248. It must be made on behalf of defendant. Marshall *v.* Whitte, 1 Phila. (Pa.) 117.—*Contra.*—Such an affidavit cannot be made by an attorney on information derived from his client. Crine *v.* Wallace, 1 W. N. C. (Pa.) 292.

5. Morris *v.* Hunt, 1 Chit. Rep. 97, 18 E. C. L. 37; Neesom *v.* Whytock, 3 Taunt. 403; Frankoviz *v.* Smith, 35 Minn. 278; Bailey *v.* Taaffe, 29 Cal. 422; Geib *v.* Icard, 11 Johns. (N. Y.) 82; Philips *v.* Blagge, 3 Johns. (N. Y.) 144; Banks *v.* Walker, 1 Barb. Ch. (N. Y.) 74; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199. An affidavit of merits may be made by the attorney if he have personal knowledge of the facts. Frankoviz *v.* Smith, 35 Minn. 278. It is no objection that the knowledge of the attorney is derived from the defendant, as this is usually all the information the attorney can have. Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199.

6. Neesom *v.* Whytock, 3 Taunt. 403; Morris *v.* Hunt, 1 Chit. Rep. 97, 18 E. C. L. 37; Nash *v.* Swinburn, 4 Scott N. R. 326, 3 M. & G. 630; Doe *v.* Mc-

for defendant's failure to make it should usually be shown.[1] When such an excuse has been attempted, plaintiff has been allowed to controvert it by affidavits, in order to show that the substituted affidavit should not be received.[2]

VII. Contents of Affidavit of Merits—1. In General—*a.* THE USUAL AFFIDAVIT—**Ordinary Form.**—The form of the affidavit of merits usually required to be made by a defendant and which should generally be strictly followed is "that defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense upon the merits in the action, as he is advised by his counsel and verily believes."[3]

Every Part of this Form is Material, and any departure from it should be avoided.[4] The affidavit should state that defendant has *fully*

Donnell, 8 Dowl. Pr. Cas. 508, 4 Jur. 578; Bromley *v.* Gerish, 7 Scott N. R. 516, 6 M. & G. 750. If made by the attorney's clerk it should show that he has had the management of the case and is acquainted with the facts fully. Doe *v.* McDonnell, 4 Jur. 578; Morris *v.* Hunt, 1 Chit. Rep. 97, 18 E. C. L. 37.

1. Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581; Mason *v.* Bidleman, 1 How. Pr. (N. Y.) 62; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199; Geib *v.* Icard, 11 Johns. (N. Y.) 82; Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Bailey *v.* Taaffe, 29 Cal. 422; Nicholl *v.* Nicholl, 66 Cal. 36; People *v.* Spalding, 2 Paige (N. Y.) 326; Bank of Michigan *v.* Williams, Harr. (Mich.) 219; Griel *v.* Buckins, 114 Pa. St. 187; Reisky *v.* Gilman, 13 W. N. C. (Pa.) 282; Cowperthwait *v.* Roney, 10 W. N. C. (Pa.) 482; Krauer *v.* Cameron, 17 W. N. C. (Pa.) 223; Clymer *v.* Fitler, 1 W. N. C. (Pa.) 626; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177.

Sufficient Excuse.—The absence of the defendant from the state or beyond seas will usually be a sufficient excuse for his not making the affidavit of merits. Reisky *v.* Gilman, 13 W. N. C. (Pa.) 282; Krauer *v.* Cameron, 17 W. N. C. (Pa.) 223; Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Geib *v.* Icard, 11 Johns. (N. Y.) 82; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199. So also the severe sickness of the defendant, incapacitating him from making the affidavit, is a sufficient excuse for his not making it. James *v.* Young, 1 Dall. (Pa.) 248; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177; Clymer *v.* Fitler, 1 W. N. C. (Pa.) 626; Mason *v.* Bidleman, 1 How. Pr. (N. Y.) 62. But that the facts are peculiarly within the knowledge of some other person is no excuse for defendant's not making the affidavit. In such case the defendant should make it on information and belief. Philadelphia *v.* Peterson, 3 W. N. C. (Pa.) 292; Cumberland B'ld'g, etc., Assoc. *v.* Bunn, 4 W. N. C. (Pa.) 494. So too if defendant's affidavit could have been obtained at any time before the circuit, the affidavit of another person is insufficient. Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199.

When the defendant puts in an affidavit of defense, made by another than himself, it must show upon its face sufficient reason why it is not made by the defendant himself, that a real disability exists which prevented him from making it, and the circumstances giving rise to the disability. Griel *v.* Buckins, 114 Pa. St. 187.

2. Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199; Quin v. Riley, 3 Johns. (N. Y.) 249. And see Douglass *v.* Todd, 96 Cal. 655.

3. Brown *v.* St. John, 19 Wend. (N. Y.) 617; Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549; Brittain *v.* Peabody, 4 Hill (N. Y.) 61; State Bank *v.* Gill, 4 Hill (N. Y.) 535; Tate *v.* Bodfield, 3 Dowl. Pr. Cas. 218; Page *v.* Smith, 7 Dowl. Pr. Cas. 412; Hazelrigg *v.* Wainwright, 17 Ind. 218; Woodward *v.* Backus, 20 Cal. 137; Nickerson *v.* California Raisin Co., 61 Cal. 268; Burnham *v.* Smith, 11 Wis. 258; Sutton *v.* Wegner, 72 Wis. 294; Bernstien *v.* Brown, 23 Neb. 64; Home *v.* Caldren, 4 Neb. 171; Lecompte *v.* Wash, 4 Mo. 557; Treftz *v.* Stahl, 46 Ill. App. 462.

4. Brown *v.* St. John, 19 Wend. (N. Y.) 617.

and fairly stated[1] *the case*;[2] a statement of the defendant's

1. **Alleging "Statement" of Case.**—Bleecker *v.* Storms, 2 How. Pr. (N. Y.) 161; Brown *v.* St. John, 19 Wend. (N. Y.) 617; Cary *v.* Livermore, 2 How. Pr. (N. Y.) 170; Hazelrigg *v.* Wainwright, 17 Ind. 218. It should state that defendant has fully and fairly stated, etc. Equivalent words will not answer unless some good excuse for the failure to follow the rule is shown, and where the words used were "that defendant has made a full and fair statement of all the facts of the case so far as they had come to his knowledge, and believed them to exist," *held*, defective. Brown *v.* St. John, 19 Wend. (N. Y.) 617.

So where the affidavit was that defendant had fully stated, etc., the word "fairly" being omitted, it was held bad. Bleecker *v.* Storms, 2 How. Pr. (N. Y.) 160. So where the words "fully and fairly stated," etc., were omitted, it was held defective. Cary *v.* Livermore, 2 How. Pr. (N. Y.) 170.

But an affidavit stating "that the case had been fully and fairly represented to counsel," etc., was held sufficient. Francis *v.* Cox, 33 Cal. 323; Woodward *v.* Backus, 20 Cal. 137.

Where an affidavit by an attorney stated that from representations made to him by defendant and the papers he had examined he verily believed defendant had a legal defense, *held* sufficient. Philips *v.* Blagge, 3 Johns. (N. Y.) 141.

2. **Alleging Statement of "the Case."**—Ellis *v.* Jones, 6 How. Pr. (N. Y. Supreme Ct.) 296; Richmond *v.* Cowles, 2 Hill (N. Y.) 359; Fitzhugh *v.* Truax, 1 Hill (N. Y.) 644; Tompkins *v.* Acer, 10 How. Pr. (N. Y. Supreme Ct.) 309.

Where it was alleged that defendant had fully and fairly stated *his* case, or the facts of *his* case, *held* defective, as not equivalent to *the* case. It implies that but one side of the case has been stated, viz., that of the defendant. Fitzhugh *v.* Truax, 1 Hill (N. Y.) 644; Ellis *v.* Jones, 6 How. Pr. (N. Y. Supreme Ct.) 296; Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549.

"This" or "His" Case.—Where it was alleged that defendant had stated *this* case or *his* case, it was held sufficient, as fairly implying that he had stated the whole case. Brownell *v.* Marsh, 22 Wend. (N. Y.) 636; Brown *v.* Master, 2 How. Pr. (N. Y.) 195. An allegation that defendant has stated *this* case held equivalent to a statement of *the* case. Jordan *v.* Garrison, 6 How. Pr. (N. Y. Supreme Ct.) 6.

Facts to His Knowledge.—An allegation that defendant has stated all the facts of the case, "so far as the facts have come to his knowledge," etc., was held defective, as not implying a statement of the who'e case. Brown *v.* St. John, 19 Wend. (N. Y.) 617.

"His Defense."—An allegation that defendant has stated *his defense*, instead of the *case*, is bad. Richmond *v.* Cowles, 2 Hill (N. Y.) 359; Tompkins *v.* Acer, 10 How. Pr. (N. Y. Supreme Ct.) 309; Rickards *v.* Swetzer, 3 How. Pr. (N. Y. Supreme Ct.) 413; McMurray *v.* Gifford, 5 How. Pr. (N. Y. Supreme Ct.) 14; Nickerson *v.* California Raisin Co., 61 Cal. 268; Brownell *v.* Marsh, 22 Wend. (N. Y.) 636; Burnham *v.* Smith, 11 Wis. 258. *Contra*, see Bernstien *v.* Brown, 23 Neb. 64.

Facts of the Case.—But *held* that there is no substantial difference between an affidavit "that defendant has fully and fairly stated the case in this action" and one "that he has fully and fairly stated *the facts* of the case in this action." Reidy *v.* Scott, 53 Cal. 69; Rathgeb *v.* Tiscornia, 66 Cal. 96; Buell *v.* Dodge, 63 Cal. 553.

No Statement of Facts.—And where an affidavit made by a defendant contained no allegation of a statement of facts, but was "that defendant has a good defense on the merits, as he is advised and believes," it was held sufficient. Crosby *v.* Innes, 5 Dowl. Pr. Cas. 566.

"His Case in this Cause."—An allegation that defendant had stated his case in *this* cause" held bad, as not equivalent to a statement that he had stated his case generally. Ellis *v.* Jones, 6 How. Pr. (N. Y. Supreme Ct.) 296. But such an allegation was held good in *California*, viz., "that I have fully and fairly stated the case in this action." Watkins *v.* Degener, 65 Cal. 500.

Proper Form.—"That defendant has fully and fairly stated the case to his counsel" is proper in form, and sufficient. Brown *v.* St. John, 19 Wend. (N. Y.) 617; Jordan *v.* Garrison, 6 How. Pr. (N. Y. Supreme Ct.) 6; Buell *v.* Dodge, 63 Cal. 553; Woodward *v.* Backus, 20 Cal. 138.

defense is not sufficient.[1] The statement should be alleged to have been made *to the defendant's counsel.*[2] It must be alleged that defendant has a *good and substantial defense*,[3] and that such

1. **Defendant's Defense.**—An affidavit "that defendant has fully and fairly stated the said defendant's defense in this action to his counsel" is not sufficient. It must clearly appear that defendant has fully and fairly stated the facts of the case to his counsel, before the advice of counsel can amount to a *prima-facie* showing of a meritorious defense, and a statement of defendant's defense is only a partial statement of the facts of the case. Nickerson *v.* California Raisin Co., 61 Cal. 268. An affidavit "that defendant has fully and fairly stated his case and the facts constituting his defense," etc., held bad. People *v.* Larne, 66 Cal. 235. *Semble*, that a statement of the grounds of defense would be sufficient. Bernstien *v.* Brown, 23 Neb. 64.

An affidavit of merits stating "that the defendant has fully and fairly stated to his attorneys (naming them) all the facts of said case, and they have informed him that he has a good and perfect defense to said action, and affiant therefore states that he has a good defense to said action," was held sufficient. Reidy *v.* Scott, 53 Cal. 69.

On a motion to open a default, defendant's affidavit of merits stated "that defendant had employed an attorney and stated his defense to him, and through the attorney's neglect the default had been taken, and since then he had employed another attorney, by whom he was advised that he had a good defense on the merits, and he believed the same to be true." *Held* insufficient, and motion denied. Sanborn *v.* Centralia Furniture Mfg. Co., 5 Wash. 150.

On a motion to open a default, defendant's affidavit of merits stated "that defendant had a good and valid defense upon the merits to the whole of said plaintiff's claim in this action, and that he is not indebted to the plaintiff in the amount claimed in the complaint, or in any sum whatsoever." *Held* insufficient as an affidavit of merits; but the default was opened on terms on the ground that it was the policy of the court to open all defaults not caused by gross neglect. Dûché *v.* Voisin, 18 Abb. N. Cas. (N. Y.) 358.

2. State Bank *v.* Gill, 23 Hun (N. Y.) 406; Bernstien *v.* Brown, 23 Neb. 64; Treftz *v.* Stahl, 46 Ill. App. 462; Hazelrigg *v.* Wainwright, 17 Ind. 218. It must appear that the statement was made to the counsel of defendant, in order that the advice thereon should be effectual. Nickerson *v.* California Raisin Co., 61 Cal. 268; Brown *v.* St. John, 19 Wend. (N. Y.) 617; and that the counsel was the counsel of the defendant in the action. State Bank *v.* Gill, 23 Hun (N. Y.) 406. Where it was alleged "that defendant had fully and fairly stated the case in this action to his attorney and counsel," it was held sufficient. Watkins *v.* Degener, 63 Cal. 500.

3. State Bank *v.* Gill, 23 Hun (N. Y.) 406; Bank of Utica *v.* Root, 4 Hill (N. Y.) 535; Tate *v.* Bodfield, 3 Dowl. Pr. Cas. 218; Lane *v.* Isaacs, 3 Dowl. Pr. Cas. 652; Reidy *v.* Scott, 53 Cal. 69; Woodward *v.* Backus, 20 Cal. 138; Rowland *v.* Coyne, 55 Cal. 1; Page *v.* Smith, 7 Dowl. Pr. Cas. 412; Lynch *v.* Mosher, 4 How. Pr. (N. Y. Supreme Ct.) 86; Wharton *v.* Barry, 1 How. Pr. (N. Y.) 62; Brittain *v.* Peabody, 4 Hill (N. Y.) 61; Bernstien *v.* Brown, 23 Neb. 64; Bower *v.* Kemp, 1 C. & J. 288; Westerley *v.* Kemp, 1 Tyr. 261. The affidavit should state that defendant has "a good and substantial defense;" any departure from this form has been held bad. Bower *v.* Kemp, 1 C. & J. 288; Westerley *v.* Kemp, 1 Tyr. 261; Lane *v.* Isaacs, 3 Dowl. Pr. Cas. 652; Pringle *v.* Marsack, 1 D. & R. 155; Kenney *v.* Hutchinson, 4 Jur. 106; Lynch *v.* Mosher, 4 How. Pr. (N. Y. Supreme Ct.) 86; Brittan *v.* Peabody, 4 Hill (N. Y.) 61; Warton *v.* Barry, 1 How. Pr. (N. Y.) 62; Bernstien *v.* Brown, 23 Neb. 64.

"**Full and Substantial.**"—That defendant has "a full and substantial defense," *held* not equivalent to "a good and substantial defense." Bank of Utica *v.* Root, 4 Hill (N. Y.) 535.

"**Good and Lawful.**"—"That defendants have a good, lawful, and sufficient defense," *held* not equivalent to "a good and substantial defense." Bernstien *v.* Brown, 23 Neb. 64.

"**Good Cause of Defense.**"—"That defendant has merits, and a good cause of defense," *held* insufficient.

defense is *upon the merits* [1]

Lane *v.* Isaacs, 3 Dowl. Pr. Cas. 652.

"**Good and Perfect.**" — But "that defendant has a good and perfect defense," *held* sufficient. Reidy *v.* Scott, 53 Cal. 69. So, that "defendant has a good, full, and perfect defense," has been held sufficient. Woodward *v.* Backus, 20 Cal. 137; Francis *v.* Cox, 33 Cal. 323.

"**Good and Valid.**"—"That defendant has a good and valid defense" has been held sufficient. Rowland *v.* Coyne, 55 Cal. 4.

1. Bower *v.* Kemp, 1 C. & J. 287; Pringle *v.* Marsack, 1 Dowl. Pr. Cas. 155; Page *v.* Smith, 7 Dowl. Pr. Cas. 412; Meech *v.* Calkins, 4 Hill (N. Y.) 534; Tompkins *v.* Acer, 10 How. Pr. (N. Y. Supreme Ct.) 309; State Bank *v.* Gill, 23 Hun (N. Y.) 406; Lane *v.* Isaacs, 3 Dowl. Pr. Cas. 652. "That defendant has a good defense to the action," without stating on the merits, is bad. Grottick *v.* Bailey, 5 B. & Ald. 703, 7 E. C. L. 235; Pringle *v.* Marsack, 1 D. & R. 155; Page *v.* South, 7 Dowl. Pr. Cas. 412; Jackson *v.* Stiles, 3 Cai. (N. Y.) 93; Tompkins *v.* Acer, 10 How. Pr. (N. Y. Supreme Ct.) 309.

Good and Meritorious Defense.—"That defendant has a good and meritorious defense," is bad, and not equivalent to a defense on the merits. Westerley *v.* Kemp, 1 Tyr. 260; Bower *v.* Kemp, 1 C. & J. 287. "That defendant hath merits, and a good defense," is also bad. Lane *v.* Isaacs, 3 Dowl. Pr. Cas. 652. But where the allegation was "that defendant has a good and substantial defense in the cause," it was held sufficient, as being equivalent to a defense on the merits. Briggs *v.* Briggs, 3 Johns. (N. Y.) 258; Worthington *v.* Pierson, 3 Edw. Ch. (N. Y.) 297.

Defense to Plaintiff's Claim.—To allege a defense to the particular claim made by plaintiff is held not to be alleging a defense on the merits. "That defendants have a good and substantial defense upon the merits in the above-entitled cause to the promissory note on which this action is brought, as they are advised by their counsel," *held* defective, as not stating a defense on the merits. Durant *v.* Cook, 1 How. Pr. (N. Y.) 45; Mason *v.* Moore, 2 How. Pr (N. Y.) 70. "That defendant has a good defense to plaintiff's declaration filed in this suit," *held* bad, for the same reason. Howe *v.* Hasbrouck, 1 How. Pr. (N. Y.) 68. "That defendant has a good and substantial defense to the bond on which the action is brought," is bad, as not on the merits. Meech *v.* Calkins, 4 Hill (N. Y.) 534. "That defendant has a good and valid defense to the whole of plaintiff's claim, as set forth in said complaint, upon the merits thereof," *held* insufficient, as being to the claim alleged, and not on the merits. State Bank *v.* Gill, 23 Hun (N. Y.) 406.

"That defendant has a good and valid defense upon the merits to the whole of said plaintiff's claim in this action," *held* bad, for the same reason. Dûché *v.* Voisin, 18 Abb. N. Cas. (N. Y.) 358.

The Proper Form is, "that defendant has a good and substantial defense upon the merits in this cause." State Bank *v.* Gill, 23 Hun (N. Y.) 406.

Must be to the Whole Action.—It must be a defense to the whole action, hence it was held bad where it alleged "that defendant has a good and substantial defense on the merits to the whole or some part of plaintiff's demand." Chemung Canal Bank *v.* Chemung County, 1 How. Pr. (N. Y.) 162.

But to obtain an extension of time to plead, an affidavit "that defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof," is made sufficient by rule 24 of *New York* Supreme Court.

Where defendant's affidavit of merits on a motion to open a default also stated that the verdict was taken for more than was due plaintiff, and that plaintiff offered to relinquish the surplus, defendant was allowed to present another affidavit to show whether the excess of the verdict was the sole basis of his affidavit of merits; and on the second affidavit the default was opened. Fink *v.* Bryden, 3 Johns. (N. Y.) 245. There is no indication in the case as to what the result would have been had the excess of the verdict been the sole basis of the affidavit of merits.

In *Illinois* and *Pennsylvania* an affidavit of merits or defense may go to only a part of the claim of plaintiff, and plaintiff may have judgment for

and *in the action*,[1] as he *is advised by his counsel*.[2]

Advice of Counsel.—The better practice is to have it appear that the counsel whose advice is sworn to is the counsel of the defendant in the action,[3] and that the advice was given after a statement of the case to him,[4] and to state the name of the

the balance thereon; but this does not seem to be the general rule. The affidavit of merits must go to the whole claim. Chemung Canal Bank *v.* Chemung County, 1 How. Pr. (N. Y.) 162. And the court will not determine the sufficiency of the defense if put in in good faith. Excise Com'rs. *v.* Hollister, 2 Hilt. (N. Y.) 588.

1. Tate *v.* Bodfield, 3 Dowl. Pr. Cas. 218; Johnson *v.* Nevison, 2 Dowl. Pr. Cas. 260. It should appear from the affidavit that the defense is to the particular action in which it is made; "to this action" is a proper form. Johnson *v.* Nevison, 2 Dowl. Pr. Cas. 260. Where the allegation was "that defendant has a good and substantial defense on the merits," without stating to the action, it was held bad, as not connecting the defense with the action in which the affidavit was made. Tate *v.* Bodfield, 3 Dowl. Pr. Cas. 218. An affidavit "that defendant has a good, legal, and meritorious defense" is not sufficient. Howe *v.* Coldren, 4 Nev. 171.

2. Cannon *v.* Titus, 5 Johns. (N. Y.) 355; Wilkes *v.* Hotchkiss, 5 Johns. (N. Y.) 360; Swartwout *v.* Hooge, 16 Johns. (N. Y.) 3; Bruen *v.* Adams, 3 Cai. (N. Y.) 97; Cromwell *v.* Van Rensselaer, 3 Cow. (N. Y.) 346; Johnson *v.* Rogers, 3 Cow. (N. Y.) 14; Anonymous, 3 Wend. (N. Y.) 425; Howe *v.* Coldren, 4 Nev. 171. "That defendant has been advised and believes he has a good defense," without stating advised by counsel, is insufficient. Lecompte *v.* Wash, 4 Mo. 557. Where the affidavit was "that defendant is advised by said counsel that defendants have a good and substantial defense to said suit upon the merits, which advice deponent believes to be true," *held* defective, as swearing to belief in advice, rather than to merits, and that it should have been, "they have a defense, as they are advised by counsel," etc. Brittan *v.* Peabody, 4 Hill (N. Y.) 61. "That defendant, as informed, believes he has a good defense," etc., is insufficient. Page *v.* South, 7 Dowl. Pr. Cas. 412. But an affidavit "that defendant has a good defense on the merits, as he is advised and believes," was held sufficient. Crosby *v.* Innes, 5 Dowl. Pr. Cas. 566.

3. Where only a general statement was made as to advice of counsel, without specifying that he was defendant's counsel in the action, it was considered insufficient for that reason. State Bank *v.* Gill, 23 Hun (N. Y.) 406. But the case did not necessarily turn on this point, as there was another defect in the affidavit; and the allegation, "advised by my counsel," or equivalent words, seems to have been considered as equivalent to an allegation of "my counsel *in this cause*." Rowland *v.* Coyne, 55 Cal. 1; Watkins *v.* Degener, 63 Cal. 500; Howe *v.* Coldren, 4 Nev. 171; Butler *v.* Mitchell, 17 Wis. 52; Brown *v.* St. John, 19 Wend. (N. Y.) 617.

Attorney or Counsel.—On a motion for a commissioner to examine witnesses, an affidavit of merits made by an attorney, without swearing to advice of counsel, was held sufficient, the court saying that the advice of an attorney was equivalent to that of counsel within the rules of practice. Beall *v.* Dey, 7 Wend. (N. Y.) 513. But in a subsequent case, on a motion to open a default, it was shown that the advice sworn to in an affidavit of merits was that of an attorney, not of a counsellor, and on that ground the affidavit was held defective; that the advice of an attorney was not that of a counsel within the rules, and that the parties had been misled. Beall *v.* Dey, 7 Wend. (N. Y.) 513; McGarry *v.* Hart, 7 Hill (N. Y.) 176, 1 How. Pr. (N. Y.) 74.

4. **Advice "After" Statement.**—It need not be expressly stated that the advice of counsel was given *after* the statement of the case to him, particularly where the affidavit imports this. Brown *v.* Seys, 2 How. Pr. (N. Y.) 276. *Contra*, Lansing *v.* Mickles, 1 How. Pr. (N. Y.) 248. But the advice of counsel is of no avail unless it appears that the case has been stated to him. Nickerson *v.* California Raisin Co., 61 Cal. 268. And the better form is to allege that the advice was given

counsel.[1] Where the facts are stated or the affiant is a counsellor the advice of counsel need not be alleged.[2]

Defendant's Belief.—It should appear that defendant believes his defense to be good,[3] and such belief should generally be founded on knowledge, not information.[4]

after the statement. Watkins *v.* Degener, 63 Cal. 500; Sutton *v.* Wegner, 72 Wis. 294.

1. **Name of Counsel.** — Rule 23 of *New York* Supreme Court provides that, whenever it is necessary to swear to advice of counsel, the name and place of residence of counsel shall be stated. Where the affidavit to open a default was, "that defendant had fully stated his case to his attorney, who had advised him that he had a good defense on the merits of plaintiff's action," *held* defective in not stating *who the attorney was*, and the facts of the defense. Treftz *v.* Stahl, 46 Ill. App. 462. In other states it seems also to be the practice to state the counsel's name. Reidy *v.* Scott, 53 Cal. 69; Butler *v.* Mitchell, 17 Wis. 52; Sutton *v.* Wegner, 72 Wis. 294; Nash *v.* Swinburn, 4 Scott N. R. 326, 3 M. & G. 630.

2. Where the facts of the defense are stated, so that the court can judge for itself whether there are merits or not, the advice of counsel need not be alleged. Wilkes *v.* Hotchkiss, 5 Johns. (N. Y.) 360; Johnson *v.* Nevison, 2 Dowl. Pr. Cas. 260. Where the party making the affidavit is a counsellor, he need not swear to advice of counsel. The court will take judicial notice that he is a counsellor of that court. Cromwell *v.* Van Rensselaer, 3 Cow. (N. Y.) 346; Worthington *v.* Price, 5 Tyr. 1029, 2 C. M. & R. 315.

3. Nash *v.* Swinburn, 4 Scott N. R. 326; Wharton *v.* Barry. 1 How. Pr. (N. Y.) 62; Brittan *v.* Peabody, 4 Hill (N. Y.) 61, 3 Chitty Genl. Pr. 543; Schofield *v.* Huggins, 3 Dowl. Pr. Cas. 427; Worthington *v.* Price, 5 Tyr. 1029, 2 C. M. & R. 315.

"**Believed.**"—Where the affidavit was "that defendant has a good and substantial defense upon the merits, as he is advised by the counsel above-named, and verily *believed*," *held* insufficient, because it imported a past but not a present belief, and that it should have been, "and verily believes." Wharton *v.* Barry, 1 How. Pr. (N. Y.) 60.

Belief in Truth of Advice.—Where the affidavit was, "that deponent is advised by his said counsel that said defendants have a good and substantial defense upon the merits, *which advice* this deponent believes to be true," *held* insufficient, as swearing to belief in the truth of the advice, instead of in the truth of his defense. Brittan *v.* Peabody, 4 Hill (N. Y.) 61. But where the affidavit was, "I have fully and fairly stated the facts in this case to my counsel, and after said statement they informed me I had a good and valid defense upon the merits to said action and to all of it, all of which I verily believe to be true," it was held sufficient. Rowland *v.* Coyne, 55 Cal. 4.

"**As he is Advised and Believes.**"—It is sufficient that the defendant swears to merits "as he is advised and believes." Crosby *v.* Innes, 5 Dowl. Pr. Cas. 566.

An affidavit of merits by defendant, "that defendant has fully and fairly stated the case in this cause to his counsel (naming him), and that he has a good and substantial defense on the merits to the whole of the plaintiff's demand on which this action is brought, as he is advised by his said counsel and verily believes to be true," *held* proper and sufficient. Butler *v.* Mitchell, 17 Wis. 61.

An affidavit of merits by defendant in support of a motion for a continuance of the action stated "that defendant has fully and fairly stated the case herein to his counsel (giving his name and residence), and from such statement so made he is advised by his said counsel and verily believes that he has a good, valid, and substantial defense in this action upon the merits thereof, and to the whole and every part thereof." *Held* a proper and sufficient affidavit of merits. Sutton *v.* Wegner, 72 Wis. 294.

4. The statement of the defense on the merits should be positive and without qualification. Crowell *v.* Van Rensselaer, 3 Cow. (N. Y.) 346. The affiant should swear to a defense on the merits from his own knowledge of the facts, and not on information and belief. Brown *v.* Cowee, 2 Dougl. (Mich.)

b. WHERE FACTS ARE STATED.—Where the affidavit states facts constituting a good defense, an affidavit in the usual form of an affidavit of merits is not necessary and any defects therein are immaterial.[1]

In chancery an affidavit of merits is required to state the facts of the defense, and in that case the usual form need not be followed.[2] This is also the rule at law in some jurisdictions on

432. An affidavit of merits stating facts on information and belief is insufficient and improper, as being hearsay. Jenkins *v.* Gamewell Fire Alarm, etc., Co. (Cal., 1892), 31 Pac. Rep. 570; Adamson *v.* Wood, 5 Blackf. (Ind.) 448. Where an attorney is a defendant, he should swear positively to his belief of a defense on the merits, and not that he is instructed and believes, as a client might. Worthington *v.* Price, 5 Tyr. 1029, 2 C. M. & R. 315. An affidavit by defendant's attorney "that he was informed and believed defendant had a substantial defense on the merits," was held insufficient. Briggs *v.* Briggs, 3 Johns. (N. Y.) 258. An affidavit by an attorney, upon mere information and belief, that there is a defense, without stating the facts or giving an excuse for not stating facts also on information and belief, *held* insufficient. Hitchcock *v.* Herzer, 90 Ill. 543. But an affidavit by an attorney, "that, from representations made to him by defendant, and papers he had examined, he verily believed defendant had a legal defense," was held sufficient. Philips *v.* Blagge, 3 Johns. (N. Y.) 141. Where the agent of a country attorney swore "that he was informed and verily believed it to be true that the defendant had a good defense to the action on the merits," it was held sufficient. Johnson *v.* Popplewell, 2 Tyr. 718. To the same effect is Schofield *v.* Huggins, 3 Dowl. Pr. Cas. 427.

In *Pennsylvania* an affidavit of defense on information and belief is held proper. Philadelphia *v.* Peterson, 3 W. N. C. (Pa.) 292; Cumberland B'ld'g, etc., Assoc. *v.* Brown, 4 W. N. C. (Pa.) 494.

1. Johnson *v.* Beresford, 2 C. & M. 222; *In re* King, 1 Ad. & El. 560, 28 E. C. L. 154; Johnson *v.* Nevison, 2 Dowl. Pr. Cas. 260; Atty. Genl. *v.* Hall, 2 Dowl. Pr. Cas. 111; Wilkes *v.* Hotchkiss, 5 Johns. (N. Y.) 360; Shaw *v.* Brown, 42 Miss. 309. Where the statute required an affidavit of merits on overruling a demurrer, *held*, that a plea stating a good defense, with an affidavit that the plea was true, was sufficient. Johnston *v.* Beard, 7 Smed. & M. (Miss.) 214.

On motion to open a default, an unverified answer was presented, and also an affidavit by defendant, "that she believed she had a good defense to the action," but she did not swear that the answer was true. *Held* insufficient; that the court should not only be advised of the defense presented, but also assured by affidavit or other testimony that such defense is at least believed to be true. McPherson *v.* Kingsbaker, 22 Kan. 646.

On motion to open a default an affidavit by defendant stated "that he believed the endorsement of his name on the note on which judgment had been taken against him was a forgery, which belief was derived from information obtained since the judgment was entered, and that plaintiff's counsel refused him an inspection of said note." *Held* sufficient, and default opened. Bell *v.* Kelly, 17 N. J. L. 270.

On motion to open default made by one of several joint defendants, his affidavit stated "that he had never been served with process, that only one of the defendants had been served, and that he did not know until the day before what the claim of the plaintiff was, but that having discovered it he was perfectly satisfied that the defendants owed nothing, and had a good and full defense." *Held*, that the affidavit was to be favorably considered under the circumstances, and was sufficient, and motion granted. Gulick *v.* Thompson, 4 N. J. L. 294.

2. 1 Barb. Ch. Pr. (N. Y.) 602, ed. 1843; Hunt *v.* Wallis, 6 Paige (N. Y.) 371; Wells *v.* Cruger, 5 Paige (N. Y.) 164; Meach *v.* Chappel, 8 Paige (N. Y.) 155; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173; Mowry *v.* Hill, 11 Wis. 146; Thayer *v.* Swift,

motions to open defaults.[1]

c. THE ILLINOIS RULE.—The statute of *Illinois* requires a defendant in certain cases, in order to prevent a judgment by default, to file with his plea an affidavit stating "that he verily believes he has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and if a portion specifying the amount according to the best of his judgment and belief."[2]

Formal Defects.—The form specified in the statute is not in practice required to be strictly followed,[3] nor do mere formal defects vitiate the affidavit.[4]

Facts Constituting Defense.—The facts constituting the defense need not be stated;[5] but if an attempt is made to state them, a good defense must be set out.[6]

Walk. (Mich.) 384. And see SETTING ASIDE JUDGMENTS BY DEFAULT, *supra*.

1. See OPENING JUDGMENTS OR INQUESTS, *supra*.

2. Hurd's Revd. Stat. 1891, 1047, § 37.

3. Wilborn *v.* Blackstone, 41 Ill. 264; Bell *v.* Nims, 51 Ill. 171. An affidavit which states that the defendant has a defense on the merits, in the language of the statute, is sufficient. McCormick *v.* Wells, 83 Ill. 239. So one is sufficient which meets all the requirements of the statute, although not in the precise language of the statute. Harrison *v.* Willett, 79 Ill. 482; Castle *v.* Judson, 17 Ill. 381. The affidavit need not describe the defense as good; the statute only intends it in the sense of *bona fide*. McDonnell *v.* Olwell, 17 Ill. 375; Castle *v.* Judson, 17 Ill. 381. Such affidavit should be positive and direct, and not on information and belief. King *v.* Haines, 23 Ill. 280.

4. An affidavit will not be held defective because not entitled of the court or term, if properly entitled in the cause and regularly filed, so that it can readily be seen to what cause it relates. Wilborn *v.* Blackstone, 41 Ill. 264. Nor need it even be entitled in the cause. Harris *v.* Lester, 80 Ill. 307; McCormick *v.* Wells, 83 Ill. 239; Hays *v.* Loomis, 84 Ill. 18; Beardsley *v.* Gosling, 86 Ill. 58. Where entitled C. D. *v.* A. B., where A. B. is plaintiff and C. D. defendant, it is entitled in the cause, especially where written on the same paper as the plea which was properly entitled. Bowen *v.* Wilcox, etc., Sewing Machine Co., 86 Ill. 11. Interlineations made before it is sworn to do not vitiate it. Garrity *v.* Wilcox, 83 Ill. 159. See also AFFIDAVITS.

Substantial Compliances.—An affidavit "that defendant verily believes he has a good defense to the suit upon the merits to the whole of the plaintiff's demand" is sufficient. Eberhart *v.* Page, 89 Ill. 550; Fisher *v.* National Bank, 73 Ill. 34.

An affidavit "that defendant believes he has a good defense to the action upon the merits," is a substantial compliance with the statute, being equivalent to a statement of a defense to the whole of the demand. Wadsworth *v.* Ætna Nat. Bank, 84 Ill. 272.

An affidavit "that defendant has a good and valid defense to the whole of the suit upon the merits," is sufficient, for if a defense to the whole suit, it is also a defense to the suit for the whole demand. Harrison *v.* Willett, 79 Ill. 482.

An affidavit that a plea of *non est factum* to an action on an appeal bond is true, has been held a sufficient affidavit of merits. Kimbark *v.* Blundin, 6 Ill. App. 542.

So, where several were sued as partners, a plea denying joint liability, and verified by affidavit, has been held a sufficient affidavit of merits. Fergus *v.* Cleveland Paper Co., 3 Ill. App. 629.

5. Hays *v.* Loomis, 84 Ill. 18; Beardsley *v.* Gosling, 86 Ill. 58.

6. Stuber *v.* Schack, 83 Ill. 191.

Facts Not Provable. — So, if defendant sets out facts which the law would not allow him to prove, it is not an affidavit of defense made in good faith, and is insufficient. Wallbaum

A Partial Defense is allowed by the statute.[1]

d. THE PENNSYLVANIA RULE.—The statute of *Pennsylvania* requires a defendant to make an affidavit of defense in certain cases to prevent judgment by default.[2]

Form—Statement of Facts.—Such statute does not prescribe the form or contents of such affidavit, but it has been construed to require the affidavit to state facts showing a good defense to the action.[3] Every fact necessary to a defense should be stated.[4] It should be

v. Haskin, 49 Ill. 313; Frank *v.* Morris, 57 Ill. 138, 11 Am. Rep. 4.

Court Compelling Facts to be Stated.—If defendant's affidavit is defective, and defendant asks leave to amend, the court may impose as terms that he state the facts of his defense. McKichan *v.* Follett, 87 Ill. 103; Wilder *v.* Arwedsoe, 80 Ill. 435. So, where defendant has filed a sufficient affidavit, but the court rules to the contrary, and directs him to file an affidavit disclosing his defense, while defendant need not obey, yet if he files another affidavit he must state therein facts showing a meritorious defense. Stuber *v.* Schack, 83 Ill. 191; McCormick *v.* Wells, 83 Ill. 239; Hays *v.* Loomis 84 Ill. 18; Eberhart *v.* Page, 89 Ill. 550.

Testing Sufficiency of Affidavit.—If defendant desires to test the question of the sufficiency of his first affidavit, he should except to the ruling of the court thereon, and raise the question on appeal. Hays *v.* Loomis, 84 Ill. 18; McKichan *v.* Follett, 87 Ill. 103.

1. The statute allows defendant's affidavit to state that he has a defense to a portion of plaintiff's demand, if he specifies the amount thereof to the best of his judgment and belief. In such a case the putting in a defense to only a portion of the demand is a confession of liability for the balance of plaintiff's demand, and judgment may be rendered for plaintiff therefor. Allen *v.* Watt, 69 Ill. 655; Haggard *v.* Smith, 71 Ill. 226; Mayberry *v.* Van Horn, 83 Ill. 289.

Good Defense to Part of Damage.—An affidavit "that defendant had a good defense to a part of the damages claimed by plaintiff" was held bad, the court saying that it might have been held good if the nature of the defense had been specified, and it had been stated to what part of the damages it extended. McDonnell *v.* Murphy, 20 Ill. 347. But in a subsequent case this ruling was *reconsidered*, and an affidavit of defendant, "that defendant had a good defense to said suit or a portion of the same upon the merits," was held sufficient, the court ruling that such an affidavit would be considered sufficient in the first instance, and that plaintiff should then limit his claim to its actual extent, and if he does so and defendant fails to make a further affidavit, plaintiff may take judgment. Hurd *v.* Burr, 22 Ill. 29.

2. Act of May 25, 1887, P. L. 271.

3. Erie Boot, etc., Co. *v.* Eichenlaub, 127 Pa. St. 164; Clarke *v.* Allen, 132 Pa. St. 40; Kilpatrick *v.* Home Bldg., etc., Assoc., 179 Pa. St. 30. It is sufficient if the affidavit states facts showing a *prima-facie* defense. Sixth Nat. Bank *v.* Harkness, 6 W. N. C. (Pa.) 108; Lerch Hardware Co. *v.* First Nat. Bank, 109 Pa. St. 240; Liebersperger *v.* Reading Sav. Bank, 30 Pa. St. 531; Christy *v.* Bohlen, 5 Pa. St. 38. It is sufficient if it sets forth in words or by necessary inference the necessary elements of a good defense. Selden *v.* Neemes, 43 Pa. St. 421; Twitchell *v.* McMurtrie, 77 Pa. St. 383; Oberle *v.* Schmidt, 86 Pa. St. 221.

4. Ogden *v.* Offerman, 2 Miles (Pa.) 40; Bruner *v.* Wallace, 4 W. N. C. (Pa.) 53; Gaskill *v.* Lynch, 4 W. N. C. (Pa.) 542; Brick *v.* Coster, 4 W. & S. (Pa.) 494; Moore *v.* Somerset, 6 W. & S. (Pa.) 262; Peck *v.* Jones, 70 Pa. St. 83. And the facts on which the defense turns must be specifically and distinctly stated, and be such as to warrant a legal inference of a full defense. Dows *v.* White, 2 Miles (Pa.) 140; Bryan *v.* Harrison, 37 Pa. St. 233; Kissing *v.* Patterson, 5 Whart. (Pa.) 316; Black *v.* Halstead, 39 Pa. St. 64; Camly *v.* Bryan, 5 Whart. (Pa.) 261; Woods *v.* Watkins, 40 Pa. St. 458; Blackburn *v.* Ormsby, 41 Pa. St. 97; Anspack *v.* Bast, 52 Pa. St. 356; Reed *v.* Raymond, 37 Fed. Rep. 186. But if the defense is stated in the affidavit with certainty to a common intent, it is sufficient. Hugg *v.* Scott, 6 Whart. (Pa.) 274; Thompson *v.* Clark, 56 Pa. St. 33.

Where the affidavit states facts which

a statement of facts, not of conclusions of law,[1] and they should be clearly and not evasively stated.[2]

Information and Belief.—Facts may be alleged on information and belief, but in such case the sources of the information should be stated, or it should be averred that defendant expects to be able to prove them.[3]

do not constitute a defense, and which would entitle plaintiff to judgment, but which defendant avers as matter of law constitute a defense, plaintiff is entitled to judgment. Clapier *v.* Manpay, 2 Miles (Pa.) 136; West *v.* Simmons, 2 Whart. (Pa.) 261; Knox *v.* Reeside, 1 Miles (Pa.) 294.

Action on Bond.—In an action on a bond an affidavit of defense, "that defendant believes he never signed said bond, nor authorized any one to do so," is too general to prevent judgment for plaintiff. Pennock *v.* Kennedy, 153 Pa. St. 577.

Foreign Judgment.—To an action on a foreign judgment which recites the appearance of defendant by attorney, an affidavit of defense, "that if there was an appearance for defendant he had no knowledge of it," without denying that he authorized such an appearance, is not sufficient to prevent judgment for plaintiff. Moore *v.* Phillips, 154 Pa. St. 204.

Not Real Party.—So also in an action on a note an affidavit averring "that the suit was brought in the name of one not the real holder for the purpose of shutting out a set-off," is sufficient to put plaintiff to prove that he is a *bona-fide* holder. Eyre *v.* Yohe, 67 Pa. St. 477.

Goods Sold.—To an action for goods sold, an affidavit of defense denying delivery by the knowledge, consent, or direction of the defendant, is sufficient to put plaintiff to the proof of it. Pittsburg, etc., R. Co. *v.* Harbaugh, 4 Brews. (Pa.) 115.

Mechanic's Lien.—To an action to enforce a mechanic's lien, an affidavit of defense, "that defendant never contracted with the plaintiff in any way," was held insufficient to show any defense. Hill *v.* Bramall, 1 Miles (Pa.) 352.

Defendant not Conscious, Etc.—An affidavit of defense, "that defendant is not conscious of and does not believe he executed an instrument," is not a sufficient affidavit of defense to an action thereon. Harris *v.* Mason, 2 Miles (Pa.) 270.

Action on Note.—In an action on a note, an affidavit of defense, "denying the holder's title, to the best of defendant's knowledge and belief," is not sufficient. First Nat. Bank *v.* Greggs, 79 Pa. St. 384. Nor is an averment, "that, as defendant believes, the note was held by the payee (not plaintiff) at maturity." Brown *v.* Street, 6 W. & S. (Pa.) 222. But in an action on a note having a special endorsement, an affidavit "alleging fraud, and denying plaintiff's title," is sufficient to put plaintiff to proof that he is a *bona-fide* holder. Reamer *v.* Bell, 79 Pa. St. 292.

1. Erie *v.* Brady, 127 Pa. St. 169; Eshleman *v.* Balemius, 8 Lancaster Law Rev. (Pa.) 9. *Contra*, Erie *v.* Brady, 127 Pa. St. 169, 24 W. N. C. (Pa.) 252, 46 Leg. Int. (Pa.) 392, 20 Pitts. L. J. N. S. 101. An affidavit setting forth no particular or specific facts, and embodying conclusions of law, is bad and insufficient. Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634; Flagg *v.* Taylor (Del., 1888), 14 Atl. Rep. 26.

2. Fraser *v.* Behee, 1 Kulp (Pa.) 37; Lehman *v.* Jaquett, 5 W. N. C. (Pa.) 183; Coulston *v.* Bertolet (Pa., 1888), 12 Atl. Rep. 255; McBrier *v.* Marshall, 126 Pa. St. 390. Facts, and not the evidence or manner in which they are to be proved, are what is required to be stated in the affidavit. Bronson *v.* Silverman, 77 Pa. St. 94; Kauffman *v.* Mining Co., 105 Pa. St. 541. The affidavit will be reasonably construed in favor of the defendant. Twitchell *v.* McMurtrie, 77 Pa. St. 383.

3. Harman *v.* Ramsey, 5 W. N. C. (Pa.) 188; Black *v.* Halstead, 39 Pa. St. 64; Ball *v.* Monagan, 1 W. N. C. (Pa.) 188; Salter *v.* Askin, 1 W. N. C. (Pa.) 388; Brown *v.* Street, 6 W. &. S. (Pa.) 222; Moore *v.* Sumnerset, 6 W. N. C. (Pa.) 263; Thompson *v.* Clark, 56 Pa. St. 33; Kidd *v.* Koch, 2 Pa. Co. Ct. Rep. 285; Black *v.* Garrett, 2 Legal Record Rep. (Pa.) 251; Phillips *v.* Dryfoos, 3 Kulp (Pa.) 525; Winson *v.* Farmers', etc., Bank, 81 Pa. St. 304; Newbold *v.* Pennock, 154 Pa. St. 598. Where facts are alleged on informa-

Written Instruments.—If the defense consists of or embraces a written contract or record, a copy thereof should be set out in the affidavit.[1]

Partial Defense—Supplemental Affidavit.—A partial defense is allowed,[2] and defendant is usually allowed to file a supplemental affidavit if the original is considered defective.[3]

tion, a belief in their truth should be alleged. Cook *v.* Com. (Pa., 1887), 11 Atl. Rep. 574; Coke *v.* Stidfale, 1 Walk. (Pa.) 95. *Contra*, Foster *v.* Kline, 1 Woodward (Pa.) 457.

When facts are averred on information and belief, the grounds of belief should be stated. Wolverton *v.* Smith, 4 W. N. C. (Pa.) 442; Gowen *v.* McPherson, 10 Phila. (Pa.) 358. *Contra*—Where facts are alleged on information and belief, it is sufficient to allege an expectation of ability to prove them. Lewis *v.* Broadbent, 21 W. N. C. (Pa.) 31.

Where the facts are not within the knowledge of defendant, an averment "that defendant is informed and believes an allegation to be a fact, and expects to be able to prove it," is sufficient. Bank *v.* Broadhead, 2 Kulp (Pa.) 285; Lewis *v.* Broadbent, 21 W. N. C. (Pa.) 31; Reznor *v.* Supplee, 81 Pa. St. 180; Moeck *v.* Littell, 82 Pa. St. 354; Thompson *v.* Clark, 56 Pa. St. 33; Newbold *v.* Pennock, 154 Pa. St. 591.

The proper form of such an averment is "that he is informed and belief and expects to be able to prove them." Where it is averred "that he has abundant reason to believe them," it is not sufficient, and the affidavit is bad. Newbold *v.* Pennock, 154 Pa. St. 598.

But where facts are positively averred, no allegation of defendant's ability to prove them is necessary, especially where the defendant is a competent witness for himself. Eyre *v.* Yohe, 67 Pa. St. 477.

1. Richards *v.* Risler, 3 W. N. C. (Pa.) 485; Birkey *v.* Whitaker, 4 W. N. C. (Pa.) 137; Potts *v.* Erst, 4 W. N. C. (Pa.) 542.

Where the defense set forth in an affidavit of defense is based on a written agreement, such agreement should be set forth in full therein. Hence, where the defendant, being sued in assumpsit, set forth in his affidavit of defense that by a written agreement duly made (the substance of which was alleged) a third party had been substituted for defendant as plaintiff's debtor, and plaintiff had consented thereto, *held* defective in not setting forth fully the alleged contract, and giving no reason why it was not set forth. Lucas Coal Co. *v.* Hunt (Pa., 1887), 8 Atl. Rep. 860. Where an affidavit of defense does not deny the contract alleged in plaintiff's statement, but sets up a different and subsequent contract between the parties, if such contract is in writing it should be annexed to the affidavit of defense, and if not in writing its terms should be stated with particularity, so that the court can determine whether defendant's construction of it is warranted or not. If this is not done, and plaintiff's statement presents a *prima-facie* case, the plaintiff is entitled to a summary judgment. Willard *v.* Reed, 132 Pa. St. 58, 25 W. N. C. (Pa.) 268, 48 Leg. Int. (Pa.) 132, 20 Pitts. L. J. N. S. 368.

Referring to Paper Without Annexing Copy.—It is a fatal defect in an affidavit of defense to refer therein to a material paper which is accessible, without annexing a copy thereof, so that the court may judge of its terms and sufficiency. Erie *v.* Butler, 120 Pa. St. 374. And see Pittsburg *v.* MacConnell, 130 Pa. St. 463.

2. If the affidavit of defense presents only a partial defense, it should be so precise that plaintiff can take judgment for the amount admitted to be due. Gould *v.* Bush, 13 W. N. C. (Pa.) 29. An affidavit of defense stating generally "that plaintiff's claim is in excess of the amount agreed upon," is too vague; it should state the precise amount admitted to be due. Griel *v.* Buckius, 114 Pa. St. 187.

3. If the court deems the defense good, but defectively stated, or so generally stated that it cannot be determined whether a defense exists, it is usual to allow a supplemental affidavit of defense to be filed. Callan *v.* Lukens, 7 W. N. C. (Pa.) 28.

Under a former statute it was held

2. By Codefendant.—An affidavit of merits made by a defendant has been held sufficient for his codefendants.[1] But in such case it should appear that the defense of all is the same;[2] but this has not always been required.[3]

3. By Agent, Attorney, or Clerk.—When an agent or attorney makes an affidavit of merits, he should swear to his belief of a defense on the merits,[4] and to his knowledge of the defense and

that the court could not disregard a supplemental affidavit, although filed after a rule for judgment. West *v.* Simmons, 2 Whart. (Pa.) 26. If a supplemental affidavit is ordered by the court, and none is filed, judgment does not follow as of course for plaintiff, but the case must be again called up, and the court will re-examine the original affidavit, and no inference should be drawn against defendant from his failure to file a supplemental affidavit. Hill *v.* Gaw, 4 Pa. St. 495. In one case it was said, "it seems as though the legislature intended the propriety of entering judgment to be tested not so much by plaintiff's claim as by the defendant's affidavit. *Opinion* of Sargeant, J., in Dewey *v.* Dupuy, 2 W. & S. (Pa.) 556. Judgment for want of a proper affidavit of defense is final, not interlocutory. McClung *v.* Murphy, 2 Miles (Pa.) 177.

As Evidence.—An affidavit of defense may be read on the trial of an action as an admission of the facts stated in it, but if so used the whole of it must be taken together. Bowen *v.* DeLattre, 6 Whart. (Pa.) 430.

1. Ontario Bank *v.* Baxter, 6 Cow. (N. Y.) 395; Clark *v.* Parker, 19 Wend. (N. Y.) 125; Woodward *v.* Backus, 20 Cal. 137; Rowland *v.* Coyne, 55 Cal. 1; Watkins *v.* Degener, 63 Cal. 500.

2. Where several separate actions were brought against the maker and endorsers of a note, an affidavit of merits by the maker in all the actions was held sufficient, although he was not a nominal defendant in all the cases, on the ground that he was a party to the instrument, asserted familiarity with all the facts, and that the defense was the same in all the actions. Ontario Bank *v.* Baxter, 6 Cow. (N. Y.) 395.

But where several parties to a note were sued in one action, an affidavit of merits by one defendant was held not sufficient for the others in the absence of a statement that the defense of all the defendants was the same. Clark *v.* Parker, 19 Wend. (N. Y.) 125.

3. In California this does not seem to be required. Woodward *v.* Backus, 20 Cal. 137; Rowland *v.* Coyne, 55 Cal. 1; Watkins *v.* Degener, 63 Cal. 500. On a motion to open a default the affidavit of one of two defendants was "that he had fully and fairly stated the case to his counsel, and that he is advised by such counsel, after such statement made as aforesaid, and verily believes that he and said defendant Harris have a good, full, and perfect defense to said action on the merits." *Held* sufficient. Woodward *v.* Backus, 20 Cal. 137.

Sheriff and Sureties.—In an action against a sheriff and his sureties, an affidavit by the sheriff, "that he had fully and fairly stated the facts of the case to his counsel (naming them), and after such statement they informed him that he had a good and valid defense upon the merits to said action, and to all of it, all of which he verily believed to be true," was held to be a sufficient affidavit of merits for all the defendants on a motion to change the venue. Rowland *v.* Coyne, 55 Cal. 4.

Partners.—An affidavit by one of defendants sued as partners, "that he had fully and fairly stated the case in the action to his attorney and counsel, and that, after such statement, was advised by said counsel and verily believed that the defendants and each of them had a good and substantial defense to the action upon the merits," *held* sufficient for the defendants on a motion to change the venue. Watkins *v.* Degener, 63 Cal. 500.

4. Worthington *v.* Price, 5 Tyr. 1029; Mason *v.* Bidleman, 1 How. Pr. (N. Y.) 62; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199; Schofield *v.* Huggins, 3 Dowl. Pr. Cas. 427.

When the affidavit is made by an attorney, he should swear positively to his belief of a defense upon the merits, not that he is instructed and advised,

from whom he derived it.[1] It is no objection that such knowledge has been derived from his client.[2] When made by a managing clerk, he should swear that he has the management of the case in which it is made.[3]

as a client might. Worthington *v.* Price, 5 Tyr. 1029, 2 C. M. & R. 315.

An affidavit of an agent of a country attorney "that he was informed and verily believed it to be true that the defendant had a good defense to the action upon the merits," was held sufficient. Johnson *v.* Popplewell, 2 Tyr. 718. But an affidavit by an attorney, "that from the examination of defendant's case, so far as he had made such examination, he verily believed that it was better than the plaintiff's," was held insufficient, as not showing a meritorious defense. Bailey *v.* Taaffe, 29 Cal. 422.

An affidavit by an attorney, "that from representations made to him by the defendant, and from the papers which he had examined, he verily believed the defendant had a legal defense," was held sufficient. Philips *v.* Blagge, 3 Johns. (N. Y.) 141.

1. Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199; Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Briggs *v.* Briggs, 3 Johns. (N. Y.) 258; Hitchcock *v.* Herzer, 90 Ill. 543. An affidavit by an attorney, "that he was informed and verily believed defendant had a substantial defense on the merits," *held* insufficient. Briggs *v.* Briggs, 3 Johns. (N. Y.) 258.

An affidavit by an attorney upon mere information and belief, but not stating the facts, *held* insufficient. Hitchcock *v.* Herzer, 90 Ill. 543.

An affidavit by an agent of a country attorney, "that from instructions received by deponent from the attorney for defendant, for whom deponent is agent in this cause, and which instructions deponent believes to be true, deponent verily believes that said defendant hath a good defense to this action on the merits," *held* sufficient. Schofield *v.* Huggins, 3 Dowl. Pr. Cas. 427.

Attorney in Fact.—An agent or attorney in fact should swear to advice of counsel. Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199.

In Admiralty.—Although a defendant should, in general, make an affidavit of merits, this rule is not inflexible in admiralty, and the affidavit of the proctor is sufficient on incidental motions, where the facts cannot be supposed to rest particularly in the knowledge of the defendant. Brig Harriet, Olc. Adm. 222. To open default in admiralty a meritorious defense should be shown; an affidavit of a proctor, "that he believes a good defense exists," is not sufficient; the facts of defense should be stated. Scott *v.* The Young America, Newb. Adm. 110.

2. Philips *v.* Blagge, 3 Johns. (N. Y.) 141; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 199. *Contra*, Crine *v.* Wallace, 1 W. N. C. (Pa.) 292.

Affidavit Not Showing Whole Case Stated.—An affidavit by an attorney, "that, from the examination of the testimony given before the justice and the statement of facts made to him by defendant, he verily believed that said defendant had a valid defense to said action upon the merits, *held* not sufficient; that it did not show that the whole case had been stated to the attorney, or that the statement was true, and did not show merits. Pinger *v.* Vanclick, 36 Wis. 145.

Affidavit "from Client's Statement."—An affidavit by an attorney, "that from his client's statement of the case to him, he believes that his client has a good and substantial defense upon the merits," *held* insufficient. Stilson *v.* Rankin, 40 Wis. 527.

3. Clerk's Affidavit.—Doe *v.* McDonnell, 8 Dowl. Pr. Cas. 501, 4 Jur. 578. The managing clerk should have had the entire management of the case, and should swear that he is fully acquainted with the facts relating to the action. Morris *v.* Hunt, 1 Chit. Rep. 97, 18 E. C. L. 37. An affidavit by an attorney's clerk, "that there was a good and substantial defense," *held* insufficient; it only tended to show that there was a defense, and was no evidence of merits. Russell *v.* Stiles, 3 Cai. (N. Y.) 93.

An affidavit of an attorney's clerk, "that defendant had been advised by counsel that he had a good defense to the action on the merits, which the deponent verily believed to be true," *held* insufficient, on the grounds that it did not allege any statement of the case to

4. To Obtain Change of Venue.—On a motion to change the venue, defendant must swear to a meritorious defense, as he is advised by his counsel;[1] also that he has disclosed to his counsel the facts he expects to prove by each of his witnesses;[2] that each and every of such witnesses is material to his defense, as he is advised by counsel;[3] and that without the testimony of each and every witness he cannot safely proceed to trial, as he is advised by his counsel.[4] This applies to a plaintiff opposing such a

counsel, or who the counsel was, or that the clerk had the management of the case, and did not even allege the belief of the clerk as to merits. Nash *v.* Swinburn, 4 Scott N. R. 326, 3 M. & G. 630.

An affidavit by a clerk having the management of the case, "that he was apprised and believed that the defendant had good grounds of defense upon the merits," *held* insufficient; it should have been, a good defense to this action on the merits, as he is informed and verily believes. Bromley *v.* Gerish, 7 Scott N. R. 516, 6 M. & G. 750.

1. Swartwout *v.* Hooge, 16 Johns. (N. Y.) 3; Brownell *v.* Marsh, 22 Wend. (N. Y.) 636; Brittan *v.* Peabody, 4 Hill (N. Y.) 61; Mills *v.* Adsit, 2 How. Pr. (N. Y.) 83; *California* Code of Civ. Proc., § 396; People *v.* Larue, 66 Cal. 236; and that he believes his defense to be true. Wharton *v.* Barry, 1 How. Pr. (N. Y.) 62.

2. Constantine *v.* Dunham, 9 Wend. (N. Y.) 431; Young *v.* Arndt, 1 How. Pr. (N. Y.) 227; Harris *v.* Clark, 2 How. Pr. (N. Y.) 82; Dimon *v.* Dimon, 2 How. Pr. (N. Y.) 91. Where the affidavit failed to allege any statement of the facts expected to be proved by the witnesses, or any advice of counsel, or any reason for the belief of affiant that the witnesses would testify as stated, *held* entirely defective, and judgment granting a change of venue reversed on that ground. Chapin *v.* Overin, 55 N. Y. St. Rep. 139. The affidavit should allege that defendant has fully and fairly stated the case to his counsel, and has disclosed to him the facts which he expects to prove by each and every of his witnesses. Onondaga County Bank *v.* Shepherd 19 Wend. (N. Y.) 10. The words "fully and fairly" apply to *the case*, not to *the disclosure of facts* which the witnesses will swear to; and an affidavit, "that defendant *had stated* to his counsel the facts which he expects to prove by each and every of his witnesses," was held sufficient. "Stated" was held equivalent to "disclosed" in such connection. Anonymous, 1 Hill (N. Y.) 668.

3. Johnson *v.* Rogers, 3 Cow. (N. Y.) 14; Noys Mfg. Co. *v.* Whitmore, 23 N. Y. Wkly. Dig. 424; Lansing *v.* Mickles, 1 How. Pr. (N. Y.) 248; Carpenter *v.* Continental Ins. Co., 31 Hun (N. Y.) 78.

Materiality of Witnesses.—The advice of counsel as to the materiality of the witnesses must be clearly stated. Johnson *v.* Rogers, 3 Cow. (N. Y.) 14; Carpenter *v.* Continental Ins. Co., 31 Hun (N. Y.) 78.

Advice of Counsel After Statement.—It should appear that the advice was given after the statement to counsel. Lansing *v.* Mickles, 1 How. Pr. (N. Y.) 248.

Witnesses "for Defendant."—An affidavit stating "that each and every witness is a material witness for defendant," instead of "for his defense," was held sufficient, the words "for defendant" being held equivalent to "for his defense." Anonymous, 1 Hill (N. Y.) 668.

4. Satterlee *v.* Groot, 6 Cow. (N. Y.) 33; Onondaga County Bank *v.* Shepherd, 19 Wend. (N. Y.) 10; Brittan *v.* Peabody, 4 Hill (N. Y.) 61; Porter *v.* Munn 4, Hill (N. Y.) 540; Carpenter *v.* Continental Ins. Co., 31 Hun (N. Y.) 78. The affidavit should allege "that each and every of the witnesses is material and necessary, and that without the testimony of each and every witness defendant cannot safely proceed to trial, as he is advised by his counsel, etc." Carpenter *v.* Continental Ins. Co., 31 Hun (N. Y.) 78.

A proper form of affidavit should allege "that defendant has stated to his counsel the facts which he expects to prove by his witnesses, and that his counsel has advised him that his witnesses are necessary and material, and that without the testimony of each and

motion.[1]

5. Title, Jurat, etc.—An affidavit of merits ought to be properly entitled in the action, and when not so entitled it has been held void.[2] Proper venue is essential to it;[3] also a proper jurat.[4] See also AFFIDAVITS, *ante*, p. 311.

every one of them he cannot safely proceed to the trial of the action." Chapin *v.* Overin, 55 N. Y. St. Rep. 130; State Bank *v.* Gill, 23 Hun (N.Y.) 406.

The Term "Each and Every" may be omitted where there is only one witness, but not where there is more than one. Brown *v.* Peck, 10 Wend. (N. Y.) 569.

What Counsel.—It should appear that the counsel whose advice is sworn to is the counsel of defendant *in the action in which the advice is alleged.* State Bank *v.* Gill, 23 Hun (N. Y.) 406.

Where Defendant is Himself a Counsellor, the advice of counsel need not be alleged. Cromwell *v.* Van Rensselaer, 3 Cow. (N. Y.) 346; Ackerman *v.* Delude, 29 Hun (N. Y.) 137.

1. **When a Plaintiff Opposes a Motion** to change the venue, he must make a similar affidavit, although the term "affidavit of merits" does not properly apply to a plaintiff. Onondaga County Bank *v.* Shepherd, 19 Wend. (N. Y.) 110.

California.—§ 396 of the *California* Code of Civil Procedure requires an affidavit of merits to be filed with the answer or demurrer as a condition of a motion by defendant to change the venue. Buell *v.* Dodge, 63 Cal. 553; Watkins *v.* Degener, 63 Cal. 500. Such affidavit should be a proper affidavit of merits, and where the affidavit stated "that affiant had fully and fairly stated his case and the facts constituting his defense to his counsel, etc.," it was held insufficient, as showing only a partial statement of the case, viz., defendant's part of it, and failing to show merits. People *v.* Larue, 66 Cal. 236. But no allegations as to the statements of facts to be proved by the witnesses, or as to the materiality of the witnesses, is required, a general affidavit of merits being sufficient. Rowland *v.* Coyne, 55 Cal. 1; Degener *v.* Watkins, 63 Cal. 500; Buell *v.* Dodge, 63 Cal. 553.

2. Baxter *v.* Seaman, 1 How. Pr. (N. Y) 51; Higham *v.* Hayes, 2 How. Pr. (N.Y.) 27.

Improper Title.—Where the title is improper, the affidavit is of no effect; hence where the title of the action was Sandland *v.* Adams, and an affidavit of merits was served, entitled Adams *ads.* Sunderland, *held*, plaintiff was regular in taking an inquest, as no affidavit of merits *in that action* had been served. Sandland *v.* Adams, 2 How. Pr. (N. Y.) 98.

It should be entitled in the proper court, for an affidavit made in one court cannot properly be used in another court. Clickman *v.* Clickman, 1 N. Y. 611.

But where an affidavit of merits was entitled only "State of Nevada, Storey County," but the affidavit referred intelligently to the action in which it was used, the defect in the title was held immaterial. State *v.* Consolidated, etc., Min. Co., 13 Nev. 202.

So where an affidavit of merits was not entitled of the court or term, but was entitled in the cause, and regularly filed, so that it could readily be seen to what cause it applied, it was held sufficient. Wilborn *v.* Blackstone, 41 Ill. 264.

Caption.—In *Illinois* it has been held not indispensable that it should have a caption, or be entitled in the cause. Harris *v.* Lester, 80 Ill. 307; McCormick *v.* Wells, 83 Ill. 239; Hays *v.* Loomis, 84 Ill. 18; Beardsley *v.* Gosling, 86 Ill. 58.

An affidavit of merits entitled C. D. *ads.* A. B., in an action where A. B. is plaintiff and C. D. defendant, is entitled in the cause, especially where written on the same paper as the plea, which is properly entitled. Bowen *v.* Wilson, etc., Sewing Mach. Co., 86 Ill. 11. As to title of affidavits generally, see AFFIDAVITS, *ante*, p. 311.

3. **If the Venue is Omitted**, the affidavit is a nullity, although sworn to before the officer named in it. Cook *v.* Staats, 18 Barb. (N. Y.) 407. See AFFIDAVITS, *ante*, p. 313.

4. **A Proper Jurat** is essential. And where the affidavit is made by an illiterate person, the jurat should state that the affidavit was read over to him, and that he appeared to under-

6. **Amendments.**—Where there is a good defense, it is usual to allow defendant to amend any technical defects in an affidavit of merits,[1] unless there has been great delay, or the circumstances are suspicious.[2]

VIII. **SERVICE AND FILING.**—An affidavit of merits should be served or filed within the time required by the rules and statutes.[3] To prevent an inquest it should be served and filed before the first day of the circuit,[4] otherwise defendant is compelled to show service to the knowledge of plaintiff's attorney before the inquest is taken.[5]

IX. **CONTROVERTING THE AFFIDAVIT.**—Where a proper affidavit of merits has been made, it is the usual rule that the allegations therein relating to merits cannot be controverted, but must be considered as true for the purpose for which the affidavit is used.[6]

stand it. Haynes *v.* Powell, 3 Dowl. Pr. Cas. 599. See also AFFIDAVITS, *ante*, p. 316.

Foreign Language.—But where the affidavit purports to be signed by a defendant, it is no valid objection to it that it is signed in a foreign character, and that there is no statement in the jurat to show the defendant to be a foreigner and that it is his signature. Nathan *v.* Cohen, 3 Dowl. Pr. Cas. 373.

1. Cary *v.* Livermore, 2 How. Pr. (N. Y.) 170; Ellis *v.* Jones, 6 How. Pr. (N. Y. Supreme Ct.) 298; Tomkins *v.* Acer, 10 How. Pr. (N. Y. Supreme Ct.) 310; Brown *v.* St. John, 19 Wend. (N. Y.) 619. If the court deem the defense good, but defectively stated, or stated so generally that it cannot be determined whether a defense exists, it is usual to allow defendant to file a supplemental affidavit of defense. Callan *v.* Lukens, 7 W. N. C. (Pa.) 28.

2. Rickards *v.* Swetzer, 3 How. Pr. (N. Y. Supreme Ct.) 414; Johnson *v.* Lynch, 15 How. Pr. (N. Y. Super. Ct.) 203.

3. **In Illinois** it should be filed with the plea. Mestling *v.* Hughes, 89 Ill. 389; Hurd Rev. Sts. 1891, 1047, § 37. But an extension of plaintiff's time to file his claim extends defendant's time to file the affidavit. Healy *v.* Charnley, 79 Ill. 592.

In Pennsylvania it should be filed on the return day of the writ, or fifteen days after the service of plaintiff's statement. Act of May 25, 1887, P. L. 271. Under the former statute it was held that it might be filed even on a motion for judgment. West *v.* Simmons, 2 Whart. (Pa.) 261; Gillespie *v.* Smith, 13 Pa. St. 65. It may be served anywhere within the state. Cochran *v.* Pyle, 10 Pa. Co. Ct. Rep. 198.

In New York it should be filed with the clerk of the circuit. 3 Wait's Pr. 50. And a copy (with notice of filing the original) should be served on plaintiff's attorney. Cannon *v.* Titus, 5 Johns. (N. Y.) 355; Baker *v.* Ashley, 15 Johns. (N. Y.) 536.

Filing Affidavit after Denial of Motion.—The filing of an affidavit of merits after the denial of a motion to set aside a default does not cure the defect of the want of it in the original papers. Thompson *v.* Savage, 43 Iowa 398.

4. Baker *v.* Ashley, 15 Johns. (N. Y.) 536; Brainard *v.* Hanford, 6 Hill (N. Y.) 368; Rule 99, *Michigan* Supreme Court.

Filing will not take the place of service; it must be both filed and served. Baker *v.* Ashley, 15 Johns. (N. Y.) 536.

5. Brainard *v.* Hanford, 6 Hill (N. Y.) 368; Anonymous, 6 Abb. Pr. (N. Y.) 512; Smith *v.* Aylesworth, 24 How. Pr. (N. Y. Supreme Ct.) 37.

Service by leaving at the office of plaintiff's attorney when the office was vacant, and the inquest was taken before the attorney's return, *held* not a sufficient service. Brainard *v.* Hanford, 6 Hill (N. Y.) 368. But service on a clerk of plaintiff's attorney in time for the clerk to have notified the attorney before the inquest, was held a sufficient service. Smith *v.* Aylesworth, 24 How. Pr. (N. Y. Supreme Ct.) 33.

6. Heane *v.* Batterby, 3 Dowl. Pr. Cas. 213; Blewitt *v.* Gordon, 1 Dowl. N. S. 815, 6 Jur. 825; Philips *v.* Blagge,

The facts involving merits alleged in such an affidavit cannot be contradicted, even by matter of record.[1]

3 Johns. (N. Y.) 141; Hanford *v.* McNair, 2 Wend. (N. Y.) 286; Roosevelt *v.* Kemper, 2 Cai. (N. Y.) 30; Francis *v.* Cox, 33 Cal. 325; Gracier *v.* Wier, 45 Cal. 54; Reclamation Dist. *v.* Coghill, 56 Cal. 607; Douglass *v.* Todd, 96 Cal. 655; Mendall *v.* Kimball, 85 Ill. 582; Thelin *v.* Thelin, 8 Ill. App. 421; Kalkaska Mfg. Co. *v.* Thomas, 17 Ill. App. 235; Serafield *v.* Sheeler, 18 Ill. App. 507; Bristor *v.* Galvin, 62 Ind. 352; Buck *v.* Havens, 40 Ind. 221; Lake *v.* Innes, 49 Ind. 297; Beatty *v.* O'Connor, 106 Ind. 81; Hill *v.* Crump, 24 Ind. 291; Allegheny *v.* McCaffrey, 131 Pa. St. 142.

1. Feust *v.* Fell, 6 W. N. C. (Pa.) 43.

The Court Cannot Take Testimony as to the truth of the facts of defense, but must determine the question on the affidavit of the defendant. Worth *v.* Wetmore (Iowa, 1893), 54 N. W. Rep. 56. In this case the court said: "In this case the court proceeded to take testimony as to the merits of the defense. This it had no right to do, under an application to set aside a default by motion. We have heretofore held that, if the affidavit of merits shows a good defense, there can be no further inquiry as to the truth of the defense. Joerns *v.* La Nicca, 75 Iowa, 709. In other words, when the application is by motion, and the applicant shows a reasonable excuse for having made default, and also shows by affidavit that he has a meritorious defense to the plaintiff's claim, or some part of it, and presents his answer, the court must pass on the question of setting aside the default on the showing thus made. It cannot take testimony to establish the truth of the facts alleged in the affidavit of merits. To take testimony as to the matters set out in the affidavit, as was done in this case, is in effect trying the defense before the court has determined, by setting aside the default, that the defendant shall be heard to make a defense."

But Counter-Affidavits controverting the merits were considered by the court in Pitts *v.* Magie, 24 Ill. 610; Whiteside *v.* Logan, 7 Mont. 373; Houston, etc., R. Co. *v.* Burke, 55 Tex. 336, 40 Am. Rep. 808; and in the two cases last cited the merits were apparently weighed by the court on the conflicting affidavits.

Where, on a Motion to Open a Default, defendant presented an affidavit of merits and an excuse for the default, and plaintiff opposed the motion by an affidavit that defendant had admitted the claim alleged in the complaint, *held*, that the affidavit of defendant was overbalanced by that of plaintiff, and that the motion was properly denied. Henry Prouse Cooper Co. *v.* Findlay, 53 N. Y. Super. Ct. 524. See also Johnson *v.* Lynch, 15 How. Pr. (N. Y.) 191.

AFFIRMATION.

By Ward B. Coe.

I. **Definition**, 377.
II. **History—English Statute Law**, 377.
III. **American Statute Law**, 378.
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V. **Effect**, 380.

I. **Definition.**—An affirmation is a solemn religious asseveration in the nature of an oath.[1] It is a solemn declaration made before a court, judge, or other authorized officer, and having the force of an oath; an indulgence allowed by law to persons professing to have conscientious scruples against taking an oath.[2]

II. **History—English Statute Law.**—An oath was the only method known to the common law for insuring the undertaking of a witness that he would speak the truth, and difficulty was experienced upon his refusal to comply with religious forms—in other words, to guarantee the truth of his testimony by the sanction of an oath in any shape.[3] Relief was afforded by allowing the party so refusing to make a solemn affirmation in lieu of an oath. An affirmation, therefore, had no existence at common law, but is entirely the product of statute.[4]

1. Black L. Dict., *Affirmation;* Bouv. L. Dict., *ib.*; 1 Green Ev. § 371.

2. Burrill L. Dict., *Affirmation.*

Appeal to Supreme Being.—These definitions are doubtless too narrow. An affirmation does not, in strictness, it is conceived, involve an appeal to a Supreme Being. Abb. L. Dict., *Affirmation;* And. L. Dict., *Affirmation.* Although in the forms prescribed in some of the earlier English statutes allowing the practice of affirming to certain sects who were conscientiously scrupulous of taking an oath, an acknowledgment, express or implied, of a belief in a Higher Power is apparent. 1 Geo. I, stat. 2, c. 6; 9 Geo. IV, c. 32. See also Atcheson *v.* Everitt, Cowp. 382. The term "affirmation" can also properly be applied to the solemn declaration made by atheists in those jurisdictions where, by statute, atheists are permitted to testify, Wharton going so far even as to define an *oath* as the "assurance of the truth of an assertion by an appeal to a superior sanction,—that is, the 'superior sanction' of the moral sense,"—thus making his definition of an oath include the affirmations of atheists. Whar. Cr. Ev. § 353.

3. Best Prin. Ev. § 166.

4. **The Origin of the Practice** of affirming is to be found among the tenets of the Quakers, who held that taking an oath was unlawful and contrary to the Word of God. Before the revolution in *England* in 1688 the Quakers were subjected to severe penalties for refusing to take a legal oath. Anonymous, 1 Ch. Cas. 237; 2 Freem. 27. These hardships were in great measure removed by the Toleration Act, 1 Wm. & M., c. 18, § 13, which first allowed them to make a declaration of their fidelity to the state, instead of taking

III. American Statute Law.—The United States have, like England, recognized the necessity of dealing tenderly with the consciences of those opposed to the taking of an oath, and have, without exception, allowed such witnesses to affirm in both civil and criminal proceedings. This privilege has generally been extended also to grand and petit jurors, as well as to all officers from whom an oath is required by law.[1]

the oath of allegiance. In 1696, by the temporary act of 7 & 8 Wm. III, c. 34, Quakers were allowed in civil cases, instead of giving oath, to affirm, said act being afterward continued by 13 Wm. III, c. 4, and made perpetual by 1 Geo. I, stat. 2, c. 6. Further relief was given by the statute of 8 Geo. I, c. 6. By the statute of 12 Geo. II, c. 13, Quakers are allowed to be enrolled as attorneys or solicitors on their affirmation. Their privileges were further extended by 22 Geo. II, c. 46, sec. 36, which, construing previous statutes, permits them to affirm in all cases where an oath is required by act of Parliament, although still expressly excluding them from giving evidence in criminal cases, serving on juries, or bearing any office or place of profit under the government. *Ib.*, sec. 37. But these actions must be both technically and in substance criminal to exclude the testimony of a Quaker. Atcheson *v.* Everitt, Cowp. 382. See also on this point Hilton *v.* Byron, 3 Salk. 248; Robins *v.* Sayward, 1 Strange 441; Rex *v.* Green, 1 Strange 527; Wood *v.* Story, 1 P. Wms. 781; Castell *v.* Bambridge, 2 Strange 854; Rex *v.* Wych, 2 Strange 872; Cowell *v.* Waller, 2 Kely. 66; Oliver *v.* Lawrence, 2 Strange 946; Rex *v.* Bell, Andr. 200; *Ex p.* Gumbleton, 9 Mod. 232, 2 Atk. 70; Rex *v.* Turner, 2 Strange 1219; Rex *v.* Bridges, Say. 72; Rex *v.* Bow, Say. 75; Rex *v.* Gardner, 2 Bur. 1117. The statute 9 Geo. IV, c. 32, however, was passed, allowing both Quakers and Moravians to give evidence on simple affirmation in both civil and criminal cases. This was followed by an act allowing both of said sects to affirm in all cases where by law an oath is required. 3 & 4 Wm. IV, c. 49. A similar statute was passed for the relief of the Separatists. 3 & 4 Wm. IV, c. 82. The Common Law Procedure Act, 17 & 18 Vic., c. 125, sec. 20, enacts, with respect to civil cases, that any person called as a witness who should sincerely object to be sworn might be permitted to affirm. This enactment was extended to civil cases by 24 & 25 Vic., c. 66.

Atheists.—The case of an atheist was first provided for in *England* by the Evidence Further Amendment Act, 32 & 33 Vic., c. 68, s. 4, which provided that every person called to give evidence in a court of justice, whether in a civil or criminal proceeding, who should object to take an oath, or who should be objected to as incompetent to take an oath, should, if the presiding judge be satisfied that the taking of an oath would have no binding effect on his conscience, declare as follows: "I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth." This act, however, not applying to the promissory oath of allegiance appointed to be taken by members of Parliament before taking their seats, an atheist elected to a seat in that body would be in an unfortunate and difficult position. He could not affirm, as he did not come within the statutes allowing the use of affirmations to Quakers and other sects; and he could not take an oath, since this was impossible for an atheist. The controversy between the House of Commons and Mr. Bradlaugh, who found himself in this situation (Clarke *v.* Bradlaugh, 7 Q. B. Div. 38, 8 App. Cas. 354), was terminated by the passage of the General Oaths Act of 1888, 51 & 52 Vic., c. 46, which authorized any person to affirm wherever an oath is required. Under sec. 3 of the same act, where a witness has been duly sworn, the fact that at the time of taking the oath he had no religious belief in nowise affects the validity of the oath. But where a witness does not state either of above circumstances, and is yet allowed to affirm, this will be error, sufficient for reversal. Rex *v.* Moore, 6 L. J. M. C. 80, 40 W. R. 304.

1. The provisions are various in form, but have the same general ef-

Children.—Although it is a general rule that a child must be examined upon oath, yet one brought up by those conscientiously scrupulous of taking an oath will doubtless be allowed to affirm.[1]

Strict Construction.—But these statutes are in general strictly construed, at least as to the bare privilege of affirming.[2]

fect, the most common being simply that the word "oath," whenever used, shall include affirmation, and the word "swear" shall include the word "affirm" wherever by law an affirmation may be substituted for an oath; *i.e.*, a person who declares conscientious scruples against taking any form of oath may satisfy any statute requiring an oath by making a solemn affirmation in lieu thereof. Abb. L. Dict., *Oath*.

United States.—§ 1 of the Rev. Sts. of the United States provides that a requirement of an oath shall be deemed complied with by making affirmation in judicial form. See also Cons. U. S., Art. I, § 3; II, 1; VI; and Amend. Art. IV.

New England States.—It is generally provided in the New England states, and in one or two others which seem to have followed in their lead, that in substituting an affirmation for an oath, the usual closing words of an oath, "so help me God," shall be omitted, and the words, "this I do under the pains and penalties of perjury," inserted in their stead. But this, of course, is not necessary to make the affirmant liable to perjury if his testimony is false. *Maine* Rev. Stat. ch. 1, sec. 7; *New Hampshire* Pub. Stat. ch. 10, sec. 5; *Vermont* Rev. Laws, sec. 4552; *Massachusetts* Pub. Stat. ch. 169, sec. 17; *Rhode Island* Cons. Art. IX, sec. 3; *Connecticut* Gen. Stat. sec. 3362; *Ohio* Rev. Stat. sec. 7282; *Wisconsin* Stat. sec. 4692.

Atheists.—Many states have, like *England*, either by their constitutions or by statutes, abrogated the rule of the common law which (since the essence of an oath is the recognition of a belief in a Supreme Being) rendered atheists incompetent as witnesses, and unable to fill any office to the legal assumption of which an oath is necessary. In more than half of the states the privilege of affirming in lieu of making oath is now given to atheists, either by provisions expressly doing away with incompetency on account of religious belief, or by general provisions declaring complete equality of civil rights, privileges, and capacities, which latter, perhaps, are sufficiently broad to accomplish the same purpose. Cooley Const. Lim. 586; Perry's Case, 3 Gratt. (Va.) 632; Bush *v.* Com. 80 Ky. 244. It is observable that, generally speaking, these changes are accomplished in the older states by statute, in those of newer growth by constitutional provision. They affect sometimes merely the competency of atheists as witnesses; sometimes the provision has for its object the protection of all their civil capacities.

United States.—"The laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the *United States* in trials at common law, and in equity and admiralty." Rev. Sts. sec. 858.

Massachusetts.—Atheists are competent witnesses, but evidence of unbelief may be received to affect their credibility. Pub. Stat. ch. 213, sec. 6.

Georgia.—Religious belief goes only to the credit of the witness. Rev. Code, sec. 3853.

Other States.—In the following states constitutional or legislative provisions are found dealing more or less thoroughly with this question: *Maine*, *Vermont*, *Massachusetts*, *Connecticut*, *New York*, *Georgia*, *Florida*, *Mississippi*, *Louisiana*, *Texas*, *Arkansas*, *Missouri*, *Ohio*, *Indiana*, *Michigan*, *Minnesota*, *Wisconsin*, *Kansas*, *Nebraska*, *Arizona*, *Nevada*, *Colorado*, *Wyoming*, *Washington*, *Oregon*, *Iowa*, and *California*.

1. Phil. Evid. 11. See also Williamson *v.* Carroll, 16 N. J. L. 217.

2. **Privilege of Affirming.**—Where one who was not a Quaker was called to affirm, and refused to do so on the ground of conscientious scruples, he was committed for contempt, the liberty of affirming being strictly confined to Quakers under the [then] laws and practice of *Massachusetts*. U. S. *v.* Coolidge, 2 Gall. (U. S.) 364. And where a material witness before a grand jury is not sworn, he not being a Quaker, the indictment will be quashed. U. S. *v.* Coolidge, 2 Gall. (U. S.) 364.

Witness Not Objecting to Oath.—A witness who has no objection to be sworn cannot be affirmed to give evidence.[1]

IV. Form.—The form of affirmations does not vary greatly in the different jurisdictions.[2] It is regulated sometimes by statute, sometimes by usage; but even where it is prescribed by statute, a slight variance is not fatal.[3]

V. Effect.—The legal effect of an affirmation is, in all re-

1. Whar. Crim. Ev. § 355; Williamson *v.* Carroll, 16 N. J. L. 217, where a witness was affirmed without alleging or even having any conscientious scruples against taking an oath, the court saying: "*Prima facie*, every witness is to be sworn, and all evidence is to be given under oath. But the legislature, with becoming respect and deference to the religious sentiments of a numerous and highly respectable portion of the community, has provided a substitute for the sacramental or corporal oath, for such as are conscientiously scrupulous of submitting to that ceremony. But this privilege, by the very terms of the statute, is to be extended only to such as 'shall allege' themselves 'conscientiously scrupulous of taking an oath;' and we have no right to extend it to any others or upon any other terms." See also Wilson Bryan's Case, 1 Cranch (C. C.) 151, where a Methodist who objected to be sworn as a petit juror, but could not say that it was contrary to the principles of his religious society to take an oath, was ordered into the custody of the marshal for persisting in his refusal. But a special juror who stated that he had the persuasions of a Quaker, but was not a member of the Society of Friends, was allowed to affirm. Emmett *v.* Norton, 8 C. & P. 506.

2. The most common form is, "You do solemnly, sincerely, and truly declare and affirm that you will state the truth," etc. And. L. Dict., *Affirm.* This is sometimes followed by the words, "this I do under the pains and penalties of perjury," as in the *New England* states, *supra.*

3. **Variance from Statute.**—Thus, an official affirmation in the words "declare and affirm," instead of "promise and affirm," as required by statute, was deemed sufficient. Bassett *v.* Denn, 17 N. J. L. 432. So, where an oath was administered in the following form: "I, J. B., do solemnly and sincerely promise and swear (or affirm) that I will," etc., and at the bottom the words, "Affirmed before me, one of the justices of the county, Samuel Clarke," it was held valid in spite of its irregularity, the word "swear" being mere surplusage. State *v.* Shreve, 4 N. J. L. 297.

Presumption as to Regulations of Statute being Complied with.—In general, the court, in the absence of any fact to the contrary, will presume that the officer administering the affirmation was satisfied that the party making it was conscientiously scrupulous of taking an oath. It need not state this fact, nor need a statement of all forms gone through with appear on the face of the document. The affidavit will be assumed to be properly made. Loney *v.* Bailey, 43 Md. 10; Wolseley *v.* Worthington, 14 Ir. Ch. 369.

Rule in Criminal Cases.—A distinction has, however, been taken in this regard between civil and criminal cases. Coxe *v.* Field, 13 N. J. L. 215, where the court said: "The manner of administering the oath or affirmation in a court of record, proceeding according to the common law, is presumed to be correct and legal unless it appears to be otherwise on the face of the record. In criminal cases no such presumption is allowed, and therefore in them the manner is required to be set out; but there is no case or even *dictum* for it in a civil cause." See also Clark *v.* Collins, 15 N. J. L. 473; State *v.* Fox, 9 N. J. L. 244; State *v.* Harris, 7 N. J. L. 361; State *v.* Sharp, 6 N. J. L. 341; State *v.* Putnam, 1 N. J. L. 260; State *v.* Davis, 69 N. Car. 383, where the court uttered the following *dictum* in a criminal case: "If the usual form of oaths upon the Holy Evangely of Almighty God is dispensed with, and an 'appeal' or 'affirmation' is substituted, it must appear that the person sworn had conscientious scruples; else the 'appeal' or 'affirmation' is invalid." It is not necessary in a civil case to ask an affirming juror if he be conscientiously scrupulous of taking an oath. Anonymous, 3 N. J. L. 930.

spects and for all purposes, the same as that of an oath, the affirmant being under the same obligation to speak the truth, and therefore liable to the penalties of perjury if he affirm falsely,[1] the general doctrine being that what is materially an oath in its administration is also so in its effect.[2]

1. Bouv. L. Dict., *Perjury;* Steph. Cr. 93, 94; Whar. Cr. Ev. § 555; Am. & Eng. Ency. Law, *Perjury*, p. 303; Bishop Cr. Law, vol. 2, § 1018 (4); And. L. Dict., *Affirmation;* Abb. L. Dict., *Affirm.*

2. Omichund *v.* Barker, Willes 538, 1 Atk. 21, where Willes, L.C.J., said: "Though Quakers and fanatics, deviating from the common sentiments of mankind, refuse to give a formal oath, if they do that which is materially the same, it is materially an oath."

Pretending to be Quaker.—Where one who affirms as being a Quaker is not of that sect, he yet undertakes that he is a Quaker, and his affirmation cannot be impugned on that ground. His affirmation, if false, will subject him to the penalties of perjury. Marsh *v.* Robinson, 2 Anstr. 479.

Irregularity in an Affirmation will probably not prevent an indictment for perjury from lying. State *v.* Shreve, 4 N. J. L. 297.

AFFRAY.

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I. **DEFINITION.**—An affray is the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people.[1]

II. **THE INDICTMENT—1. The Form.**—The indictment for an affray need only follow the language of the statute defining a crime.[2]

2. Allegation of an Affray.—The authorities are conflicting as to whether the defendants may be charged merely with having "made an affray," without further allegation of fighting.[3]

1. Am. & Eng. Ency. Law, tit. AFFRAY.

2. Com. *v.* Barrett, 108 Mass. 302; State *v.* Sumner, 5 Strobh. (S. Car.) 53; Com. *v.* Welsh, 7 Gray (Mass.) 324.

The above authorities are cases of prize-fighting.

A Good Indictment.—An indictment which charges that the defendants on, etc., at, etc., with force and arms, in a certain county, were unlawfully assembled together in a certain public street or highway, in a certain town, and then and there being so unlawfully assembled together, and arrayed in a warlike manner, then and there did make an affray, to the great terror of divers good citizens of the State, then and being, contrary, etc., is a good indictment for an affray. State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323. And an indictment is sufficient if it charges that the parties did, at a time and a public place designated, "unlawfully and willingly fight together." State *v.* Billingsley, 43 Tex. 93. See also form of indictment given in Arch. Crim. Pl. & Ev. 599.

Assault and Battery.—Care must be taken not to allege the affray as a mere assault and battery. Champer *v.* State, 14 Ohio St. 437.

3. In State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323, such an indictment was held to be good. In State *v.* Benthal, 5 Humph. (Tenn.) 519, an allegation that defendants made an affray "by fighting" was held to be good. But in State *v.* Priddy, 4 Humph. (Tenn.) 429, an indictment charging only that defendants "made an affray" was held to be bad. The court held that the facts which constitute the affray must be alleged, and not merely the technical designation thereof. State *v.* Priddy, 4 Humph. (Tenn.) 429; and Simpson *v.* State, 5 Yerg. (Tenn.) 356; State *v.* Woody, 2 Jones (N. Car.) 335, are to the same effect. See also State *v.* Vanloan, 8 Ind. 182. Where the information stated that defendants fought in a public place, but whom or what they fought was not stated, the court held that the information was correctly quashed.

3. Allegation of Place.—The indictment must charge the fighting to have been in a public place.[1]

But the place need not be described further than by alleging that it was a public one.[2]

III. THE TRIAL—Both Must Be Convicted.—Where two defendants are jointly indicted for an affray, both must be convicted, or neither.[3]

Including Assault and Battery.—An indictment for an affray includes a charge of an assault and battery,[4] and the acquittal for an affray bars an indictment for assault.[5]

The Verdict.—The verdict may be special instead of general. The jury may find the facts and the court may draw the inference of guilt from it.[6]

1. State *v.* Heflin, 8 Humph. (Tenn.) 84; Shelton *v.* State, 30 Tex. 432.

2. Shelton *v.* State, 30 Tex. 432, where the court said: "It is true the statute does define what is intended to be a public place within the meaning of the law. But this is altogether a matter of evidence, and the state must show in sustaining the charge that the fighting was in a public place. The appellant, in pleading guilty, furnished the proof to the state in this case." But see State *v.* Heflin, 8 Humph. (Tenn.) 84, where it was held that an allegation that the affray took place in the town of Clarksville did not sufficiently describe the place.

3. Hawkins *v.* State, 13 Ga. 322, 50 Am. Dec. 517.

Contra.—One may be found guilty and the other acquitted. Cash *v.* State, 2 Overt. (Tenn.) 198.

4. McClellan *v.* State, 53 Ala. 640; Bishop Crim. Proc. § 25.

Ignored Against One Defendant.—An indictment charging that the defendant and another "did commit an affray by fighting together by mutual and common consent, in public view," includes a charge of a mutual assault and battery, and the defendant may be convicted under it, though the grand jury indorsed *not a true bill* as to the other. State *v.* Wilson, Phil. (N. Car.) 237. See State *v.* Allen, 4 Hawks (N. Car.) 356.

5. State *v.* Stanly, 4 Jones (N. Car.) 290.

6. Curlin *v.* State, 4 Yerg. (Tenn.) 143.

AGREED CASE.

By WILLIAM A. MCQUAID.

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Case Certified or Reported, see that title.

I. DEFINITION.—An agreed case is a formal written statement of all the material facts of a real controversy which might be the subject of a civil action between two or more parties, signed by them for the purpose of submission to a court to obtain rulings of law thereon enforceable by judgment. The proceeding is wholly the creation of statute.

II. NATURE OF THE AGREED CASE—1. Purpose.—The purpose of an agreed case is to save the expense of a trial and dispense with a jury.[1] The parties perform the function of a jury and determine the facts. There is no dispute about the facts, but there is as to the propositions of law to be deduced therefrom.[2]

2. Contents.—An agreed case must contain all the material facts that are necessary for a determination of the questions of law arising out of the controversy.[3]

1. McKethan *v.* Ray, 71 N. Car. 165; 1 Bouv. Law Dict. 288; 1 Troubat & Haly's Prac. (Pa.) § 752; Fuller *v.* Trevoir, 8 S. & R. (Pa.) 529; Diehl *v.* Ihrie, 3 Whart. (Pa.) 143; Whitesides *v.* Russell, 8 W. & S. (Pa.) 44.

2. McLughan *v.* Bovard, 4 Watts (Pa.) 308; Diehl *v.* Ihrie, 3 Whart. (Pa.) 143; Williams *v.* Rochester, 2 Lans. (N. Y.) 169.

As a Substitute for an Action.—"This mode of procedure is not intended to provide for the submission of questions of law for the opinion of the court merely, without a case in which a judgment might be rendered, in accordance with its opinion, legally determining the rights of the parties. It does not authorize a submission of questions in cases that are merely anticipated, nor of cases where the facts are disputed, nor is such submission intended to be merely advisory as to the rights of the parties. It is rather a substitute for an action, and its effect upon the rights of the parties is the same as that of an action. It is a short and convenient mode for the final adjudication of the case submitted." Newark R. Co. *v.* Perry County, 30 Ohio St. 120.

As Commencement of a Suit.—The filing of the agreed case is the commencement of the suit within a rule fixing the legal rights of the parties to a suit at the time of its commencement. Nashville Trust Co. *v.* Nashville Fourth Nat. Bank (Tenn.), 18 S.W. Rep. 822, 15 L. R. A. 710.

3. Sargent Invalid Furniture Co. *v.* Sargent, 65 N. H. 672. All facts material to a final and complete determination of the controversy, with nothing further to be done except to carry the judgment into effect. Moore *v.* Hinnant, 87 N. Car. 505; Piedmont R. Co. *v.* Reidsville, 101 N. Car. 404; Kneller *v.* Lang, 137 N. Y. 589; Levy *v.* Sheehan, 3 Wash. 420. See also *post*, V, *Function of the Court*.

Facts Pertinent to the Particular Issue.—See Royall *v.* Eppes, 2 Munf. (Va.) 479, to the effect that parties do not need to state all the facts of the case, but only those pertinent to a particular question of law, providing that judgment may be entered for or against the plaintiff according as the decision of such question is for or against him.

Kind of Action.—In *Pennsylvania* an agreed case should contain the kind of action as well as the cause of action. It should appear whether the action is in debt, assumpsit, or trespass. Berks County *v.* Jones, 21 Pa. St. 413.

Must Show a Cause of Action.—An agreed case should show a cause of action in favor of one party against another. Gregory *v.* Perdue, 29 Ind. 66.

Facts Regarded as True.—Judgment on the agreed case must be rendered in favor of the party entitled thereto, taking the facts recited therein to be true; but if the facts so recited fail to show a cause of action in the party in whose favor the judgment is rendered by the trial court, it will not be upheld by the appellate court. Day *v.* Day, 100 Ind. 460; Manning *v.* Coogan, 49 N. H. 331; but see Taunton *v.* Taylor, 116 Mass. 254.

Signature.—An agreed case must be signed by each of the parties, or by their attorneys, in order that it may

Not Evidence, but Facts.—The agreed case must contain the ultimate facts and should not be a mere recital of the evidence or circumstances which may tend to prove the ultimate facts or from which they may be inferred.[1] Whatever is not distinctly stated must be taken not to exist.[2]

3. Mode of Stating.—An agreed case should be something more than a mere narrative of facts.[3] It should give the subject-matter of contention and state the conflicting claims.

4. Like a Special Verdict.—An agreed case is not a mere stipulation concerning evidence from which inferences of fact may be drawn, but it is equivalent to a finding of facts by a court or the special verdict of a jury in which every fact necessary to a recovery must be expressly found in a conclusive and unambiguous form.[4]

be heard. Farrand *v.* Bentley, 6 Mich. 280; Branchardiere *v.* Elvery, 18 L. J. Exch. 383.

1. Either a statement of facts by the parties or a finding of facts by the court is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and must not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred. Raimond *v.* Terrebonne Parish, 132 U. S. 192; Burr *v.* Des Moines R., etc., Co., 1 Wall. (U. S.) 99; Norris *v.* Jackson, 9 Wall. (U. S.) 125; Martinton *v.* Fairbanks, 112 U. S. 670; Glenn *v.* Fant, 134 U. S. 398; U. S. *v.* Eliason, 16 Pet. (U. S.) 291; Powers *v.* Provident Sav. Inst., 122 Mass. 443; Lewis *v.* Hoblitzell, 6 Gill & J. (Md.) 259; Diehl *v.* Ihrie, 3 Whart. (Pa.) 143; Com. *v.* Baum, 1 Lehigh Valley Rep. (Pa.) 187; Kinsley *v.* Coyle, 58 Pa. St. 461; Union Sav. Bank *v.* Fife, 101 Pa. St. 388; Ament *v.* Sarver, 2 Grant's Cas. (Pa.) 34; Holmes *v.* Wallace, 46 Pa. St. 266; Luzerne County *v.* Glennon, 109 Pa. St. 564; Parker *v.* Urie, 21 Pa. St. 305; Melick *v.* Smith, 1 Leg. Opin. (Pa.) 157; Fisher *v.* Purdue, 48 Ind. 323; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am, Dec. 445; Ramsey *v.* McCue, 21 Gratt. (Va.) 349.

2. Berks County *v.* Jones, 21 Pa. St. 413; Berks County *v.* Pile, 18 Pa. St. 493; Canonsburg Iron Co. *v.* Union Nat. Bank (Pa., 1886), 6 Atl. Rep. 574; Holmes *v.* Wallace, 46 Pa. St. 268; Ford *v.* Buchanan, 111 Pa. St. 31; Seiple *v.* Seiple, 133 Pa. St. 460; Com. *v.* Howard, 149 Pa. St. 302; Philadelphia, etc., R. Co. *v.* Waterman, 54 Pa. St. 337; Diehl *v.* Ihrie, 3 Whart. (Pa.) 143.

Reference for Determination of Facts.—The court has no power to refer the determination of the facts of a cause submitted upon an agreed case to a referee, and a judgment entered upon his report will be reversed and the agreed case quashed. Frailey *v.* Legion of Honor, 132 Pa. St. 578; Phelps *v.* Phelps, 145 Mass. 416.

3. The controversy arising on the facts, and the rulings to be made according to the opinion of the court of their legal operation, should be specifically described. Overman *v.* Sims, 96 N. Car. 451; McKethan *v.* Ray, 71 N. Car. 165; Moore *v.* Hinnant, 87 N. Car. 505. But see, *contra*, Haeger *v.* Nixon, 69 N. Car, 108; Lewis *v.* Wake County, 74 N. Car. 194.

4. Goodrich *v.* Detroit, 12 Mich. 279; Brinkley *v.* Hambleton, 67 Md. 169; Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596; Hartman *v.* Smith, 7 Mont. 19; Crane *v.* Whittemore, 4 Mo. App. 510; Fisher *v.* Purdue, 48 Ind. 323; James *v*, McWilliams, 6 Munf. (Va.) 301.

An agreed statement of facts, strictly speaking, corresponds to a special verdict. It presupposes that the issues have been settled and that the evidence has been passed upon, and it contains therefore no questions arising on the pleadings or any matter of evidence, but results in the form of ascertained facts. It is the business of the court to deduce from them the proper legal conclusions. Barden *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 248.

There Must Be No Ambiguity.—An agreed case stands in lieu of a special

5. **Judgment.**—The judgment must be provided for in the agreed case, and such a judgment must be demanded as can be rendered upon the facts stated.[1] The agreed case must contain facts upon which an effectual judgment can be rendered.[2]

6. **What is Not an Agreed Case.**—Agreements as to evidence must not be mistaken for agreed cases. There is an essential difference between an agreed case and a case where the trial takes place before the court or jury upon an agreed statement of facts.[3]

verdict, and all the facts necessary to a determination of the case must be definitely ascertained. If there be any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment will not be allowed to stand. Munford *v.* Wilson, 15 Mo. 540; White *v.* Walker, 22 Mo. 433; Gage *v.* Gates, 62 Mo. 412; Shaw *v.* Padley, 64 Mo. 519; Carr *v.* Lewis Coal Co., 96 Mo. 149, 9 Am. St. Rep. 328; Hughes *v.* Moore, 17 Mo. App. 148; Moore *v.* Henry, 18 Mo. App. 35; Ford *v.* Cameron, 19 Mo. App. 467; State *v.* Hannibal, etc., R. Co., 34 Mo. App. 591; Berks County *v.* Pile, 18 Pa. St. 493; Holmes *v.* Wallace, 46 Pa. St. 266; Kinsley *v.* Coyle, 58 Pa. St. 461; Union Sav. Bank *v.* Fife, 101 Pa. St. 388; Whitesides *v.* Russell, 8 W. & S. (Pa.) 44; Washburn *v.* Baldwin, 10 Phila. (Pa.) 472; Clark *v.* Halberstat, 1 Miles (Pa.) 26; Norris *v.* Jackson, 9 Wall. (U. S.) 125; Glen *v.* Fant, 134 U. S. 398; Raimond *v.* Terrebonne Parish, 132 U. S. 192; Brewer *v.* Opie, 1 Call (Va.) 212; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Real Estate Bank *v.* Rawdon, 5 Ark. 558; Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596; Old Colony R. Co. *v.* Wilder, 137 Mass. 537; Hovey *v.* Crane, 10 Pick. (Mass.) 440; Gillett *v.* Detroit, 46 Mich. 309; Newark, etc., R. Co. *v.* Perry County, 30 Ohio St. 120; Stockton *v.* Copeland, 23 W. Va. 696.

1. Williams *v.* Rochester, 2 Lans. (N. Y.) 169.

Judgment for Nominal Sum.—If the case does not fix the damages or provide for the assessment thereof, judgment for the plaintiff will be for nominal damages only. McAneany *v.* Jewett, 10 Allen (Mass.) 151; Marine Bank *v.* Merchants' Bank, 12 Gill & J. (Md.) 498; Burgess *v.* Pue, 2 Gill (Md.) 254; Jackson *v.* Salisbury, 66 Md. 459; Tyson *v.* Western Nat. Bank, 77 Md. 412; Kraft *v.* James, 64 Iowa 159; Central City Water Co. *v.* Kimber, 1 Colo. 475; Hobart College *v.* Fitzhugh, 27 N. Y. 130. See also *post*, V, 4, *Power to Discharge*.

2. Williams *v.* Rochester, 2 Lans. (N. Y.) 169; Weed *v.* Calkins, 24 Hun (N. Y.) 582; Graves *v.* Brinkerhoff, 4 Hun (N. Y.) 308; Cunard S. S. Co. *v.* Voorhis, 104 N. Y. 525; Whitesides *v.* Russell, 8 W. & S. (Pa.) 44; Berks County *v.* Pile, 18 Pa. St. 493; State *v.* Sias, 17 N. H. 558; Keith *v.* Rucker, 16 Ill. 389.

An agreed case must contain a full and certain statement of all the facts belonging to the case, so that, when a judgment is entered thereon, it will be capable of enforcement to the same extent as though reached by the verdict of a jury. Washburn *v.* Baldwin, 10 Phila. (Pa.) 472; Dunn *v.* Meixell, 1 Lehigh Valley Rep. (Pa.) 168; Pittsburgh *v.* Alleghany, 1 Pitts. (Pa.) 97.

Recovery of Statutory Penalty.—Where a suit was brought to recover a statutory penalty, and the cause was submitted to the court on a case stated, which failed to show whether the acts relied on to establish the defendant's liability took place within the two years provided by law for the prosecution of such actions, or in what state they took place, such case is not sufficient to sustain a judgment. Com. *v.* Howard, 149 Pa. St. 302.

Agreed Case Without Parties.—Where an agreed case is submitted without plaintiff or defendant, and upon the facts in such case neither party is entitled to judgment, the district court should dismiss the matter. Frazer *v.* Miller, 12 Kan. 459.

Judgment upon an Agreed Case as a Bar.—A judgment dismissing a suit agreed is a bar to any other action for the same cause. If the dismissal was ordered, without actual satisfaction, upon some new agreement not complied with, an action upon the new agreement is the only remedy. Jarboe *v.* Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Bank of Commonwealth *v.* Hopkins, 2 Dana (Ky.) 395.

3. Citizens' Ins. Co. *v.* Harris, 108 Ind.

III. NATURE OF THE CONTROVERSY—1. Generally.—The controversy which it is sought to submit as an agreed case must be one that might be the subject of a civil action;[1] the court will not entertain a made-up case the parties to which are not opposed in interest.[2]

2. Affidavit of Reality.—Wherever provision is made by statute for the submission of a controversy upon an agreed case, an affidavit must be filed to show that the question submitted is a real controversy.[3]

392; Oppenheim *v.* Pittsburgh, etc., R. Co., 85 Ind. 477; Pennsylvania Co. *v.* Niblack, 99 Ind. 149. An agreed case is a mere agreement as to what the evidence would establish. Slessman *v.* Crozier, 80 Ind. 487; Downey *v.* Washburn, 79 Ind. 242; Martin *v.* Martin, 74 Ind. 207; Witz *v.* Dale, 129 Ind. 120; Hodge *v.* First Nat. Bank, 22 Gratt. (Va.) 51; Dearing *v.* Rucker, 18 Gratt. (Va.) 426; Wickham *v.* Martin, 13 Gratt (Va.) 446; Martinton *v.* Fairbanks, 112 U. S. 670.

No agreed case where facts, if found for defendant, to be taken as true; but if for plaintiff, cause to be sent to jury. Stockton *v.* Copeland, 23 W. Va. 696.

Competency of Evidence. — Should there be any question as to the effect or competency of evidence, or as to any rulings of the court below on evidence examined, the case is not an agreed case. Burr *v.* Des Moines R., etc., Co., 1 Wall. (U. S.) 99; Pomeroy *v.* State Bank, 1 Wall. (U. S.) 592.

Agreed Cases by Contestants in Disputed Elections.—When A. claims to have been elected the successor to B. to an office, which claim B. disputes, such a question arises as might be the subject of a civil action, and as may be submitted upon an agreed case. Frazer *v.* Miller, 12 Kan. 459; Alexander *v.* McKenzie, 2 S. Car. 86. But in Buffalo *v.* Mackay, 15 Hun (N. Y.) 204, it was held that such action could not be tried upon an agreed case because the state must be made a party. See also Kennedy *v.* New York, 79 N. Y. 361.

Contingent Rights.—Courts will not upon a case submitted upon an agreed case determine rights dependent upon a contingency until the happening of the event. Hobart College *v.* Fitzhugh, 27 N. Y. 130.

1. See *post*, 2, *Affidavit of Reality*, V, 2, *Abstract Questions*.

Enforcement of Lien.—If the plaintiff's remedy is solely by the enforcement of a lien, and not by action, he cannot recover. West Roxbury *v.* Minot, 114 Mass. 526.

Injunctions. — *New York.*—An injunction is expressly prohibited in New York. Paterson *v.* Mutual L. Assoc., 19 Civ. Pro. Rep. (N. Y. Super. Ct.) 262; People *v.* Binghamton Trust Co. (Supreme Ct.), 20 N. Y. Supp. 179; Cunard S. S. Co. *v.* Voorhis, 104 N. Y. 528.

Mandamus and Prohibition.— *South Carolina.*—Under the statutes of South Carolina proceedings by mandamus and prohibition cannot be maintained on an agreed case. South Carolina Soc. *v.* Gurney, 3 S. Car. 51.

Pleas in Abatement.—It is improper to bring a matter which, if there is any question upon it, is proper for a plea in abatement to the writ, before the court in the form of a case stated. Colby *v.* Dillingham, 7 Mass. 475; Libbey *v.* Hodgdon, etc., Stage Co., 9 N. H. 394; Morse *v.* Calley, 5 N. H. 222.

Submission of Actions.—No authority is contained in § 372 in the New York Code of Procedure for the submission of actions; it relates solely to the submission of questions of difference without action. Van Sickle *v.* Van Sickle, 8 How. Pr. (N. Y. Supreme Ct.) 265.

Question as to Right to Serve Process.—Where the question was whether a coroner who was also a deputy sheriff could serve process upon another deputy sheriff, it was held an improper matter to submit upon an agreed case. Colby *v.* Dillingham, 7 Mass. 475.

2. As for the purpose of determining the validity of a grand jury. People *v.* Wallace, 91 Cal. 535.

3. **Affidavit of Reality Jurisdictional.**—Without the affidavit as to reality of controversy, where it is required, the court has no jurisdiction. Myers *v.* Lawyer, 99 Ind. 237; Sharpe *v.* Sharpe, 27 Ind. 507; Witz *v.* Dale, 129

IV. OFFICE OF STIPULATION—1. Extent of Control by Parties.—The court cannot acquire jurisdiction by the mere agreement of the parties to grant it. To enable the court to decide an action upon agreed facts, the statement must have been made in a case legally before the court for its decision. Parties by their agreement cannot present a case to the court in a manner not authorized by law.[1]

Ind. 120; Manchester *v.* Dodge, 57 Ind. 584; Godfrey *v.* Wilson, 70 Ind. 50; Slessman *v.* Crozier, 80 Ind. 487; Downey *v.* Washburn, 79 Ind. 242; Western Union Tel. Co. *v.* Frank, 85 Ind. 480; Reeder *v.* Workman, 37 S. Car. 413; M'Carson *v.* Richardson, 1 Dev. & B. (N. Car.) 561; Aycock *v.* Harrison, 65 N. Car. 8; Hervey *v.* Edmunds, 68 N. Car. 243; Grant *v.* Newsom, 81 N. Car. 36; Keeline *v.* Council Bluffs, 62 Iowa 450; Bank of Commonwealth *v.* Hopkins, 2 Dana (Ky.) 395; Jones *v.* Hoffman, 18 B. Mon. (Ky.) 656; Plainfield *v.* Plainfield, 67 Wis. 525; Molandin *v.* Colorado Cent. R. Co., 3 Colo. 173; People *v.* Mutual Endowment, etc., Assoc., 92 N. Y. 622.

Effect of Omission of Affidavit.—Without such affidavit the decision of the court is not a judgment and not appealable. At most it is a mere award, as in a common-law arbitration. Plainfield *v.* Plainfield, 67 Wis. 525.

By Whom Affidavit Should Be Made.—It is sufficient if made by one only of the parties. Booth *v.* Cottingham, 126 Ind. 431. The affidavit must be made by one of the parties, and an affidavit by an attorney for one of the parties is not a compliance with the statute where there is a natural party by whom it may be made. Bloomfield *v.* Ketcham, 5 Civ. Pro. Rep. (N. Y. Ct. of App.) 407, 95 N. Y. 657.

Same Attorney for Both Parties.—Where the same attorney prepared the agreed case and also the briefs of both parties, it will be discharged notwithstanding an affidavit of reality. Wood *v.* Nesbitt (Supreme Ct.), 19 N. Y. Supp. 423.

Statement as to Affidavit in Record.—The record showed only the allegation in the agreed statement on appeal, that the cause was heard in the justice's court on an agreed statement of facts. The statement that there was an affidavit cannot be taken as equivalent to the affidavit. Mellois *v.* Chaine, 20 Cal. 679.

1. "The case is before us on agreed facts; but that circumstance does not give the court jurisdiction. It is suggested that the defendant has waived the point by the form of the argument, that if the 'trustees were not liable' for the tax, etc., judgment should be entered for the plaintiffs. We are satisfied that the defendant did not use the language with that meaning, and therefore, if necessary, should discharge the agreement rather than enter judgment for the plaintiffs. Agreed facts are not to be dealt with on quite the same principles as contracts. But as the plaintiffs expressed no wish that the agreement should be discharged if their construction was not adopted, and as we do not perceive how they could better their case, we construe the agreement as meaning, simply, if the plaintiffs are not liable although assessed as above stated and although they had brought no petition for abatement, or if the plaintiffs were entitled to recover." Richardson *v.* Boston, 148 Mass. 513.

A party is not, by his having joined in a case stated in a court of equity, precluded from objecting to the want of jurisdiction. The consent of the parties cannot give jurisdiction if otherwise it does not exist. Beeson *v.* Elliott, 1 Del. Ch. 369.

Action Against Creditor of Corporation.—No action at law can now be maintained by a creditor of a corporation against its officers to enforce liabilities imposed by the statutes relating to corporations. This objection to the form of action is not waived or rendered immaterial by the submission upon an agreed statement of facts. McRae *v.* Locke, 114 Mass. 96.

Parties Cannot Give Court Jurisdiction Over Others.—Parties cannot bind others by the agreement made between themselves. Hobart College *v.* Fitzhugh, 27 N. Y. 130; Union Nat. Bank *v.* Kupper, 63 N. Y. 617. See also subdivision of this article entitled VI, *Practice*, 1. *Parties.*

2. Effect as an Estoppel.—The parties to a controversy submitted upon an agreed case are estopped from denying the truth, competency, or sufficiency of any admissions contained therein.[1]

Specified Points of Law.—Parties may rest the decision of the controversy upon certain specified points of law, to the exclusion of all extraneous facts or circumstances. Royall *v.* Eppes, 2 Munf. (Va.) 479; Stockton *v.* Copeland, 23 W. Va. 696.

If the stipulation contains a clause which indicates the question submitted for decision, a determination of that question determines the case. Crane *v.* Whittemore, 4 Mo. App. 510.

Right to Except Reserved.—It is inconsistent for parties to agree to state the facts and then reserve the right to except. Bixler *v.* Kunkle, 17 S. & R. (Pa.) 310.

What Necessary to Make Agreed Case Part of Judgment Roll.—If the parties agree to a statement of facts and stipulate that it may be used by either party in any and all proceedings in the action, the statement of facts becomes a part of the judgment roll. Burnett *v.* Pacheco, 27 Cal. 411.

Judgment of Respondeat Ouster.—The court will not render judgment of *respondeat ouster* even though parties stipulate to that effect. The very object of a case stated, to end the controversy by a judgment in chief on certain ascertained points, would be defeated by permitting the facts to be re-examined. Darlington *v.* Gray, 5 Whart. (Pa.) 502.

When State Concluded.—When the state by its proper officers enters into an agreed case, if it is not bound by the agreement, it is in any event concluded by a judgment and decision to which it has not excepted. State *v.* Porter, 86 Ind. 404.

As to the control by stipulation of the discretion of the court in the matter of costs, see *post*, VI. *Practice.* 1. *Costs.* See *post*, V. *Function of the Court*, on the point of power of inferring facts granted by stipulation; see also *post*, *Pleadings*; 3. *Effect as a Waiver;* IX. *Appeals.*

1. Upon an agreed case facts stated are taken to be true. Manning *v.* Coogan, 49 N. H. 331; Day *v.* Day, 100 Ind. 460.

A Solemn Judicial Admission.—The effect of the admission is to conclude the parties. This admission belongs to the class of solemn judicial admissions which are made as a substitute for proof of the fact admitted. They dispense with proof as to such fact, and, although there may appear in the case evidence casting doubt on the truth of the matter admitted, it is to be presumed that there is other evidence not produced, or other reasons which induce the admission. If the admission were improvidently made, the injured party has his remedy, by motion to strike out or amend the admission; but while it exists in the case it would appear to be conclusive. Fearing *v.* Irwin, 4 Daly (N. Y.) 385, affirmed in 55 N. Y. 486; Lathers *v.* Fish, 4 Lans. (N.Y.) 213.

Parties are Bound by their Theory of the Case.—"The parties assert that this is an agreed case. Accepting without investigation or decision the statement of both parties that this is an agreed case under the statute, and taking as our guide that parties are bound by the theory which they assume to be the correct one, we shall test this case as an agreed one." Booth *v.* Cottingham, 126 Ind. 431.

Objection that Proof was not in Writing.—A party cannot agree upon a case stated which admits a certain fact, and then insist that the proof of the fact is not competent, as that it was not in writing. Swatara R. Co. *v.* Brune, 6 Gill (Md.) 41.

Statement as to Demand.—A statement in a case that a demand was made means a demand in accordance with the statute, if there is such a statute. Jennison *v.* Roxbury, 9 Gray (Mass.) 32.

Officer's Return.—Where parties in an agreed statement of facts agree to a fact decisive of the title, the officer's return, which would have been conclusive evidence upon a trial between them, is not to be regarded. Agreeing in a case stated to a fact, which a party could have been estopped to allege or deny, is a waiver of the estoppel. Wolcott *v.* Ely, 2 Allen (Mass.) 338; Wheelock *v.* Henshaw, 19 Pick. (Mass.) 341; Boston *v.* Tileston, 11 Mass. 468; Com. *v.* Greene, 13 Allen (Mass.) 251. But see Lowrey *v.* Caldwell, 139 Mass. 88, to the effect that, where a case

3. Effect as a Waiver.—By submitting to the court a cause upon an agreed case, the parties to the submission are held to waive all defects of pleading and form of action, and the cause will be determined strictly upon the merits.[1] The sole question is

stated set forth an officer's return and facts inconsistent therewith, it was held that the conclusiveness of the return was not waived by the matters so stated. See also Collins *v.* Douglass, 1 Gray (Mass.) 167.

Agreed Case in Ejectment.—A case agreed in ejectment, finding the lease, entry, and ouster in the declaration mentioned, sufficiently admits that all the defendants, who agreed upon the case, are in possession of the land in controversy. Mooberry *v.* Marye, 2 Munf. (Va.) 453.

In an action of ejectment, a recital, in an agreed case, that plaintiff's grantor "died in 1871 intestate, and her husband in 1864 intestate," is not such a precise affirmation that plaintiff's grantor was a feme covert at the time of the death of her husband as to estop defendants, in a subsequent partition of the same land, from showing that she had been divorced in 1860, before she executed a deed in trust of the land to defendant. Sutton *v.* Dameron, 100 Mo. 141.

Statute Passed Subsequent to Filing Case.—A stipulation that a cause shall be heard and determined on the pleadings and agreed statement of facts does not preclude either party from taking advantage of a statute enacted between the time of the settlement of the statement and the time of the hearing. Such stipulation governs only the facts, not the law. Huff *v.* Cook, 44 Iowa 639.

Admission Must Be in Certain Terms.—An agreed case, containing the statement that when a certain county officer entered on his official duties the population of the county "was over 150,000 and less than 300,000, based upon reasons incorporated in the following paragraph," is not in such an admission of the fact as will warrant a judgment based upon it. Luzerne County *v.* Glennon, 109 Pa. St. 564; Robidoux *v.* Casseleggi, 81 Mo. 459.

What is Sufficient Assent.—Where one of several parties to a case made was in court when the statement of facts agreed upon was read without his objection, he cannot in the Supreme Court object to its admission in evidence as error. Whitehall *v.* Crawford, 37 Ind. 147.

How Agreed Case Construed.—The agreed case must be read and interpreted in the light of the rule that the burden of excusing non-delivery is upon the carrier. It follows that it is to be taken most strongly against the defendant, just as any affirmative pleading is to be taken most strongly against the pleader. Isenberg *v.* St. Louis, etc., Anchor Line, 13 Mo. App. 415.

1. Hess *v.* Bolinger, 48 Cal. 349; Merrill *v.* Bullock, 105 Mass. 486; Fish *v.* Fiske, 154 Mass. 302; Reynolds *v.* Reynolds, 30 Kan. 95. By the agreed facts the parties are held to have waived all matters of form and of process, and the question is to be decided irrespective of the mode of proceeding. Boxford *v.* Harriman, 125 Mass. 321; Brettun *v.* Fox, 100 Mass. 234; Chappel *v.* McIntyre, 9 Tex. 161; Bates *v.* Republic, 2 Tex. 616; Parker *v.* Portis, 14 Tex. 166; American Coal Co. *v.* Alleghany County, 59 Md. 185; Bostick *v.* Blades, 59 Md. 231, 43 Am. Rep. 548; Knight *v.* Ft. Fairfield, 70 Me. 500; Bixler *v.* Kunkle, 17 S. & R. (Pa.) 310. See *post*, VII. *Pleadings*. Machias Hotel Co. *v.* Fisher, 56 Me. 321.

Question of Infancy Waived.—Where an infant plaintiff sues without the intervention of a *prochein ami*, and the facts are stated in an agreed case, the defect is waived by defendant. Smith Co. *v.* Carney, 127 Mass. 179.

Legal or Equitable Relief.—A claim was filed calling upon the Circuit Court to exercise its powers as a probate court. Subsequently a pleading was filed calling for equity jurisdiction. Then the case was submitted upon an agreed statement of facts without objection to the form of procedure. The objection if properly taken on the pleadings would have led to a severance of the causes of action. But the submission was a waiver of all objections to matters of form of proceeding, and as the court had both jurisdictions, it had power to grant the full measure of relief demanded, irrespective of the form, Baugh *v.* Barrett, 69 Iowa 495; and an objection that the plaintiff has

whether the plaintiff can recover upon any form of declaration or in any form of action.[1]

Reserving Objections by Stipulation.—Objections to the form of pleadings and proceedings may, however, be expressly reserved by stipulation.[2]

a plain, adequate, and complete remedy at law cannot be raised for the first time on the final hearing of a suit in equity, on facts agreed, when not stated in any of the pleadings. Russell *v.* Loring, 3 Allen (Mass.) 121. So a case stated whereby it is agreed that judgment shall be for the plaintiff if an action can be maintained in any form, either at law or in equity, waives all questions of form and process. Second Religious Soc. *v.* Harriman, 125 Mass. 321; Graves *v.* Brinkerhoff, 4 Hun (N. Y.) 305; Logan *v.* Hall, 19 Iowa 491; Braught *v.* Griffith, 16 Iowa 35.

1. Upon an agreed case the only question open is whether the plaintiff can recover upon any form of declaration or in any form of action. The defendant waives all technical objections to the pleadings and form of action, but not the question whether in any form of action the plaintiff can recover. Manchester *v.* Dodge, 57 Ind. 584; Pennsylvania Co. *v.* Niblack, 99 Ind. 149; Merrill *v.* Bullock, 105 Mass. 486; Folger *v.* Columbian Ins. Co., 99 Mass. 277, 96 Am. Dec. 747; West Roxbury *v.* Minot, 114 Mass. 546; Cushing *v.* Kenfield, 5 Allen (Mass.) 307; Cleveland *v.* Boston Sav. Bank, 129 Mass. 27; Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec 353; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; Rogers *v.* Daniell, 8 Allen (Mass.) 343; Moore *v.* Philbrick, 32 Me. 102, 52 Am. Dec. 642; Gardiner *v.* Nutting, 5 Me. 140, 17 Am. Dec. 211; Machias Hotel Co. *v.* Fisher, 56 Me. 323; Pillsbury *v.* Brown, 82 Me. 451.

When Defendant Entitled to Judgment.—Where there is a declaration but no plea, and the cause of action is stated in an agreed case without reference to any particular form of defense, the defendant is entitled to judgment if the facts stated afford him a defense of which he might have availed himself under any form of pleading. Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

2. Objections to the form of the pleadings and proceedings are waived unless expressly reserved for the consideration of the tribunal to which the submission is made. Snow *v.* Miles, 3 Cliff. (U. S.) 608; Bixler *v.* Kunkle, 17 S. & R. (Pa.) 310. See subdivision VII. *Pleadings.* Russell *v.* Lowry, 3 Allen (Mass.) 121; Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; Rogers *v.* Daniell, 8 Allen (Mass.) 343; Smith *v.* Carney, 127 Mass. 179; Kimball *v.* Preston, 2 Gray (Mass.) 567; Fay *v.* Duggan, 135 Mass. 242; Esty *v.* Currier, 98 Mass. 500; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Cushing *v.* Kenfield, 5 Allen (Mass.) 307; Hamilton *v.* Cook County, 5 Ill. 519.

This rule is not varied by the fact that the pleadings are made a part of the agreed case. Kimball *v.* Preston, 2 Gray (Mass.) 567; Esty *v.* Currier, 98 Mass. 500.

When Plaintiff's Right Limited to Pleadings.—Where, however, by the terms of the agreed case, the plaintiff's right to recover is limited to the pleadings, the defendant must have judgment unless the plaintiff can recover upon the particular declaration. Com. *v.* Worcester, etc., R. Co., 124 Mass. 561.

The cause being submitted upon an agreed case, the decision is made without reference to the pleadings. Miner *v.* Coburn, 4 Allen (Mass.) 136.

Defect of Parties, when Waived.—One of several sureties became insolvent, and the debt was paid by another. Where the latter sought to obtain contribution from the other solvent sureties, it was agreed to submit the controversy upon a case stated, admitting the insolvency of a surety who was not made a party to the controversy. Although the insolvent surety was a necessary party, still he was so solely for the purpose of determining his solvency. Inasmuch as that was admitted, the reason for his being made a party was removed and the defect waived. Weed *v.* Calkins, 24 Hun (N. Y.) 582.

Effect of Submission on an Action Previously Commenced.—If the submission

4. Rescission.—An agreed case may be abandoned or rescinded like any contract.[1]

V. FUNCTION OF THE COURT—1. Power of Inference.—It is the sole duty of the court to apply the law to the undisputed facts stated in the agreed case, and it has no power to draw inferences of fact,[2] although there is considerable divergence among the de-

of the case does not of itself work a discontinuance of the action, it must do so when followed by a judgment and meanwhile suspend it. Van Sickle *v.* Van Sickle, 8 How. Pr. (N. Y. Supreme Ct.) 265.

Effect when Fact of Submission Omitted.—Where an agreed statement of facts is of doubtful interpretation and does not contain the statement that the case is submitted to the court upon the facts so agreed, and one of the parties thereto and the trial court interpret it as permitting the introduction of evidence to establish some facts in issue by the pleadings, the only material error made in taking evidence was the placing of the party who thought the submission conclusive at a disadvantage because he did not expect to have to prove his case. Kansas City, etc., R. Co. *v.* Hines, 29 Kan. 695.

Controverting Facts in Argument.—Where a case is presented to the court upon an agreed statement which assumes without objection the existence of certain facts, such facts cannot be controverted in argument before the court. Alden *v.* Goddard, 73 Me. 345; Day *v.* Day, 100 Ind. 460.

1. An agreed case may be abandoned either by tacit or express consent, and subsequently pleading to the issue is satisfactory proof of such abandonment. McLughan *v.* Bovard, 4 Watts (Pa.) 308; Hart's Appeal, 8 Pa. St. 32; Darlington *v.* Gray, 5 Whart. (Pa.) 502.

Leave of Court.—An agreed case cannot be withdrawn or the agreement retracted by either party except by leave of court or cause shown. A party may apply for leave to withdraw from the files an agreed case or such part of an agreed case filed under mistake or misapprehension. Ish *v.* Crane, 13 Ohio St. 574.

In *Vermont* an agreed statement of facts filed in the court is subject to the control of the court, the same as the pleadings, and the court may in its discretion allow the same to be withdrawn. Fayston *v.* Richmond, 25 Vt. 446.

2. To balance evidence, weigh probabilities, determine the credibility of witnesses, or draw inferences and thereby determine controverted questions of fact, are not among the prerogatives of the court in an agreed case. Pray *v.* Burbank, 11 N. H. 290; Henniker *v.* Hopkinton, 18 N. H. 101; Howard *v.* Farr, 18 N. H. 459; Woodman *v.* Eastman, 10 N. H. 359; Sawyer *v.* Corse, 17 Gratt. (Va.), 248, 94 Am. Dec. 445; Trafton *v.* Hill, 80 Me. 503; Binney *v.* Chesapeake, etc., Canal Co., 8 Pet. (U. S.) 216; Byam *v.* Bullard, 1 Curt. (U. S.) 104; Pomeroy *v.* State Bank, 1 Wall. (U. S.) 592; Beer *v.* Simpson, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 351, where the residences of the parties and plaintiff's assignor were omitted; Rogers *v.* Gould, 20 Tex. 437; Barden *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 248; Ford *v.* Cameron, 19 Mo. App. 467; White *v.* Walker, 22 Mo. 433; Henri *v.* Grand Lodge, 59 Mo. 581; Shaw *v.* Padley, 64 Mo. 519; Lippencott *v.* Ledyard, 8 Phila. (Pa.) 18; Kinsley *v.* Coyle, 58 Pa. St. 461; Seiple *v.* Seiple, 133 Pa. St. 460; Hazelbaker *v.* Clipper Coal Co., 158 Pa. St. 393; Clark *v.* Wise, 46 N. Y. 612, *reversing* 57 Barb. (N. Y.) 416; Fearing *v.* Irwin, 55 N. Y. 486; Brown *v.* Evans, 15 Kan. 88; Gray *v.* Crockett, 30 Kan. 148; Crandall *v.* Amador County, 20 Cal. 72; Fisher *v.* Purdue, 48 Ind. 323; Frazier *v.* Spear, 2 Bibb (Ky.) 385; Goodrich *v.* Detroit, 12 Mich. 279; Engstron *v.* Brightman, 5 C. B. 419, 57 E. C. L. 418. The court is restricted to the facts admitted. Green *v.* Fresno County, 95 Cal. 329.

Judge's or Special-Term Order.—When an agreed case stated that an order of publication had been made at a Special Term when it should have been made by a judge, the court held that it could not under the agreed case disregard the caption and consider the order a judge's order. Crosby *v.* Thedford, 7 Civ. Pro. Rep. (N. Y. C. Pl.) 245.

Only Questions of Law can be Considered.—The court can only respond to the questions of law arising upon the admitted facts. The inference of

cisions as to the right of the parties to grant that power to the court by stipulation.[1]

2. Abstract Questions.—The court will not consider mere speculative or fictitious questions if submitted upon an agreed case.[2]

one fact from another is a question of fact and not of law, and this inference must be drawn by a jury; and it would be travelling out of the province of the court as well as the agreement in this case if the court were to infer another fact, and pronounce the law arising thereon. Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223; Crandall *v.* Amador County, 20 Cal. 73.

Necessary Inferences.—No inferences of fact can be drawn unless, as matter of law, they are necessary inferences. Mayhew *v.* Durfee, 138 Mass. 584. The court must give effect to presumptions that of necessity arise from conceded facts. Hovey *v.* Chisholm, 56 Hun (N. Y.(328; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Ramsey *v.* McCue, 21 Gratt. (Va.) 349.

The court can make no inferences, unless of law, or such as are undeniable consequences resulting from the facts agreed upon. Vansant *v.* Roberts, 3 Md. 119; Hysinger *v.* Baltzell, 3 Gill & J. (Md.) 159; Van Brunt *v.* Pike, 4 Gill (Md.) 270, 45 Am. Dec. 126; Wright *v.* Wright, 2 Md. 430, 56 Am. Dec. 723; McTavish *v.* Carroll, 7 Md. 352, 61 Am. Dec. 353; McColgan *v.* Hopkins, 17 Md. 395; Stewart *v.* State, 2 Har. & G. (Md.) 114; Reeside *v.* Fischer, 2 Har. & G. (Md.) 320. But no material fact should be left for inference when the fact is susceptible of definite statement. Kneller *v.* Lang, 137 N. Y. 589.

It could never have been the intent of the statute to provide expressly for a mere stipulation concerning evidence, which should allow the court to draw inferences from inconclusive facts, without the power of removing doubt by further proof. Goodrich *v.* Detroit, 12 Mich. 279. But see Spring *v.* Davis, 36 Me. 399, to the effect that the court has power to infer facts *dehors* the agreed case, although such power be not expressly given.

1. The power which the jury has of inferring is often preserved to the court by a clause to the effect that the court may make such inferences from the facts agreed upon as a jury might reasonably make. Crane *v.* Whittemore, 4 Mo. App. 510; Tyson *v.* Western Nat. Bank, 77 Md. 412; Jackson *v.* Salisbury, 66 Md. 459; Doe *v.* Crisp, 1 P. & D. 37; Latter *v.* White, 5 H. L. Cas. 587; but the court may decline to pass upon a question of fraud, Whitmore *v.* Claridge, 10 W. R. 1057; Bullen *v.* Sharp, L. R. 1 C. P. 86. And see Spring *v.* Davis, 36 Me. 399; but see, *contra*, Pray *v.* Burbank, 11 N. H. 290, to the effect that the assent and request of the parties can impose no duty upon the court to make inferences of fact; and see Rand *v.* Hanson, 154 Mass. 87.

2. Campbell *v.* Talbot, 132 Mass. 174; Capen *v.* Washington Ins. Co., 12 Cush. (Mass.) 517; McKethan *v.* Ray, 71 N. Car. 165; Newark R. Co. *v.* Perry County, 30 Ohio St. 120; People *v.* Mutual Endowment Assoc., 92 N. Y. 622; Troy Waste Mfg. Co. *v.* Harrison, 73 Hun (N. Y.) 528; Williams *v.* Rochester, 2 Lans. (N. Y.) 169; Washburn *v.* Baldwin, 10 Phila. (Pa.) 472; Com. *v.* Cleveland, etc., R. Co., 29 Pa. St. 370; Witz *v.* Dale, 129 Ind. 120; Wellesley *v.* Withers, 4 El. & Bl. 750, 82 E. C. L. 750.

No Hypothetical Case Can Be Submitted.—Something more substantial than a hypothetical case must be presented, and it must appear that some practical result in the case will follow the decision. Sceva *v.* True, 53 N. H. 627; Scheer *v.* Bedford, 62 N. H. 691; State *v.* Stevens, 36 N. H. 59; Wood *v.* Squire, 60 N. Y. 191, where it is stated that it is not within the purview of section 372 of the N. Y. Code of Procedure that certain legal interrogatories should be propounded to the court, not decisive of the proper judgment to be rendered on the facts stated, with the intention that the event of the answer should determine a judgment previously agreed upon by the parties.

Court Will Not Decide Preliminary Questions.—The court will not act upon a stated case by which only a preliminary question, not the merits, will be decided. Austin *v.* Wilson, 7 Mass. 205.

A Fraud Upon the Court.—An agreed case gotten up without any foundation in fact would be a fraud upon the court, and would be treated accord-

The submission must be made in good faith.[1]

3. Power to Amend.—The court having no power to amend an agreed case, because of the solemnity of the agreement entered into between the parties,[2] it will not direct an amendment on the application of one of the parties.[3] In some cases, however, the court will grant relief from the consequences of an omission of facts by mistake.[4]

ingly at any stage of the cause. State *v.* Wilson, 2 Lea (Tenn.) 204.

1. The court refused to give judgment in a special case stated under 3 4 Wm. IV, ch. 42, § 25, it appearing that the action was not brought in good faith to try a question really in contest between the parties to the cause. Doe *v.* Duntze, 6 C. B. 100, 60 E. C. L. 99.

2. In an action submitted upon an agreed case, judgment was ordered for the plaintiff according to the agreement which defined the relief to which the plaintiff, if successful, would be entitled. A motion made to change the nature of the relief in accordance with a later decision of the Court of Appeals was denied, on the ground that the court had no authority to change the nature of the relief agreed upon. Kingsland *v.* New York, 42 Hun (N.Y.) 599.

The court will not amend by inserting a fact known when the agreed case was drawn, nor will it insert a new fact if the fact would not change the judgment. Ganthony *v.* Witten, 16 W. R. 61, 17 L. T. N. S. 117; Hills *v.* Hunt, 15 C. B. 1, 80 E. C. L. 1.

3. The parties to an agreed case make their own agreements, and the court cannot alter them on the motion of one of them. Bell *v.* Twilight, 17 N. H. 528, 45 Am. Dec. 367; Pennington *v.* Cardale, 10 W. R. 544; Mersey Dock, etc., Com'rs *v.* Jones, 6 Jur. N. S. 960, 29 L. J. C. P. 239, 8 C. B. N. S. 124, 98 E. C. L. 114.

4. The court may grant relief when a case was agreed to under a mistake. Levy *v.* Sheehan, 3 Wash. 420; State *v.* Porter, 86 Ind. 404; Bell *v.* Twilight, 17 N. H. 528, 45 Am. Dec. 367.

A party may apply to the court for leave to withdraw from the files an agreed case, or such part thereof as was, in fact, untrue, and had been assented to under mistake or misapprehension. Ish *v.* Crane, 13 Ohio St. 574, 580.

When Injustice Will Be Done.—No amendment will be allowed unless it is made clear that without it the rights of a party will be sacrificed or plain injustice done. Wiswell *v.* First Cong. Church, 14 Ohio St. 31.

Instances of Allowance of Amendment.—Where an action is submitted upon a case stated by the parties, but the agreement does not limit the plaintiff's right of recovery to the particular form in which the action is brought, the writ may be amended in the court into another form of action, of which that court has original jurisdiction, although it has no jurisdiction of the action in the form in which it was first brought. A landlord-and-tenant process may be amended into an action of ejectment when the agreed case would support such an action. Merrill *v.* Bullock, 105 Mass. 486; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747. An amendment was allowed so as to set forth truly the date of the judgment. Hervey *v.* Edmunds, 68 N. Car. 243; Grant *v.* Newsom, 81 N. Car. 36. Where it appeared that some of the facts were recited in exhibits which were not attached, and that leave was given to the parties to add other matters, the cause was remanded to be completed. Piedmont R. Co. *v.* Reidsville, 101 N. Car. 404.

When Application to Amend an Agreed Case Must Be Made.—If the parties desire the case to be amended or discharged, steps must be taken to effect the object before the decision is announced. Osgood *v.* Blake, 21 N. H. 570; Goodrich *v.* Eastern R. Co., 38 N. H. 390.

How to Proceed to Amend.—If the admission were improvidently made, the injured party has his remedy by motion to strike out or amend the admission; but while it exists in the case it would appear to be conclusive. Fearing *v.* Irwin, 4 Daly (N. Y.) 385, *affirmed* 55 N. Y. 486.

Where there is a clear and palpable mistake in an agreed case and in the judgment thereon, the court at special

4. Power to Discharge.—The court has power to discharge an agreed case when the facts are insufficiently stated,[1] when there is a defect of parties,[2] when a valid judgment cannot be rendered upon the facts stated,[3] and when material facts have been omitted or are disputed.[4]

term is authorized, upon motion of the aggrieved party, to correct such mistake. State *v.* Porter, 86 Ind. 404.

1. **When Facts Insufficiently Stated.**—If through inadvertence the facts are not sufficiently stated, the agreed case will be discharged, and the case remanded to the court below for further proceedings. Old Colony R. Co. *v.* Wilder, 137 Mass. 536; Phelps *v.* Phelps, 145 Mass. 416; Smith *v.* Cudworth, 24 Pick. (Mass.) 196; Gregory *v* Pierce, 4 Met. (Mass.) 478; Merriam *v.* Merriam, 6 Cush. (Mass.) 91; Morse *v.* Mason, 103 Mass. 560; Meserve *v.* Andrews, 104 Mass. 360; Powers *v.* Provident Sav. Inst., 122 Mass. 443; Richardson *v.* Boston, 148 Mass. 513; Gage *v.* Gates, 62 Mo. 412; Carr *v.* Lewis Coal Co., 96 Mo. 149, 9 Am. St. Rep. 328; James *v.* McWilliams, 6 Munf. (Va.) 212; Brewer *v.* Opie, 1 Call. (Va.) 222; Ford *v.* Buchanan, 111 Pa. St. 31.

2. Plaintiff and one C. were both appointed to the same office. Agreed case discharged because C. was not made a party with the city. Kennedy *v.* New York, 79 N. Y. 361.

When Each Has Claim Against Third Party.—Likewise when each party has no claim against the other, though they have against a third party. Bates *v.* Lilly, 60 N. Car. 232. Likewise if the judgment properly demanded would be rendered nugatory by a defect of parties. Wood *v.* Squires, 60 N. Y. 191, reversing 1 Hun (N. Y.) 481; Wavle *v.* Tuttle, 11 N. Y. Wkly. Dig. 186; Dickinson *v.* Dickey, 76 N. Y. 602; Hodgdon *v.* Darling, 61 N. H. 582.

3. If no judgment can be rendered upon the facts in the agreed case, it will be discharged. Cunard S. S. Co. *v.* Voorhis, 104 N. Y. 528; Paterson *v.* Mutual L. Assoc. of America, 19 Civ. Pro. Rep. (N. Y. Super. Ct.) 262; Frazer *v.* Miller, 12 Kan. 459; Whitesides *v.* Russell, 8 W. & S. (Pa.) 44; Holmes *v.* Wallace, 46 Pa. St. 268; Union Sav. Bank *v.* Fife, 101 Pa. St. 388; Kinsley *v.* Coyle, 58 Pa. St. 461; Clark *v.* Halberstadt, 1 Miles (Pa.) 26; Holmes *v.* Wallace, 46 Pa. St. 266.

Injunction the Only Relief.—Where an injunction is the only relief that can be awarded, the agreed case must be discharged. Paterson *v.* Mutual L. Assoc. (Super. Ct.), 33 N. Y. St. Rep. 703; People *v.* Binghamton Trust Co. (Supreme Ct.), 20 N. Y. Supp. 179. And likewise where the judgment to be entered is not provided for in the agreed case. Marine Bank *v.* Merchants' Bank, 12 Gill & J. (Md.) 498; Burgess *v.* Pue, 2 Gill (Md.) 254.

4. **Some Misapprehension Must Be Shown.**—Upon an application to discharge a case, it must appear that the agreement was entered into under some misapprehension of the facts, or that material facts have subsequently been discovered, that due diligence was used in the preparation of the agreed case, and due caution exercised in entering into the agreement. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 526; Heywood *v.* Wingate, 14 N. H. 73; Gregory *v.* Pierce, 4 Met. (Mass.) 480; Platt *v.* Superior Ct., 124 Mass. 353; Old Colony R. Co. *v.* Wilder, 137 Mass. 537; Com. *v.* Gloucester, 110 Mass. 491; Shannon *v.* Shannon, 10 Allen (Mass.) 249; Bryan *v.* Bates, 12 Allen (Mass.) 205; Com. *v.* Scott, 123 Mass. 418; Davila *v.* Herring, 1 Str. 300; Hankey *v.* Smith, 3 T. R. 507; Wheldon *v.* Matthews, 2 Chit. Rep. 399, 18 E. C. L. 378, 2 Tidd Pr. 899; Cook *v.* Shrauder, 25 Pa. St. 312; Com. *v.* Howard, 149 Pa. St. 302; Odell *v.* Cromwell, 10 N. Y. Wkly. Dig. 273; Matter of Smith, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 452.

Court will Not Act as a Jury.—The court will not assume the office of a jury in deciding upon a special case submitted by agreement of the parties, when the principal questions are questions of fact, to be decided upon the conflicting testimony of witnesses whose credibility is a matter of question. Brockbank *v.* Anderson, 7 Scott N. R. 813, 13 L. J. C. P. 102; Burr *v.* Des Moines R., etc., Co., 1 Wall. (U.S.) 99; Pomeroy *v.* State Bank, 1 Wall. (U. S.) 592; Brown *v.* Rogers, 61 Ind. 449; Old Colony R. Co. *v.* Wilder, 137 Mass. 537; Gregory *v.* Pierce, 4 Met. (Mass.) 478; Lefavour *v.* Homan, 3 Allen (Mass.) 354; Morse *v.* Mason,

5. Miscellaneous Powers.—It is the function of the court to deduce the proper legal conclusions from the facts ascertained by the parties.[1] It must pass upon the case as stated, and cannot go outside of it. Neither can counsel in argument.[2]

103 Mass. 560; Meserve *v.* Andrews, 104 Mass. 360.

Where there is an essential fact in dispute, as, for example, whether natural gas is a volatile substance or not, the Supreme Court will quash a case. Ford *v.* Buchanan, 111 Pa. St. 31.

Must Contain All Essential Facts.—If the agreed case does not contain every fact essential to the recovery by the plaintiff on the cause of action alleged in the petition, such omission is fatal to his right of recovery. Field *v.* Chicago, etc., R. Co., 21 Mo. App. 600.

Miscellaneous. — Subsequent bankruptcy insufficient to discharge. Heywood *v.* Wingate, 14 N. H. 73. Where the agreed case sets forth testimony in place of facts, it will be discharged. Powers *v.* Provident Sav. Inst., 122 Mass. 443. But it will not be discharged for failure to set out a foreign law as a fact. Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311. Where the same attorney prepared the agreed case and the briefs of both parties, it will be discharged. Wood *v.* Nesbitt (Supreme Ct.), 19 N. Y. Supp. 423. And where the Attorney-General moved to discharge an agreed case, motion was denied because he was not a party. Berlin Iron Bridge Co. *v.* Wagner (Supreme Ct.), 32 N. Y. St. Rep. 119. But there will be no discharge upon a technicality, Jennison *v.* Roxbury, 9 Gray (Mass.) 32; though it will be discharged if the court is called upon to decide collaterally a question of public right, Loring *v.* Bridge, 9 Mass. 124. Case will not be discharged when it will work injustice. Bell *v.* Twilight, 17 N. H. 528, 45 Am. Dec. 367. Where a cause is submitted upon an agreed case, a judgment entered upon the report of a master appointed to hear and determine the facts of the cause will be reversed and the agreed case quashed. Frailey *v.* Legion of Honor, 132 Pa. St. 578; Phelps *v.* Phelps, 145 Mass. 416.

When the Agreed Case May Be Dismissed.—Even after judgment for defendant at Common Pleas and an appeal to the Supreme Court, the agreed case may be discharged. Lowell *v.* Merrimac Mfg. Co., 11 Gray (Mass.) 382; West *v.* Platt, 124 Mass. 353; Morse *v.* Mason, 103 Mass. 560; Perkins *v.* Langmaid, 36 N. H. 501; Cook *v.* Shrauder, 25 Pa. St. 312. But if party seeking discharge is guilty of laches, the agreed case will not be discharged. Page *v.* Brewsters, 54 N. H. 187. A motion to discharge a case agreed must be made before the decision is announced. Osgood *v.* Blake, 21 N. H. 570; Goodrich *v.* Eastern R. Co., 38 N. H. 390.

An agreed case is under the control of the court after it is filed, and leave of the court must be obtained to withdraw it. Ish *v.* Crane, 13 Ohio St. 574; Fayston *v.* Richmond, 25 Vt. 446.

Reference for Facts to Annexed Affidavits.—A case stated that is not clear and explicit in itself, but refers to affidavits appended thereto for the facts, may be quashed on account of the inartificial form in which it is drawn. Hemphill *v.* Yerkes, 132 Pa. St. 545. But see Piedmont R. Co. *v.* Reidsville, 101 N. Car. 404, where it appeared that some of the facts were recited in exhibits which were not attached, and that leave was given to the parties to add other matters, the case was remanded to be completed.

Receiver's Powers as to Agreed Cases.—Can a receiver submit a controversy, *quære*. Waring *v.* O'Neill, 15 Hun (N. Y.) 105. It is a serious matter to disturb a carefully-drawn agreed statement of facts upon which a cause has been tried, and it would not be done between private litigants in the absence of any unfairness; yet such an agreement between a receiver and another party to a suit may be set aside and a rehearing had, upon allegation of mistake on the part of the receiver, he being an officer of the court and representing many claimants to a fund. Matter of Smith, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 452.

Vacating Submission.—The court has no power to vacate the submission, or to refer the facts to the determination of a jury. Neilson *v.* Commercial Mut. Ins. Co., 3 Duer (N. Y.) 444.

1. Barden *v.* St. Louis L. Ins. Co., 3 Mo. App. 248.

2. Doe *v.* Lewis, 1 Burr. 617; Pike *v.* Carter, 3 Bing. 835, 11 E. C. L. 41.

When Court Will Declare Agreed Case

VI. PRACTICE—1. Parties.—The parties to the question of difference are all those who have any interest therein and whose rights may be affected by the judgment.[1] An agreed case will be dismissed if the necessary parties are not voluntarily before the court.[2]

Void.—"The submission of a controversy upon an agreed case is a contract of a high and solemn nature, and it is only upon the fullest evidence of fraud or mutual error that a court of equity would ever adjudge it to be void; and then only in a form in which their decision might be reviewed and, if erroneous, reversed. What we are therefore asked to do is not merely to vacate the judgment and order a new trial, but to vacate the submission and annul the case to which the parties have agreed, so as to enable the plaintiff to contest before a jury the facts she has admitted to exist. It is exceedingly clear, however, that we have no such power, and that were the submission and case set aside our jurisdiction would cease. It was the consent of the parties in the form prescribed by the Code that alone gave us jurisdiction." Lang *v.* Ropke, 1 Duer (N. Y.) 701; Neilson *v.* Commercial Mut. Ins. Co., 3 Duer (N. Y.) 455.

Agreed Case Obtained by Fraud.—The court has the right to ascertain whether an agreed case has been obtained through fraud. Keith *v.* Rucker, 16 Ill. 389.

Nature of Relief to be Granted.—The court is bound to give such judgment as the facts require, whether the relief be legal or equitable. Graves *v.* Brinkerhoff, 4 Hun (N. Y.) 305; Logan *v.* Hall, 19 Iowa 491; Braught *v.* Griffith, 16 Iowa 35; Baugh *v.* Barrett, 69 Iowa 495; Russell *v.* Loring, 3 Allen (Mass.) 121; Second Religious Soc. *v.* Harriman, 125 Mass. 321.

Not Necessary for Court to Make Findings.—It would be unreasonably technical to hold that the court below erred in not mechanically transcribing what already sufficiently appeared in the record of the case. Frush *v.* East Portland, 6 Oregon 281; White *v.* Walker, 22 Mo. 433.

Receiver's Application.—On application of a receiver the court may direct a referee to ascertain the facts without regard to an agreed statement between the original parties; but in case of laches the court will impose terms. Matter of Smith, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 452.

1. Effect of Defect of Parties.—A portion of them cannot agree upon a case and submit it to the court, and so give the court jurisdiction to cause the others to be brought in. No one can be made a party to the agreed case without his consent. Nor is it a case where the court may determine the controversy between the parties before it without prejudice to the rights of others by saving their rights. Hobart College *v.* Fitzhugh, 27 N. Y. 130; Union Nat. Bank *v.* Kupper, 63 N. Y. 617; Buffalo *v.* Mackay, 15 Hun (N. Y.) 204.

No Action Without a Defendant.—Inasmuch as section 1280 provides that upon filing the papers in the submission the controversy becomes an action, and judgment is to be rendered as in an action, there can be no action without two parties, and no judgment without a defendant. Dickinson *v.* Dickey, 76 N. Y. 602.

Where the Attorney-General moved to discharge an agreed case to which he was not a party, his motion was denied. Berlin Iron Bridge Co. *v.* Wagner (Supreme Ct.), 32 N. Y. St. Rep. 119.

2. Wavle *v.* Tuttle, 11 N. Y. Wkly. Dig. 186; Kennedy *v.* New York, 79 N. Y. 361; Wood *v.* Squires, 60 N. Y. 191, reversing 1 Hun (N. Y.) 481; Bates *v.* Lilly, 65 N. Car. 232.

Defendant Without Interest.—An agreed case in which the defendant has no interest does not authorize a decision of a controversy between the plaintiff and other persons who are not parties to the suit. Hodgdon *v.* Darling, 61 N. H. 582.

Parties Must Be Voluntarily Before the Court.—The court will decline to accept the submission of a cause against the wishes of those collaterally interested. St. Louis Smelting, etc., Co. *v.* Kemp, 103 U. S. 666.

Heirs-at-Law.—An action in the nature of a suit by an executor, for instructions as to his duty, was submitted by a widow and an administrator. Where it appeared that a decision in favor of the widow would

2. Costs.—The hearing of a controversy submitted upon an agreed statement of facts is a trial of the issues of law arising upon the admitted facts.[1] In such cases costs are taxable, and an extra allowance may be granted in a proper case.[2]

charge the decedent's debts upon the real estate and involve a consideration of what purported to be a release of dower, made in the lifetime of the husband, it was held that the heirs-at-law were necessary parties. Wavle *v.* Tuttle, 11 N. Y. Wkly. Dig. 186.

Defect of Parties May Be Waived.—See Weed *v.* Calkins, 24 Hun (N. Y.) 582, under subdivision of this article entitled "Waiver."

Infants as Parties.—An infant cannot sign on agreed case, because incapable of binding himself by contract, and there is no statute that authorizes the appointment of a guardian for an infant to appear for him in a controversy without action. Fisher *v.* Stilson, 9 Abb. Pr. (N.Y. Supreme Ct.) 33. An agreed case is in effect an admission of the truth of certain facts, substantially in the same manner as if they were admitted in pleadings in an action. It is a well-known principle that no guardian *ad litem* can make an admission in behalf of infants. Lathers *v.* Fish, 4 Lans. (N. Y.) 213; Baumgrass *v.* Brickell (Supreme Ct.), 7 N. Y. St. Rep. 685; but see Smith *v.* Carney, 127 Mass. 179, to the effect that if an infant plaintiff sue without the intervention of a *prochein ami*, and the facts are stated in an agreed case, the defect is waived by defendant. If the defect had been pleaded in abatement, the writ or declaration could have been amended in any way necessary to put his case in proper form to support the judgment to which the facts entitled him.

An Executor or Administrator has no power to submit a claim against the estate upon an agreed statement of facts under Ind. Rev. Sts. 1881, § 553, giving parties the right so to submit any controversy. Henes *v.* Henes, 5 Ind. App. 100.

By Whom Agreed Case Must Be Signed.—An agreed case, under § 3421 of the Compiled Laws of the State of *Michigan*, must be signed by the parties or their attorneys. Farrand *v.* Bentley, 6 Mich. 280. But see Bradford *v.* Buchanan (S. Car., 1893), 17 S. E. Rep. 501, and Reeder *v.* Workman, 37 S. Car. 413, which states the rule in *South Carolina* to be that the agreed case must be signed by the parties as well as by the attorneys. See also for the rule in *Indiana*, Booth *v.* Cottingham, 126 Ind. 431, to the effect that it will be sufficient if signed by one of the parties, and by the attorney for the other.

When Trustee Need Not Sign.—In a trustee process an agreed case upon the question whether a claimant has a valid assignment of the funds in the hands of the trustee need not be signed by the trustee. Segee *v.* Downes, 143 Mass. 240, *distinguishing* Massachusetts Nat. Bank *v.* Bullock, 120 Mass. 86.

1. Richards *v.* James, 16 L. T. N. S. 672; Neilson *v.* Mutual Ins. Co., 3 Duer (N. Y.) 683.

An Agreed Case an Action.—A controversy submitted upon an agreed case is, when the affidavit of reality and the agreed case are filed, an action in which a defense is interposed; and the hearing upon such a submission is practically the trial of an issue of law. Kingsland *v.* New York, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 323, 52 Hun (N. Y.) 98. When a controversy is submitted upon an agreed case, it carries with it the idea of a claim of some kind on one side, which is opposed and defended on the other, and it is a defense within the meaning of § 3253 of the Code of Civil Procedure. People *v.* Fitchburg R. Co. (Supreme Ct.), 44 N. Y. St. Rep. 229.

2. Costs Controlled by Stipulation.—In *New York* the court at General Term held that the stipulation of the parties determined whether costs should be awarded. *Held*, in People *v.* Fitchburg R. Co. (Supreme Ct.), 44 N. Y. St. Rep. 229, that where the parties stipulated that the prevailing party should have costs, they abridged or restricted the exercise by the court of the discretion vested in it. The stipulation must be substituted for the exercise of any discretion by the court. In Fish *v.* Coster, 28 Hun (N. Y.) 64, there was a stipulation that judgment be given in favor of the prevailing party with costs and disbursements, and in that case it was held that the stipulation controlled, and that no

3. Miscellaneous.—The practice of bringing on for hearing actions submitted on agreed cases differs in *Maine* and *New Hampshire* from that of most of the states. The action is regularly placed upon the jury-term calendar, and is transferred to the law side.[1]

extra allowance could be granted under it; afterwards *affirmed* in 92 N. Y. 627, without passing upon the point whether an extra allowance could be granted. McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 93.

No Agreement as to Costs. — Where there is no agreement as to costs, a plaintiff who has obtained judgment for part of his claim is entitled to tax his costs, less costs incurred by defendant in the portion on which he has succeeded. Elliott *v.* Bishop, 10 Exch. 522.

Additional Allowance.—The court has power to grant an additional allowance upon the decision of a controversy submitted upon an agreed case. Kingsland *v.* New York, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 323. But see, *contra*, People *v.* Fitchburg R. Co., 133 N. Y. 239. The Court of Appeals held that the stipulation of the parties has no effect upon the discretion of the court as to costs or extra allowance.

An extra allowance cannot be granted in a controversy submitted to the court by agreement, and which first appears in the form of an action upon the calendar of the general term. The provision as to granting an extra allowance for a difficult and extraordinary case was intended to apply only to actions commenced in the ordinary way and in which an answer or demurrer was interposed; and see Landon *v.* Walmuth, 76 Hun (N. Y.) 271, where Van Brunt, P. J., says: "We know of no power in the parties to take away the discretion which the Code absolutely gives the court in agreed cases." But see contrary opinion by Parker, J.

Where the Agreed Case is Dismissed.—Costs must be divided. Frazer *v.* Miller, 12 Kan. 459. No costs to either side. People *v.* Mutual Endowment, etc., Assoc., 92 N. Y. 622; Bloomfield *v.* Ketcham, 5 Civ. Pro. Rep. (N. Y. Ct. of App.) 409, 95 N. Y. 657; Patterson *v.* Mutual L. Assoc. (Super. Ct.), 33 N. Y. St. Rep. 703.

Costs on Second Trial. — Where for any reason a second trial is ordered, costs may include both trials. In favor of that proposition is Davila *v.* Herring, 1 Str. 300, 2 Tidd's Prac. 900; Booth *v.* Atherton, 6 T. R. 144; Garland *v.* Jekyll, 9 Moore 620; Roberston *v.* Liddell, 10 East 416; Holey *v.* Botfield, 4 D. & L. 328. *Opposed*, Hankey *v.* Smith, 3 T. R. 507.

1. There must be an order of transfer, and it must also appear that some proceeding was had or moved at the trial term to which the conclusion of law upon the agreed facts may be applied by an order from the Supreme Court. State *v.* Stevens, 36 N. H. 59.

Parties by their agreement cannot bring a case before the court in a manner not authorized by law. Hatch *v.* Allen, 27 Me. 85.

An entry must be made of record submitting the case to the decision of the court upon the agreed case. State *v.* Brookover, 22 W. Va. 214.

When Agreed Case is Lost.—If a case stated is lost, and if the parties cannot agree upon a new one, it cannot be reproduced from the testimony of witnesses who saw it, but the cause goes to the jury as if the agreed case had never been made, for it is important that the case should be submitted to the court in the very form and shape the parties chose to give it. Cook *v.* Shrauder, 25 Pa. St. 312.

New York Rule.—According to rule 41 of New York General Rules of Practice, the plaintiff must furnish the necessary papers for argument, duly printed, as in cases of appeal, and rule 38 determines an agreed case an enumerated motion.

An agreed case cannot be heard by a single justice, but is within the exclusive jurisdiction of the full court. Massachusetts Nat. Bank *v.* Bullock, 120 Mass. 86; Tufts *v.* Newton, 119 Mass. 476; Waring *v.* O'Neil, 15 Hun (N. Y.) 105.

New Hampshire — When Court will Take Cognizance of Submission of Question Raised in Cause Pending at Trial Term.—The court will not ordinarily take cognizance of questions raised by the parties in a cause pending at a trial term, upon an agreed statement of facts, unless there is appended to the

VII. PLEADINGS—1. Relation to the Agreed Case.—The purpose of an agreed case is the determination of controversies without the formalities and technicalities of pleadings.[1]

agreement an order, signed by the presiding judge or attested by the clerk, renewing the question for the consideration of the whole court; nor unless it appears, upon the case reserved, that some proceedings were had or moved at trial term, to which the conclusion of law upon the agreed facts may be applied by an order from the court. State *v.* Stevens, 36 N. H. 59.

Practice in U. S. Courts.—In the District Court in a suit otherwise triable by a jury, the parties may by stipulation waive a jury and agree on a statement of facts, and submit the case to the court thereon for its decision as to the law thereon. Lyons *v.* Lyons Nat. Bank, 19 Blatchf. (U. S.) 283. This they may do in the Circuit Court also without any statute to that effect. Henderson's Distilled Spirits, 14 Wall. (U. S.) 53; Campbell *v.* Boyreau, 21 How. (U. S.) 226.

When Case May Be Submitted.—Even after issues are joined parties may submit an agreed case. Hervey *v.* Edmunds, 68 N. Car. 243.

Effect of Submission upon Case Previously Commenced.—"If the submission of the case did not of itself work a discontinuance of the action, it must do so when followed by a judgment, and meanwhile suspend it." Van Sickle *v.* Van Sickle, 8 How. Pr. (N.Y. Supreme Ct.) 265.

1. McKethan *v.* Ray, 71 N. Car. 165.

The agreed case takes the place of the pleadings. They are unnecessary, and if filed will be disregarded. Day *v.* Day, 100 Ind. 460; Sharpe *v.* Sharpe, 27 Ind. 507; Manchester *v.* Dodge, 57 Ind. 584; Warrick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 195; Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445. (See subdivision of this article, *Effect as a Waiver*, *ante* p. 391.) However, as a general rule, a declaration is previously filed, but in such case is not to be considered. Bixler *v.* Kunkle, 17 S. & R. (Pa.) 310, where Tod, J., in delivering the opinion of the court, said: "The declaration is not before us; it is waived and superseded. The parties have agreed to put and actually have put before us the facts of the case. True, the counsel did reserve their exceptions; but it is a reservation incompatible with the agreement. They cannot, at the very time they are placing the facts specifically upon the record, object because the facts are not specifically upon the record. It is an attempt to mix a special demurrer with a case stated. It is without a precedent; and can be subservient to no one purpose of justice or law, nor productive of anything but vexation and delay, thus to entangle the merits of a cause with points of form relative to the wording of a declaration which both parties have agreed to set aside." But see, *contra*: where parties submit a case upon an agreed statement of facts with a stipulation that the statement was submitted subject to all objections for incompetency, a fact which is not in issue under the pleadings, although admitted in the statement, will be ignored because not a fact in issue. Marion County *v.* Harvey County, 26 Kan. 181, 202.

When Facts Not Pleaded.—Where a case is submitted on the pleadings and certain agreed facts, such facts must be considered by the court, and the case determined upon the whole record, although some of the facts were not pleaded. Perry *v.* Murray, 55 Iowa 416.

Agreement on Pleadings Alone.—An agreement by parties to submit a case upon the facts agreed upon by the pleadings alone is a binding one. McCann *v.* McLellan, 3 Neb. 25.

Issue as Made Up.—The court cannot go beyond the issue as made up. Philadelphia, etc., R. Co. *v.* Waterman, 54 Pa. St. 337; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

When Right to Recover Limited to Pleadings.—If, by the terms of a case stated, the plaintiff's right to recover is limited to the pleadings, he must establish his position on the case made out by the complaint. Com. *v.* Worcester, etc., R. Co., 124 Mass. 561.

Amendment of Pleadings.—Where an action is submitted upon a case stated, but the agreement does not limit plaintiff's right of recovery to the particular form in which the action is brought, the writ may be amended in court into another form of action, of which that

2. Question of Sufficiency.—The sufficiency of the pleadings is not under consideration by the court in an agreed case.[1]

VIII. Use in Evidence of the Agreed Case upon a Subsequent Trial.—An agreed case, after it is withdrawn, cannot be read in evidence on a subsequent trial by jury.[2]

court has original jurisdiction, although it has no jurisdiction of the action in the form in which it was first brought. Merrill *v.* Bullock, 105 Mass. 486.

After a case is reserved to this court upon issues joined and an agreed statement of facts, no change in the pleadings will be allowed, unless it is made clear that without it the rights of a party will be sacrificed or plain injustice done. Wiswell *v.* First Cong. Church, 14 Ohio St. 31.

1. American Coal Co. *v.* Alleghany County, 59 Md. 185; Bostick *v.* Blades, 59 Md. 231, 43 Am. Rep. 548; Day *v.* Day, 100 Ind. 460; Warrick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 115.

Effect of Filing an Agreed Case Subsequent to the Pleadings.—A cause was submitted upon an agreed case after petition, answer, and reply were filed. There was no dismissal of the action, and the stipulation does not purport to supersede the pleadings. In this situation the court and the parties must be held to have looked upon the agreed case as made in the case already pending, and as simply dispensing with further or other evidence in the case. Blake *v.* Johnson County, 18 Kan. 266. But see *supra*, Bixler *v.* Kunkle, 17 S. & R. (Pa.) 310, to the effect that the declaration previously filed is to be disregarded; and see also *ante* p. 391, *Effect as a Waiver*.

Equity Case.—In an equity cause, upon a case stated, the answer will be taken as true only so far as it is supported by the facts stated in the case. Taunton *v.* Taylor, 116 Mass. 254.

Manner of Alleging Facts.—The rule of pleading facts prescribed by section 532 of the N. Y. Code of Civil Procedure may with propriety be applied to the agreed case required by section 1279; and whatever is a sufficient statement of facts, according to the former, to impliedly allege jurisdiction, is a sufficient statement of facts, according to the latter, that jurisdiction existed. There is no reason for greater particularity in admitting facts for the submission of a controversy than in alleging them in a pleading. Brownell *v.* Greenwich, 114 N. Y. 518, *affirming* 44 Hun (N. Y.) 611.

Plea in Abatement.—It is improper to bring before the court, in the form of a case stated, a matter which, if there is any question upon it, is proper for a plea in abatement to the writ. Matters which can be raised only by a plea in abatement are not open in an agreed case unless specially reserved. Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316.

Form of Action.—Where an action of assumpsit was brought, and an agreed case filed, the objection that the title to land was drawn in question in an action of assumpsit was held invalid. Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

A case stated should show whether the action is in debt, assumpsit, or trespass. Berks County *v.* Jones, 21 Pa. St. 413.

2. McLughan *v.* Bovard, 4 Watts (Pa.) 308; Hart's Appeal, 8 Pa. St. 32. If it is read, it is competent to show that the attorney's signature was obtained by artifice, or that the assent of the client was not obtained. McLughan *v.* Bovard, and Hart's Appeal, *supra*. But see *Ex parte* Hayes, 92 Ala. 120, to the effect that when an agreed statement of facts is reduced to writing, signed by the attorneys of the respective parties, and not limited to use on one trial only, a party cannot be relieved from an admission therein contained, on a subsequent trial after a reversal and remandment of the cause, expect for some cause which would authorize a rescission of a contract; and neither the attorney's understanding that the agreement was for the purpose of one trial only nor his opinion that the admitted fact was immaterial is a sufficient cause to set it aside. If the court refuses to receive the admission contained in the agreed case as evidence on a second trial, an exception may be reversed and the ruling revised on appeal; but a writ of mandamus will not lie to compel its admission.

IX. APPEALS—1. Finality of Judgment.—The judgment rendered upon the submission of a controversy upon an agreed case is final unless appealed from.[1] According to the English practice the agreed case was no part of the record, hence a writ of error did not lie.[2] Generally speaking the practice in the United States permits an appeal or writ of error.

2. Whether an Appeal or Writ of Error Lies.—In general an appeal, not a writ of error, lies to review a judgment upon a case stated.[4]

3. Necessity for Bill of Exceptions.—A bill of exceptions is necessary to spread an agreed case upon the record.[5]

1. Bank of Commonwealth *v.* Hopkins, 2 Dana (Ky.) 395; Jarboe *v.* Smith, 10 B. Mon. (Ky.) 257, 15 Am. Dec. 541.

2. Courtauld *v.* Leigh, 20 L. T. N. S. 496; Burr *v.* Des Moines R., etc., Co., 1 Wall. (U. S.) 99.

3. Decisions of the U. S. Supreme Court established the rule that writs of error will lie where the judgment of the court below was founded upon an agreed statement of facts, as well as when founded upon the verdict of a jury. U. S. *v.* Eliason, 16 Pet. (U. S.) 291; Stimpson *v.* Baltimore, etc., R. Co., 10 How. (U. S.) 329; Graham *v.* Bayne, 18 How. (U. S.) 60; Old Colony R. Co. *v.* Wilder, 137 Mass. 537.

4. Alfred *v.* Saco, 7 Mass. 380; Carroll *v.* Richardson, 9 Mass. 329; Gray *v.* Storer, 10 Mass. 163; Wellington *v.* Stratton, 11 Mass. 394; Furlong *v.* Leary, 8 Cush. (Mass.) 409; Hovey *v.* Crane, 10 Pick. (Mass.) 440.

As to the right to appeal to the Supreme Court, the agreed case was intended to present the question of law whether, upon the facts stated, the process would lie. The appeal was properly taken. White *v.* Clapp, 8 Allen (Mass.) 283.

Rule in Massachusetts.—It has always been the law in Massachusetts that parties could submit to an inferior court upon an agreed case, and that an appeal lay from the judgment thereon of such court to the Supreme Judicial Court. The case stated becomes a part of the record, somewhat in the nature of a special verdict. Gen. Sts. Mass., chap. 112, §§ 11, 15; chap. 114, §§ 10–12; chap. 115, §§ 7, 12. The statutes of 1817, chap. 185, and the statutes of 1820, chap. 79, establishing the Court of Common Pleas, recognized and saved the right of appeal upon an agreed case. The Revised Statutes directly provided that, "when an action is submitted to the determination of the Court of Common Pleas upon a case stated by the parties, either party may appeal from the judgment, unless it is agreed that the judgment of the Court of Common Pleas shall be final." Rev. Sts., chap. 82, § 11. The statutes of 1840, chap. 87, provide that either party may appeal from any judgment founded upon matter of law apparent on the record. A case stated is not directly mentioned in that statute, but it is clear that it was not intended to take away the right of appeal from a judgment upon a case stated, and such right is recognized in the General Statutes and in the Public Statutes. General Statutes, chap. 112, § 5; Public Statutes, chap. 150, § 7. It has therefore constantly been held that either party had the right to appeal from judgments of the Court of Common Pleas and Superior Court to Supreme Court upon a proper case stated. Old Colony R. Co. *v.* Wilder, 137 Mass. 537.

Writ of Error.—A writ of error will lie. In trials at law, where agreed cases have been made, they have been signed by the counsel as representing their clients, and spread at large upon the record as a part thereof, and as constituting the only legitimate ground for the action of the court, and as furnishing the regular and proper test to be applied by an appellate or revising tribunal to this action. U. S. *v.* Eliason, 16 Pet. (U. S.) 301; Faw *v.* Roberdeau, 3 Cranch. (U. S.) 174; Tucker *v.* Oxley, 5 Cranch. (U. S.) 34; Kennedy *v.* Brent, 6 Cranch. (U. S.) 187; Brent *v.* Chapman, 5 Cranch. (U. S.) 358; Shankland *v.* Washington, 5 Pet. (U. S.) 390; Inglee *v.* Coolidge, 2 Wheat. (U. S.) 363; Miller *v.* Nicholls, 4 Wheat. (U. S.) 311; Graham *v.* Bayne, 18 How. U. S.) 60; Real Estate Bank *v.* Rawdon, 5 Ark. 558; Johnson *v.* Reed, 8 Ark. 202. But see State Bank *v.* Conway, 13 Ark. 348.

5. Lofton *v.* Moore, 83 Ind. 112;

4. Relation of Appellate to Inferior Court.—On appeal from a judgment given on an agreed case, the appellate court will always indulge the presumption that the decision of the inferior court was right.[1]

Real Estate Bank *v.* Rawdon, 5 Ark. 558; Pomeroy *v.* State Bank, 1 Wall. (U. S.) 592; 2 Tidd's Practice, 896; Seward *v.* Jackson, 8 Cow. (N. Y.) 406.

"The agreed case must in some manner, in the court below, be made a part of the record of the case. Blackstone and Stephens held that error did not lie on such a statement. The court, however, said that the reason for this was that in the English practice the agreed statement was not, like a special verdict, entered on the record, and the appellate court could not therefore notice it; but that in the practice of our courts such agreements are signed 'by the counsel, and spread upon the record at large as part thereof.' And thus they become technically a part of the record, into which the appellate court will look, with the other part of it, to ascertain if there be error." Burr *v.* Des Moines R., etc., Co., 1 Wall. (U. S.) 99; Graham *v.* Bayne, 18 How. (U. S.) 60.

Effect of Absence of Bill of Exceptions.—Where there is no bill of exceptions the agreed case constitutes no part of the record. King *v.* Little Rock, 26 Ark. 479; Ashley *v.* Stoddard, 26 Ark. 653; Boyd *v.* Carroll, 30 Ark. 527; Lawson *v.* Hayden, 13 Ark. 316; Noteware *v.* Sterns, 1 Mont. 311; Blackburn *v.* Wagner, 83 Ind. 325; Fisher *v.* Purdue, 48 Ind. 323; Carlton *v.* Cummins, 51 Ind. 478; Manchester *v.* Dodge, 57 Ind. 584; State *v.* Newton County, 66 Ind. 216; Martin *v.* Martin, 74 Ind. 207; Slessman *v.* Crozier, 80 Ind. 487; Western Union Tel. Co. *v.* Frank, 85 Ind. 480; Zeller *v.* Crawfordsville, 90 Ind. 262; Hall *v.* Pennsylvania Co., 90 Ind. 459; Thatcher *v.* Ireland, 77 Ind. 486; Warwick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 114; U. S. Bank *v.* Schultz, 3 Ohio 61; Wellington *v.* Stratton, 11 Mass. 394; Cochran *v.* Boston, 1 Allen (Mass.) 480; Lefavour *v.* Homan, 3 Allen (Mass.) 354; Charlton *v.* Donnell, 100 Mass. 229; Rand *v.* Hanson, 154 Mass. 87; Tyson *v.* Western Nat. Bank, 77 Md. 412. *Contra*, see McGonnigle *v.* Arthur, 27 Ohio St. 251, to the effect that where a case agreed is submitted, the court will not dismiss the case for want of a formal bill of exceptions, embodying the agreed case. Pennsylvania Co. *v.* Niblack, 99 Ind. 149; Suydam *v.* Williamson, 20 How. (U. S.) 434; Old Colony R. Co. *v.* Wilder, 137 Mass. 537; Brown *v.* Mott, 22 Ohio St. 149; Ottawa *v.* La Salle County, 12 Ill. 339; Clayton *v.* Smith, 1 Colo. 95.

Motion for New Trial.—Not necessary. Brown *v.* Mott, 22 Ohio St. 149; Fisher *v.* Purdue, 48 Ind. 323; Martin *v.* Martin, 74 Ind. 207; Clayton *v.* Smith, 1 Colo. 95. *Contra*, see Slessman *v.* Crozier, 80 Ind. 487; Downey *v.* Washburn, 79 Ind. 242; Myers *v.* Sawyer, 99 Ind. 237; Witz *v.* Dale, 129 Ind. 120; Manchester *v.* Dodge, 57 Ind. 584; Godfrey *v.* Wilson, 70 Ind. 50.

Question of Law if the Agreed Statement Will Warrant a Particular Inference.—"We find nothing in the case to make the stipulation in the agreed case, that the court may draw inferences of fact, of any importance upon the material point. There is nothing but the question what is the true legal construction of a record, which is always a question of law for the court. We therefore have no occasion to determine whether we should further approve the practice which has sometimes been permitted of presenting to the court certain agreed facts as a case stated, accompanied by a stipulation that the court may draw any proper inference of fact, and the asking the full court to treat, as a question apparent on the record, the question whether the facts agreed will warrant an inference of fact that will support the judgment appealed from, on the assumption, without proof, that the court below drew the strongest inference of fact possible in favor of the result reached. It is clear that such a statement is not like a special verdict, and is not a proper case stated because it can never be known from the record whether the court below drew any inference of fact or not. If it is desired to present to the full court the question of law whether the facts agreed will warrant a particular inference of fact, it can best be done by an exception taken at the hearing." Rand *v.* Hanson, 154 Mass. 87.

1. Henri *v.* Grand Lodge, 59 Mo.

5. Right to Appeal Reserved by Stipulation.—It is usual for both sides to reserve the right of appeal. This is a notification to the trial court that its decision may be reviewed.[1]

582; Old Colony R. Co. *v.* Wilder, 137 Mass. 537; Keegan *v.* Cox, 116 Mass. 289; West *v.* Platt, 120 Mass. 421; Fox *v.* Adams Express Co., 116 Mass. 292; Atlantic Nat. Bank *v.* Harris, 118 Mass. 152; Charlton *v.* Donnell, 100 Mass. 229; Hecht *v.* Batcheller, 147 Mass. 339, 9 Am. St. Rep. 708; Martz *v.* Newton, 29 Kan. 331; State *v.* Woodbury, 76 Me. 457. See *contra*, Day *v.* Day, 100 Ind. 460; Indianapolis, etc., R. Co. *v.* Kinney, 8 Ind. 402; Hannum *v.* State, 38 Ind. 32; Warrick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 115, to the effect that the court will indulge in no presumption in favor of judgment of the court below, because the appellate court has the same means as the court below had of reaching a correct conclusion of law upon the agreed facts of the case, which it will consider the same as if it were trying the case originally. Kansas Pac. R. Co. *v.* Butts, 7 Kan. 308.

When Court Below Makes Findings Different from Agreed Case.—In such a case the appellate court will ignore the findings of the Superior Court and decide the case upon the agreed statement of facts. Brown *v.* Evans, 15 Kan. 88; Olathe *v.* Adams, 15 Kan. 391.

Not Until After Judgment Has Been Rendered by the court below can an agreed case be brought into the appellate court. Aldrich *v.* Pickard, 12 Lea (Tenn.) 657; Memphis Freight Co. *v.* Memphis, 3 Coldw. (Tenn.) 249; Crull *v.* Keener, 17 Ill. 246; Plumleigh *v.* White, 9 Ill. 387.

Action Originating Before a Magistrate.—Such an action cannot be brought on appeal from District Court to the Supreme Court of Maine. English *v.* Sprague, 32 Me. 243; Giles *v.* Vigereaux, 32 Me. 565.

Point Not Raised in Court Below.—A point which does not appear to have been intended to be raised in the Superior Court, upon an agreed statement of facts, cannot be raised on appeal. Johnson *v.* Stewart, 11 Gray (Mass.) 181; Fitzsimmons *v.* Carroll, 128 Mass. 401.

1. Jackson *v.* Salisbury, 66 Md. 459.

Necessity for Stipulation.—In *Pennsylvania* the Supreme Court will not take cognizance of a case stated unless the parties stipulate that the decision of the Common Pleas shall be subject to a writ of error. Fuller *v.* Trevor, 8 S. & R. (Pa.) 528; Washburn *v.* Baldwin, 10 Phila. (Pa.) 472.

But see Hovey *v.* Crane, 10 Pick. (Mass.) 440, to the effect that a party aggrieved by the opinion or judgment of the Court of Common Pleas rendered upon any issue of law or any case stated by the parties, where it is not agreed that the decision of that court shall be final, may bring the action before the Supreme Court by appeal, whether the *ad damnum* be laid at more or less than $100, and whether the parties do or do not reserve a right to waive in the appellate court the pleadings joined or the statement of the case made in the court below. Upon an appeal from a judgment of the Court of Common Pleas upon a case stated, the form of bringing up the action may be by entering the agreed statement upon the record, somewhat in the manner of a special verdict and the judgment of the court thereon. Hovey *v.* Crane, 10 Pick. (Mass.) 440; Furlong *v.* Leary, 8 Cush. (Mass.) 409; Parker *v.* Framingham, 8 Met. (Mass.), 260.

Effect of Stipulation.—If the attorneys stipulate as to what are the facts in the case, and that the stipulation shall form a part of the judgment-roll, the facts therein admitted stand in place of a finding of facts by the court, and so constitute a part of the judgment-roll; and no specification of the errors relied on appeal need be made in the transcript, nor is a statement necessary. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237.

New Trial.—Upon reversal of the judgment rendered upon an agreed case, no new trial will be granted. Harrington *v.* Hilliard, 27 Mich. 271. But see Com. *v.* Howard, 149 Pa. St. 302, holding that when a case stated is quashed and a new trial granted, on the ground that a necessary fact is omitted, the action stands precisely as if no case stated had been agreed upon; and such a judgment is not a final judgment from which an appeal will lie.

Agreed Case a Part of the Record on Appeal.—To give the Supreme Court jurisdiction on appeal from a judgment

X. STATUTORY PROVISIONS.—A large number of the United States have statutes providing for the submission of controversies upon agreed cases. Sections 1279, 1280, and 1281 of the New York Code of Civil Procedure have served as a model in most states.[1]

rendered upon an agreed case, the agreed case must be made a part of the record. Mayo *v.* Dickens, 6 Yerg. (Tenn.) 490.

Was Judgment Authorised on the Agreed Facts.—This question may be raised in the appellate court. Reed *v.* Bernal, 40 Cal. 628.

Appeal in Criminal Case.—Where a criminal case is submitted to the lower court upon an agreed statement of facts, and the court finds for the defendant, that is equivalent to a verdict of not guilty and cannot be set aside on appeal. Olathe *v.* Adams, 15 Kan. 391.

1. *New York*, § 1279 Code Civ. Proc: "The parties to a question in difference, which might be the subject of an action, being of full age, may agree upon a case containing a statement of the facts upon which the controversy depends; and may present a written submission thereof to a court of record, which would have jurisdiction of an action brought for the same cause. The case must be accompanied with the affidavit of one of the parties, to the effect that the controversy is real, and that the submission is made in good faith for the purpose of determining the rights of the parties. The submission must be acknowledged or proved, and certified in like manner as a deed, to be recorded in the county where it is filed."

§ 1280 relates to the filing of the case.

§ 1281. "An order of arrest, an injunction, or a warrant of attachment cannot be granted in such an action; the costs thereof are always in the discretion of the court, but costs cannot be taxed for any proceedings before notice of trial; the action must be tried by the court, upon the case alone; and the case, submission, affidavit, and a certified copy of the judgment, and of any order or paper, necessarily affecting the judgment, constitute the judgment-roll. If the action is in the Supreme Court, a superior city court, or the Marine Court of the city of New York, it must be tried, and judgment rendered at the general term. If the statement of facts contained in the case is not sufficient to enable the court to render judgment, an order must be made dismissing the submission, without costs to either party unless the court permits the parties, or, in a proper case, their representatives, to file an additional statement, which it may do in its discretion, without prejudice to the original statement.

For the statutory provisions in other states see,

Alabama, § 866, Code.

Arkansas, §§ 5218, 5219, 5220, at pp. 1008, 1009 of the digest of the statutes of Arkansas (ed. 1884).

California, § 475 of the Code of Civil Procedure.

Colorado, §§ 276, 277, 278 of the Code of Civil Procedure.

Connecticut, § 1200 on page 279 of the General Statutes of 1888.

Illinois, chap. 110, §§ 75, 76 of the Revised Statutes of 1874.

Indiana, §§ 553, 554, 555 of the Practice Code.

Iowa, §§ 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415 of Revised Statutes.

Kentucky, § 705 Civil Code.

Massachusetts, § 13 of chap. 81 of Revised Statutes; § 5 of chap. 112, § 64 of chap. 129, and § 6 of chap. 113, of General Statutes; § 23 of chap. 312 of Laws of 1852; § 1 of chap. 237 of Laws of 1859; chap. 438 of Laws of 1869.

Michigan, §§ 3421, 4346 of Compiled Laws.

Maine, § 42 of chap. 77 of the Revised Statutes of 1883.

Montana, § 323 Civil Code.

Nebraska, §§ 567, 568, 569, at page 932 of Compiled Statutes.

North Carolina, § 315 (old number) Code Civil Procedure.

Ohio, § 495 of the Code.

Oregon, §§ 257, 258, 259, at page 337 Hill's Annotated Laws.

South Carolina, §§ 374, 375, 376 of Code of Procedure.

Tennessee, § 9, chap. 126, Act of 1809; §§ 4229, 4236, 4303, 4497, 2924 Code; chap. 97 Act of 1877.

Texas, art. 1293, chap. 11, tit. xxix, Revised Statutes of Texas, 1879.

Washington, § 421, chap. xii, tit. vii, Code of Procedure (Hill's, 1891).

England, cap. 42, 3 & 4 Wm. IV; § 46, cap. 76, 15 & 16 Vic.

ALIMONY.

By WARD B. COE.

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I. GENERAL OBSERVATIONS ON ALIMONY—1. As an Independent Right—*a.* GENERALLY.—The right to alimony, by the English doctrine and that of most of the states in this country, has no independent existence, but is ancillary to some other proceeding.[1] But some of the courts in this country have unreasonably exercised the authority of decreeing alimony without divorce, invoking, to enable them to do this, the aid of their ordinary equity powers.[2]

1. Rees *v.* Waters, 9 Watts (Pa.) 93; Lawson *v.* Shotwell, 27 Miss. 630; Bankston *v.* Bankston, 27 Miss. 692; Jones *v.* Jones, 18 Me. 311, 36 Am. Dec. 723; Peltier *v.* Peltier, Harr. (Mich.) 19; Carroll *v.* Carroll, 42 La. Ann. 1071; Head *v.* Head, 3 Atk. 547; Ball *v.* Montgomery, 2 Ves. Jr. 191.

In *Louisiana* a wife has no right of action during marriage against her husband for alimony unless a demand is made either for a separation or a divorce. Carroll *v.* Carroll, 42 La. Ann. 1072.

And see Clark *v.* Clark, 78 Ga. 79; Legard *v.* Johnson, 3 Ves. Jr. 352. For a full treatment of the right to alimony and the amount grantable, see Am. & Eng. Ency. Law, tit. ALIMONY.

2. 1 Bish. on M., D., & S. §§ 1393–1401.

Alabama.—Glover *v.* Glover, 16 Ala. 440; Kinsey *v.* Kinsey, 37 Ala. 393; Wray *v.* Wray, 33 Ala. 187; Hinds *v.* Hinds, 80 Ala. 225; Murray *v.* Murray, 84 Ala. 363.

Arkansas.—Wood *v.* Wood, 54 Ark. 172.

California.—Civil Code, § 136; Galland *v.* Galland, 38 Cal. 265; Hagle *v.* Hagle, 68 Cal. 588; Poole *v.* Wilber, 95 Cal. 339.

Iowa.—Graves *v.* Graves, 36 Iowa 310, 14 Am. Rep. 525, where, admitting that the great weight of authority is the other way, the jurisdiction is nevertheless entertained on the ground of preventing multiplicity of suits, and of there being no adequate relief at law. Finn *v.* Finn, 62 Iowa 482.

Kentucky.—Butler *v.* Butler, 4 Litt. (Ky.) 201; Griffin *v.* Griffin, 8 B. Mon. (Ky.) 120; Gaines *v.* Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Logan *v.* Logan, 2 B. Mon. (Ky.) 142; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Boggess *v.* Boggess, 4 Dana (Ky.) 307.

Mississippi.—Garland *v.* Garland, 50 Miss. 694, a decision which is in conflict with Lawson *v.* Shotwell, 27 Miss. 630. See also McFarland *v.* McFarland, 64 Miss. 449; Verner *v.* Verner, 62 Miss. 260.

Maryland.—Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485, where the court said: "There can be no doubt the courts of equity in this state have jurisdiction in such cases [applications for alimony without divorce], and will decree relief where a proper foundation is laid for it. Their authority depends not merely on the constructive powers given to our courts of chancery, but is expressly delegated by the act of 1777, ch. 12."

The following cases may also be consulted: Helms *v.* Franciscus, 2 Bland (Md.) 544; Fornshill *v.* Murray, 1 Bland (Md.) 479, 18 Am. Dec. 344; McNamara's Case, 2 Bland (Md.) 566, note; Scott's Case, 2 Bland (Md.) 568, note; Govane's Case, 2 Bland (Md.) 570, note; Jamison *v.* Jamison, 4 Md. Ch. 289; Hewitt *v.* Hewitt, 1 Bland (Md.) 101; Crane *v.* Meginnis, 1 Gill & J. (Md.) 463; Wright *v.* Wright, 2 Md. 429, 46 Am. Dec. 723; Wilkes *v.* Wilkes, 3 Md. 1; Dunnock *v.* Dunnock, 3 Md. Ch. 140; Galwith *v.* Galwith, 4 Har. & M. (Md.) 477; Keerl *v.* Keerl, 34 Md. 25; Tayman *v.* Tayman, 2 Md. Ch. 398; Coles *v.* Coles, 2 Md. Ch. 347; Ricketts *v.* Ricketts, 4 Gill (Md.) 109; Wiles *v.* Wiles, 3 Md. 7; Feigley *v.* Feigley, 7 Md. 563, 61 Am. Dec. 375; Schindel *v.* Schindel, 12 Md. 294; J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183.

North Carolina. — Anonymous, 1 Hayw. (N. Car.) 347; Spiller *v.* Spiller, 1 Hayw. (N. Car.) 482.

Ohio.—Bascom *v.* Bascom, Wright (Ohio) 632; Questel *v.* Questel, Wright (Ohio) 491; D'Arnsmont *v.* D'Arnsmont, 4 Law Rep. 321.

South Carolina.—Jelineau *v.* Jelineau, 2 Desaus. Eq. (S. Car.) 45; Anonymous, 2 Desaus. Eq. (S. Car.) 198;

In many states also the power of granting alimony without divorce has been given by statute, so that in one way or another this jurisdiction widely prevails.[1]

b. JURISDICTION AND PROCEDURE.—In cases where alimony is granted as an independent right and not as a mere incident to divorce, jurisdiction usually belongs to the chancery courts of the state where the parties, or one of them at least, are domiciled.[2]

And in general the practice and procedure are similar, or analogous, to that of suits for alimony with divorce.[3]

Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Mattison *v.* Mattison, 1 Strob. Eq. (S. Car.) 387, 47 Am. Dec. 541; Prince *v.* Prince, 1 Rich. Eq. (S. Car.) 282; Rhame *v.* Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597, wherein it is said: "That the courts of equity in this state have jurisdiction in cases of alimony is now settled by the long practice of this court. From necessity, such jurisdiction must exist somewhere; and there is no tribunal in the state where it can be so well exercised as in that court. It belongs to the ecclesiastical court in England, but we have no such court in this state. And even in England, during the Revolution, when the ecclesiastical courts were shut up, equity took cognizance of such cases. 1 Madd. Ch. 386. . . . In England it appears that alimony is allowed only where a separation is decreed. And although our courts of equity have not the power to grant divorce, yet, as the two subjects, divorce and alimony, are inseparable companions in England, we must look to the causes of divorce to ascertain the grounds on which alimony will be allowed." Converse *v.* Converse, 9 Rich. Eq. (S. Car.) 535; Hair *v.* Hair, 10 Rich. Eq. (S. Car.) 163; Threewits *v.* Threewits, 4 Desaus. Eq. (S. Car.) 560; Briggs *v.* Briggs, 24 S. Car. 377.

Texas.—Walker *v.* Stringfellow, 30 Tex. 570.

Virginia.—Almond *v.* Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507.

1. See Am. & Eng. Ency. Law, tit. ALIMONY.

Allowance where Divorce Refused.—An allowance under statute may sometimes be granted where a divorce is refused. Wis. Ann. Sts. § 2366; Cray *v.* Cray, 32 N. J. Eq. 25. And an appeal will lie from the judgment refusing such allowance. Graves *v.* Graves, 50 Ohio St. 196. And so a petition for injunction, divorce, and alimony may be amended by striking out the prayer for divorce. Price *v.* Price, 90 Ga. 244.

Alimony After Legislative Divorces has been sometimes granted by the courts, as where the act of divorce reserves the right to the judicial tribunal to grant alimony, Richardson *v.* Wilson, 8 Yerg. (Tenn.) 67; or where the divorce is *a mensa et thoro*, Crane *v.* Meginnis, 1 Gill & J. (Md.) 463. See also Gaines *v.* Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec 425.

A legislative divorce act cannot give the wife alimony. To do so would be an exercise of judicial authority and therefore void. Crane *v.* Meginnis, 1 Gill & J. (Md.) 463.

2. See Am. & Eng. Ency. Law, tit. ALIMONY. Babbitt *v.* Babbitt, 69 Ill. 277, where it was held that one of the parties must reside in the county where the suit is brought. Jamison *v.* Jamison, 4 Md. Ch. 289; Glover *v.* Glover, 16 Ala. 440; Keerl *v.* Keerl, 34 Md. 21, where, neither party having domicil in the state, though the husband owned property there, the court said: "To give jurisdiction to our courts in such cases, one or other of the parties must be domiciled within the state." But see Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

3. 1 Bish. on M., D., & S. §§ 1412–1421; Stewart on M. & D. §§ 179, 367; Miller *v.* Miller, 1 N. J. Eq. 386; Almond *v.* Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781.

Florida.—"Proceedings against absent defendants in suits for alimony shall be the same as in other chancery cases." Rev. Sts. § 1488.

Circumstances under which Right Granted.—In those states in which statutes give this right, they usually

c. DECREE.—The decree cannot be for a separation which the court has not the power to grant;[1] nor can it be for specific property, unless under statutes, but merely for a periodical allowance.[2]

Conditions.—Usually the decree is that the husband pay alimony until reconciliation, or until he will take back his wife and treat her properly.[3]

define the circumstances under which it is granted. But where courts assume jurisdiction in these cases without statutory aid, the conditions of their doing so are not clearly to be deduced from the cases. Stewart on M. & D. § 179.

Temporary Alimony, by the weight of authority, may be granted, an allowance which Mr. Bishop says there is no just ground to dispute. 1 Bish. on M., D., & S. § 1411; Am. & Eng. Ency. Law, tit. ALIMONY; Verner *v.* Verner, 62 Miss. 260; McFarland *v.* McFarland, 64 Miss. 449; Daniels *v.* Daniels, 9 Colo. 133; Johnson *v.* Johnson, 20 Ill. App. 495, *overruling* Foss *v.* Foss, 2 Ill. App. 411; Holleman *v.* Holleman, 69 Ga. 676; Vreeland *v.* Vreeland, 18 N. J. Eq. 43. But see Finn *v.* Finn, 62 Iowa 482, where an order of the lower court that defendant pay money to enable plaintiff to carry on the action, but denying a motion for temporary alimony, was affirmed.

As well as costs and counsel fees. Finn *v.* Finn, 62 Iowa 482; Harding *v.* Harding, 144 Ill. 588; cases *supra*.

And additional counsel fees on appeal. *Ex p.* Winter, 70 Cal. 291.

But the petition should make out a *prima-facie* case and be supported by verification and affidavit. Daniels *v.* Daniels, 9 Colo. 133.

And oral testimony may be taken by the chancellor to assist him in determining the amount of alimony *pendente lite*, where proof by deposition would have caused unnecessary delay. McFarland *v.* McFarland, 64 Miss. 449. See Lochnane *v.* Lochnane, 78 Ky. 467.

Relief.—But the writ *ne exeat* (Yule *v.* Yule, 10 N. J. Eq. 138; Anshutz *v.* Anshutz, 16 N. J. Eq. 162; Peltier *v.* Peltier, Harr. (Mich.) 19; Anonymous, 1 Hayw. (N. Car.) 347; Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33) and an injunction will be granted. Greenland *v.* Brown, 1 Desaus. Eq. (S. Car.) 196; Anshutz *v.* Anshutz, 16 N. J. Eq. 166; Peltier *v.* Peltier, Harr. (Mich.) 19.

And the affidavit of the wife is alone sufficient to support the order. Yule *v.* Yule, 10 N. J. Eq. 138.

It is not necessary in these suits for the wife to sue by *prochein ami*. Knight *v.* Knight, 2 Hayw. (N. Car.) 101. But see Peltier *v.* Peltier, Harr. (Mich.) 19.

And it is held in *Georgia* that, in proceedings for alimony under the Code, where there is no divorce pending, relief may be granted by injunction or the appointment of a receiver or otherwise, and that to this end all necessary parties may be joined as defendants. Price *v.* Price, 90 Ga. 244.

And it is provided by statute in *Indiana* that creditors must be joined as parties in this suit. Rev. Sts. § 5132.

Where Answer Alleges Insanity of plaintiff, temporary alimony and counsel fees may yet be granted without awaiting the determination of this issue or praying the appointment of a guardian *ad litem* for her. Storke *v.* Storke, 99 Cal. 621.

1. Jelineau *v.* Jelineau, 2 Desaus. Eq. (S. Car.) 45; Anonymous, 2 Desaus. Eq. (S. Car.) 198.

2. Almond *v.* Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485; Hewitt *v.* Hewitt, 1 Bland (Md.) 101. See also 1 Bish. on M., D., & S. § 1415.

The court deals only with the income of the husband's property, and not divesting the title to any part of it or permanently depriving him of its use. Murray *v.* Murray, 84 Ala. 363.

3. 1 Bish. on M. D. & S. § 1417; Anonymous, 2 Desaus. Eq. (S. Car.) 198; Hewitt *v.* Hewitt, 1 Bland (Md.) 101; Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Rhame *v.* Rhame, 1 McCord Eq. (S. Car.) 209, 16 Am. Dec. 597; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507.

Pennsylvania.—In this state a di-

Duration of Payment.—And the payment cannot be ordered for the term of the wife's life, but only during the joint lives of wife and husband.[1]

vorce *a mensa et thoro* and alimony may be decree in certain cases, "which shall continue until a reconciliation shall take place, or until the husband shall, by his petition or libel, offer to receive and cohabit with her again, and to use her as a good husband ought to do; and then in such case the court may either suspend the aforesaid sentence or decree, or in case of her refusal to return and cohabit, under the protection of the court, discharge and annul the same according to their discretion; and if he fail in performing said offers and engagements, the former sentence or decree may be revived and enforced, and the arrears of alimony ordered to be paid." Bright. Pur. Dig. p. 688, § 31.

Temporary Decree.—A decree in these cases is therefore in its nature temporary; and when obtained in a state where the parties had only a temporary residence, it will probably have force only so long as this residence continues, or at least until a decree of divorce is granted in the state in which the parties have their permanent residence. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; 2 Bish. on M., D., & S. §§ 70, 71.

Decree in Another State.—But a decree for alimony without divorce obtained in one state will be enforced in another, which does not recognize this doctrine, by comity. Stewart *v.* Stewart, 27 W. Va. 167.

1. Briggs *v.* Briggs, 24 S. Car. 377; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52.

Revision.—The decree is usually subject to revision or amendment, as circumstances may require. Wade *v.* Wade (Cal., 1892), 31 Pac. Rep. 258; Anonymous, 1 Desaus. Eq. (S. Car.) 113; Thomas *v.* Thomas, 44 Ill. App. 604; Whorwood *v.* Whorwood, 1 Rep. Ch. 223; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507; Murray *v.* Murray, 84 Ala. 363; Hewitt *v.* Hewitt, 1 Bland (Md.) 101; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Logan *v.* Logan, 2 B. Mon. (Ky.) 142. And an original bill may be maintained to set the decree aside. Whorwood *v.* Whorwood, Rep. Ch. 223.

Bonds to Keep the Peace have been required of the husband as a part of the decree. Threewits *v.* Threewits, 4 Desaus. Eq. (S. Car.) 560.

Enforcing Decree.—This is done by sequestration, Anonymous, 1 Hayw. (N. Car.) 347; Spiller *v.* Spiller, 1 Hayw. (N. Car.) 482; attachment for contempt, Davis' Appeal, 90 Pa. St. 131; Com. *v.* Jones, 90 Pa. St. 431; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507; making decree a lien on real estate, Questel *v.* Questel, Wright (Ohio) 491; placing husband's property in the hands of a receiver or trustee, Murray *v.* Murray, 84 Ala. 363; or by *fi. fa.*, preceded by petition for same, as each instalment becomes due, Hewitt *v.* Hewitt, 1 Bland (Md.) 101. And security of some sort is generally required. Cases *supra*.

In *Pennsylvania* it has been held that the surety of one ordered to pay alimony may surrender the body of the defendant to custody and be himself released from his recognizance. Com. *v.* Jones, 90 Pa. St. 431.

Avoidance of Decree.—The decree is avoided by a renewal of cohabitation. Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485; Hewitt *v.* Hewitt, 1 Bland (Md.) 101; Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507; Wade *v.* Wade (Cal., 1892), 31 Pac. Rep. 258. And is probably barred by promise of good conduct, if the court is convinced it is made in good faith. Kenley *v.* Kenley, 2 How. (Miss.) 751. And see Almond *v.* Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; 1 Bish. on M., D., & S. §§ 1538, 1539.

Abatement.—Suit for independent alimony abates on the death of one of the parties. 1 Bish. on M., D., & S. § 1420. And if the wife did not bring suit during the husband's life she has no rights which she can enforce against his estate. Anonymous, 2 Desaus. Eq. (S. Car.) 198; Gaines *v.* Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Glenn *v.* Glenn, 7 T. B. Mon. (Ky.) 285, where the court said: "A bill, after the death of the husband, for alimony from the time of abandonment to her husband's death is a new species of suit, without precedent, and

2. As Incident to Some Other Proceeding.—But, as stated above, the right to alimony is, according to the better view, merely incident to some other proceeding,[1] commonly that of divorce;[2] and it is in this regard that we shall hereafter consider it.

II. JURISDICTION—1. Divorce Courts.—Alimony being in general granted as an incident of divorce, the jurisdiction is therefore a part of the jurisdiction of divorce suits, and belongs to the divorce courts, whether courts of law or equity.[3]

2. Domicil.—The plaintiff must generally be domiciled[4] within the state, in order to give the courts of the state jurisdiction.[5]

against the principles upon which a suit for alimony is sustained." See also Wallingsford *v.* Wallingsford, 6 Har. &. J. (Md.) 485; Lawson *v.* Shotwell, 27 Miss. 630; Sackett *v.* Giles, 3 Barb. Ch. (N. Y.) 204.

But a decree dismissing a bill for alimony is no bar to another suit founded upon subsequently accruing causes. Griffin *v.* Griffin, 8 B. Mon. (Ky.) 120.

Appeal from Order.—An order allowing temporary alimony and counsel fees is such a final order as is appealable under the Code of *Colorado*. Daniels *v.* Daniels, 9 Colo. 133.

1. *Ante*, I, 1 *a*. p. 408.

2. 2 Bish. on M., D., & S. § 852; Bowman *v.* Worthington, 24 Ark. 537; Foss *v.* Foss, 2 Ill. App. 413; Adams *v.* Adams, 100 Mass. 365, 1 Am. Rep. 111; McGee *v.* McGee, 10 Ga. 486; Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Damon *v.* Damon, 28 Wis. 514; Prosser *v.* Warner, 47 Vt. 667, 19 Am. Rep. 132; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362; Lamy *v.* Catron (N. Mex., 1890), 23 Pac. Rep. 773; Harshberger *v.* Harshberger, 26 Iowa 503.

Supplicavit for Security of Peace.—It is doubtful whether permanent alimony can be granted to a wife upon a *supplicavit* for security of the peace. against her husband. 1 Bish. on M., D., & S. § 1389 and note 3. It seems, indeed, questionable whether the writ of *supplicavit* can now be granted at all, the remedy at law being adequate. In a recent *Massachusetts* case it was refused. Adams *v.* Adams, 100 Mass. 365, 1 Am. Rep. 111. See also Ball *v.* Montgomery, 2 Ves. Jr. 191; Duncan *v.* Duncan, 19 Ves. Jr. 394; Lambert *v.* Lambert, 2 Bro. Parl. R. (Tomlins' ed.) 18; Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Codd *v.* Codd, 2 Johns. Ch. (N. Y.) 141.

Nullity Suits.—No alimony can be granted with, or as supplementary to, a decree pronouncing an alleged marriage void for a cause existing at the time of the marriage. Am. & Eng. Ency. Law, tit. ALIMONY.

3. Chaires *v.* Chaires, 10 Fla. 308; Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Taylor *v.* Gladwin, 40 Mich. 232; Lawson *v.* Shotwell, 27 Miss. 630, Phelps *v.* Baker, 60 Barb. (N. Y.) 107; McGee *v.* McGee, 10 Ga. 477; Stewart on M. & D. § 366.

Removal of Cause.—The court whence a case by motion is being removed has yet authority, pending the motion, to decree temporary alimony and suit money. Moe *v.* Moe, 39 Wis. 308.

4. "The rule is," says Swayne, J., "that she [a wife] may acquire a separate domicil whenever it is necessary or proper for her to do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceedings for divorce may be instituted where the wife has her domicil. The place of the marriage, of the offense, and the domicil of the husband are of no consequence." Cheever *v.* Wilson, 9 Wall. (U. S.) 108.

Again, in Gould *v.* Crow, 57 Mo. 200, it is said: "Some courts hold that a wife cannot have a separate domicil from her husband; but this doctrine has been exploded, and the current of authority is that she may have a separate domicil for the purposes of divorce." See also Dutcher *v.* Dutcher, 39 Wis. 651; Am. & Eng. Ency. Law, tit. DOMICIL.

5. Cook *v.* Cook, 56 Wis. 195, 43 Am. Rep. 706; Thompson *v.* State, 28 Ala. 12; Wilcox *v.* Wilcox, 10 Ind. 436; Leith *v.* Leith, 39 N. H. 20. So in House *v.* House, 25 Ga. 473, it was held that, "where neither party was in the state, or was a citizen in, or a

3. Appearance of Defendant.—And although a divorce *ex parte* may be obtained on constructive service, yet no alimony can be decreed unless the defendant appears to the action in person or by attorney,[1] or has been duly served with process within the jurisdiction of the court.[2]

4. Defendant Domiciled in State.—But it seems that if the defendant is domiciled within the state, alimony may be decreed against him on constructive service, at least if the statutes of the state allow it.[3]

resident of, the state, or, as far as it appeared, had property in the state," it was "a case over which no court of the state had, or could have, any jurisdiction—a case to which no law of the state could possibly extend."

Under the laws of *Wisconsin* a non-resident plaintiff cannot maintain an action for divorce in that state, even though the defendant be a resident there. Dutcher *v.* Dutcher, 39 Wis. 651.

1. Sanford *v.* Sanford, 5 Day (Conn.) 53, the court saying: "In the present case the respondent was not merely nominally in court; he was actually in court, like any other suitor with his counsel, an officer of the court, duly retained in the cause. This gave the court jurisdiction, as a court of chancery, to pass a decree *in personam*." But the defendant may disprove the authority of the attorney to appear for him. Nichols *v.* Nichols, 25 N. J. Eq. 60. See also Gould *v.* Crow, 57 Mo. 200. See APPEARANCES.

2. Cooley Const. Lim. 499; Harding *v.* Alden, 9 Me. 140; Prosser *v.* Warner, 47 Vt. 667, 19 Am. Rep. 132; Lytle *v.* Lytle, 48 Ind. 200; Middleworth *v.* McDowell, 49 Ind. 386; Turner *v.* Turner, 44 Ala. 437; Beard *v.* Beard, 21 Ind. 321; Madden *v.* Fielding, 19 La. Ann. 505; Ellison *v.* Martin, 53 Mo. 575; Gould *v.* Crow, 57 Mo. 200; Leith *v.* Leith, 39 N. H. 20; Nichols *v.* Nichols, 25 N. J. Eq. 60; Maguire *v.* Maguire, 7 Dana (Ky.) 181; Bunnell *v.* Bunnell, 25 Fed. Rep. 214. See also State *v.* Hennepin County Ct., 42 Minn. 40. But see Doughty *v.* Doughty, 27 N. J. Eq. 315, *affirmed* in 28 N. J. Eq. 581. Where defendant is served but does not appear, alimony may be decreed against him without further notice. Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466.

Alimony Decree in Personam.—The reason for this rule is that a decree for alimony is a decree *in personam*, and is void without personal service on the defendant or his appearance. Campbell *v.* Campbell, 37 Wis. 206; Russell *v.* Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112; Maguire *v.* Maguire, 7 Dana (Ky.) 181; Miller *v.* Miller, 75 N. Car. 70; Beard *v.* Beard, 21 Ind. 321; Pennoyer *v.* Neff, 95 U. S. 714; Turner *v.* Turner, 44 Ala. 437; Odom *v.* Odom, 36 Ga. 286; Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485; Garner *v.* Garner, 56 Md. 127, where it was also held that so much of the decree as prevents a non-resident defendant from marrying again is *in personam* and therefore void. Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129. And see People *v.* Baker, 76 N. Y. 78, 32 Am. Rep. 274; Stewart on M. & D. § 217a; Bish. on M., D., & S. § 79.

Where Land Within Jurisdiction of Court.—And the rule is not otherwise even when there is land within the jurisdiction of the court, Bunnell *v.* Bunnell, 25 Fed. Rep. 214; and certainly not where neither party is domiciled within the state, Keerl *v.* Keerl, 34 Ind. 21. But see Stewart on M. & D. § 366; Johnson *v.* Johnson, 31 Neb. 385; Ellison *v.* Martin, 53 Mo. 575, where it was doubted whether, in a divorce suit by publication, not followed by appearance, property could be brought before the court by describing it in the petition, and a judgment *in rem* for alimony be demanded thereupon.

The court of a county in which an alimony suit is brought is without jurisdiction to order the sale of land in another county. Wilmot *v.* Cole, 23 Wkly. Law Bull. (Ohio) 339; Bunch *v.* Bunch, 26 Ind. 400.

3. Beard *v.* Beard, 21 Ind. 321; Phelps *v.* Baker, 60 Barb. (N. Y.) 107; Borden *v.* Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225.

5. Application after Dissolution of Marriage.—The grant of alimony being a mere incident to a suit for divorce,[1] it follows that if the application[2] for alimony is made after the marriage has been wholly dissolved[3] it will be denied,[4] a final judgment being held to settle all property rights between the parties.[5] The rule is that where by leave of court a suit has been once dismissed,[6] or a final decree entered, the court has no longer jurisdiction over the subject-matter of the action, or over the parties,[7] unless this right has been reserved to itself by the decree[8] or by statute.[9]

Service on Solicitor.—And where an order requiring defendant to pay alimony and counsel fees cannot be served on him personally because he absents himself from the state, service upon his solicitor is sufficient to make the former guilty of contempt if he disobeys the order. Fairchild *v.* Fairchild (N. J., 1888), 13 Atl. Rep. 599.

Property in Jurisdiction.—And where the wife obtained by publication a decree for divorce and alimony against her husband, and the latter's property was within the jurisdiction of the court, and the wife brought suit to have said property subjected to the payment of the alimony decree, and the husband was served, and appeared and answered to said suit, it was held that, in spite of the general rule that an alimony decree obtained solely by publication is void, yet, since the property was in the jurisdiction of the court, and the husband had been served and had answered, and it was apparent that alimony should be granted, the decree for alimony would be sustained. Johnson *v.* Johnson, 31 Neb. 385.

Temporary Alimony.—An order for temporary alimony made *ex parte* where husband has no chance to be heard will be set aside; and an order of attachment for contempt based thereon is void. Sanchez *v.* Sanchez, 21 Fla. 346. But see Park *v.* Park, 80 N. Y. 156.

Fraud. — Where a woman fraudulently leaves a state to obtain a divorce with alimony in another state, the husband appearing in the latter, the decree of alimony, at least, will not be enforced in the courts of the state that she fraudulently left. Jackson *v.* Jackson, 1 Johns. (N. Y.) 424.

1. And the general doctrine is that a decree of divorce valid by the laws of the state where granted is valid everywhere. Cheever *v.* Wilson, 9 Wall. (U. S.) 108. But not where the court granting the same had no jurisdiction. Wright *v.* Wright, 24 Mich. 181; though see Doughty *v.* Doughty, 27 N. J. Eq. 315.

2. And it does not matter whether the application is made in the same —Wilde *v.* Wilde, 36 Iowa 319—or in a different court from that in which the divorce was granted. Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 254

3. And this may be by death as well as by divorce. O'Hagan *v.* O'Hagan, 4 Iowa 509.

4. McQuien *v.* McQuien, 61 How. Pr. (N. Y. C. Pl.) 280; Wilde *v.* Wilde, 36 Iowa 319; Blythe *v.* Blythe, 25 Iowa 266; Holbrook *v.* Holbrook, 32 La. Ann. 13; Kirrigan *v.* Kirrigan, 15 N. J. Eq. 146; Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251, where the court said: "Whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with a very few exceptions, throughout the civilized world. The principle not only embraces what actually was determined, but also extends to every other matter which the parties have litigated in the case." Jones *v.* Jones, 95 Ala. 443; Downey *v.* Downey, 98 Ala. 373; Harrison *v.* Harrison, 20 Ala. 649, 56 Am. Dec. 227.

5. Roe *v.* Roe, 52 Kan. 724.

6. Thompson *v.* Thompson, 3 Head (Tenn.) 527; Chestnut *v.* Chestnut, 77 Ill. 346.

7. Kamp *v.* Kamp, 59 N. Y. 212; Johnson *v.* Johnson, 12 Daly (N. Y.) 232.

8. Cooledge *v.* Cooledge, 1 Barb. Ch. (N. Y.) 77. And see Petersine *v.* Thomas, 28 Ohio St. 599.

9. Stewart on M. & D. § 370; Mass. Pub. Sts. ch. 146, § 36. See also the case of a legislative divorce where the

6. Where Cause Is Still Open.—But if the divorce is *a mensa et thoro*, the cause is regarded as still being open, and alimony may be granted at any subsequent time or term,[1] and in some cases even where the divorce is *a vinculo*.[2]

7. Divorce Ex Parte.—So also, in general, it may be said that if the divorce is *ex parte*, a decree for alimony may be subsequently rendered on the wife's application to the courts of her husband's jurisdiction, or those of her own, if he can be found there and personally served.[3]

act granting the divorce reserves the right to the judicial tribunal to grant alimony. Richardson *v.* Wilson, 8 Yerg. (Tenn.) 67.

1. 2 Bish. on M., D., & S. §§ 839–844; Stewart on M. & D. § 370; Covell *v.* Covell, L. R. 2 P. & M. 411; Westmeath *v.* Westmeath, 3 Knapp 42; Cooke *v.* Cooke, 2 Phillim. 40; McKarracher *v.* McKarracher, 3 Yeates (Pa.) 56.

But in Erkenbrach *v.* Erkenbrach, 63 How. Pr. (N. Y. C. Pl.) 194, alimony was refused in the case of a divorce *a mensa et thoro*, where applied for by motion after judgment. This case was *affirmed* in 12 Daly (N. Y.) 258 and 96 N. Y. 456, and *followed* in Cullen *v.* Cullen, 55 N. Y. Super. Ct. 346, and Anderson *v.* Cullen (C. Pl.), 8 N. Y. Supp. 643.

2. Crugom *v.* Crugom, 64 Wis. 253; Wilde *v.* Wilde, 36 Iowa 319. The relief in the latter case was granted in a subsequent supplementary proceeding which set forth a change of circumstances. The court said: "An action for alimony cannot be maintained as an independent proceeding after a divorce of the parties. The relation of husband and wife must exist to justify a judgment for an allowance of this character to the wife. Blythe *v.* Blythe, 25 Iowa 266. But regarding the case as presented by this amended petition as a proceeding supplementary to the action for divorce for the purpose of modifying the decree therein rendered, affecting the property of the defendant, that pleading is defective and the demurrer was properly sustained."

And in Shotwell *v.* Shotwell, 1 Smed. & M. Ch. (Miss.) 51, the court held that equity had jurisdiction of a bill by a divorced wife for alimony, declaring that "the right to alimony is a separate and distinct right *resulting* from a decree for a divorce, but not identical with it." See also Jordan *v.* Jordan, 53 Mich. 550; Lawson *v.* Shotwell, 27 Miss. 630.

3. Cook *v.* Cook, 56 Wis. 195, 43 Am. Rep. 706; Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364; Stilphen *v.* Stilphen, 58 Me. 508, 4 Am. Rep. 305; Nichols *v.* Nichols, 25 N. J. Eq. 60; Wright *v.* Wright, 24 Mich. 180; Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415, where the court said: "The question, therefore, is whether the *ex-parte* divorce can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the alimony which the statute, upon the facts as they exist in regard to the husband's desertion, intended to provide for her. We think the decree ought not to have such an effect. In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign and one rendered in a domestic forum." And see *In re* James Estate, 99 Cal. 374; Golden *v.* Golden (Ala., 1894), 14 So. Rep. 638.

But it seems this rule will only apply to property owned in the state in which application is made at the time of the divorce, not that which is subsequently acquired. Van Orsdal *v.* Van Orsdal, 67 Iowa 35. See Am. & Eng. Ency. Law, tit. ALIMONY.

Dismissal Without Prejudice.—Where the court granting the divorce has dismissed without prejudice the wife's application for alimony because personal service could not be obtained on the husband, the court of another state may take jurisdiction of another application. Woods *v.* Waddle, 44 Ohio St. 449.

Two Suits at Same Time.—Where a divorce suit has been commenced by a wife in the courts of one state, herself a resident there, and the husband subsequently commences a divorce suit in another state and obtains a decree there before the first suit is brought to

8. Enforcing Decree in Another State.—The alimony decree is within the "full faith and credit" clause of the constitution of the United States; and the better opinion is that if, after the decree, the husband removes to another jurisdiction, it may be enforced in the courts of the latter,[1] or on the equity side of the proper United States courts.[2]

trial, the first suit is not thereby affected; but the jurisdiction of the court therein, having once attached, will be exercised to the end, in order to do complete justice between the parties. Turner *v.* Turner, 44 Ala. 437.

Fraud.—So temporary alimony may be granted pending a suit to impeach a divorce on the ground of fraud. *Ex p.* Smith, 34 Ala. 455.

And a decree of divorce obtained by fraud will not operate as a bar to alimony previously and properly decreed in another state. Barber *v.* Barber, 21 How. (U. S.) 582.

So where a wife was not notified of the proceedings for divorce, being imprisoned at the instigation of her husband, she may subsequently have the decree set aside and alimony granted. Golden *v.* Golden (Ala., 1894), 14 So. Rep. 638.

Laches.—But where the decree of divorce has been acquiesced in for several years, a court will not permit it to be disturbed for the purpose of giving alimony, Nichols *v.* Nichols, 25 N. J. Eq. 60; Roe *v.* Roe, 52 Kan. 724; or for any other purpose, especially where a third party has acquired rights by marriage, Singer *v.* Singer, 41 Barb. (N. Y.) 139. And reasons which would, in the first instance, have caused the decree to be withheld may not be sufficient to warrant setting it aside after a long space of time. Hubbard *v.* Hubbard (Colo., 1893), 34 Pac. Rep. 170. See also Chester *v.* Chester, 17 Mo. App. 657.

1. Borden *v.* Fitch, 15 Johns. (N. Y.) 121; Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Nunn *v.* Nunn, 8 L. R. Ir. 298; Allen *v.* Allen, 100 Mass. 373; Stewart *v.* Stewart, 27 W. Va. 167; Rigney *v.* Rigney (Sup. Ct.), 6 N. Y. Supp. 141. See Am. & Eng. Ency. Law, tit. ALIMONY.

See particularly the late case of Dow *v.* Blake, 148 Ill. 76, where Magruder, J., speaking for the court, says: "It is urged that an action will not lie in one state upon a judgment for alimony rendered in another state. There are some authorities which seem to support this contention. Such are Van Ruskirk *v.* Mulock, 18 N. J. L. 184; Barber *v.* Barber, 2 Pin. (Wis.) 297; Elliott *v.* Ray, 2 Blackf. (Ind.) 31. These cases proceed upon the ground either that at common law an action of debt will not lie upon a decree in equity, or that the decree for alimony sued upon was not final in its character and was subject to modification, or that the decree did not have the force and effect of a judgment in the state where it was rendered. But we see no reason why a final decree which directs the payment of a specific sum of money should not have the same force and effect as a judgment at law; and it has not been here shown that it does not have such force and effect in the state of *Wisconsin*. Where such a final decree is rendered in a court of competent jurisdiction in one state, the constitution of the United States requires that full faith and credit be given to it in every other state. It makes no difference, so far as the duty of the courts in another state to enforce it is concerned, that the specific sum required to be paid by such final decree is for alimony." And see Howard *v.* Howard, 15 Mass. 196. But see, *contra*, Barber *v.* Barber, 1 Chand. (Wis.) 280, and cases cited in opinion quoted *supra*. And where a divorce was obtained in *Ohio*, neither party residing in that state, the decree, at least so far as the alimony therein granted was concerned, was held void in *New York*. Phelps *v.* Baker, 60 Barb. (N. Y.) 107.

2. Barber *v.* Barber, 21 How. (U. S.) 582, where the court, speaking through Swayne, J., said: "The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical courts of England. The

III. **PROCEDURE—1. Generally.**—In obtaining alimony in divorce cases the practice is similar to that of the ecclesiastical or the chancery courts, except where modified by statutes or rules;[1] and in minor matters the ordinary methods of the court wherein the cause is being tried are followed.[2]

2. Pleadings—*a.* PRAYER FOR ALIMONY.—Alimony, being an incident of divorce,[3] has been granted by the court, although not specifically prayed either in the original bill or in the petition;[4] or even although it is not prayed until after the decree of divorce and in a subsequent term, provided the libel is still pending;[5] but the necessary facts must be before the court to enable it to decree alimony under such circumstances.[6] Generally, however, alimony should be prayed,[7] as well as all other relief which may be sought.[8]

The proceeding is, according to the better doctrine, ancillary,[9] and therefore neither the original bill nor the answer, as the case may be, usually petitions alimony, or alleges the husband's faculties. This at least is the English,[10] and, according to a standard authority, the better American practice.[11]

decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree rendered in any state of the United States, the court having jurisdication, will be carried into judgment in another state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose both the equity courts of the United States and the same courts of the states have jurisdiction." See also Cheever *v.* Wilson, 9 Wall. (U. S.) 108, and Bennett *v.* Bennett, Deady (U. S.) 299.

1. Sparhawk *v.* Sparhawk, 120 Mass. 390; Stewart on M. & D. § 367. See Fla. Rev. Sts. § 1488; Bauman *v.* Bauman, 18 Ark. 320; 68 Am. Dec. 171; Lyon *v.* Lyon, 21 Conn. 186; State *v.* St. Louis Ct., 99 Mo. 222.

2. Gernon *v.* Hickey, 18 La. Ann. 454. But the entire divorce practice is very loose in many states. 2 Bish. on M., D., & S. § 644; Vance *v.* Vance, 17 Me. 203; Brown *v.* Brown, 37 N. H. 536, 75 Am. Dec. 174. "In fact divorce is not a common-law or chancery proceeding, but a proceeding *sui generis*." Mangels *v.* Mangels, 6 Mo. App. 481.

3. *Ante*, pp. 408, 412,

4. Jackson *v.* Jackson, 1 McArth. (D. C.) 34; McEwen *v.* McEwen, 26 Iowa 375; Darrow *v.* Darrow, 43 Iowa 411.

5. Prescott *v.* Prescott, 59 Me. 146; Sheafe *v.* Laighton, 36 N. H. 240.

6. Weishaupt *v.* Weishaupt, 27 Wis. 621; Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485; Lishey *v.* Lishey, 2 Tenn. Ch. 1.

7. Chandler *v.* Chandler, 13 Ind. 492; Damon *v.* Damon, 28 Wis. 510; Prescott *v.* Prescott, 59 Me. 146; Clayton *v.* Clayton, 1 Ashm. (Pa.) 52.

To What Court Application Made.—And the application must be made to the court in which the divorce case is being conducted, not to any other. Bennett *v.* Southard, 35 Cal. 688.

8. Stewart on M. & D. § 332.

Remedy Where Alimony Not Prayed or Decreed.—Where the divorce bill does not ask alimony, and the decree does not award it, a motion to amend the decree by adding a reference to a commissioner to take testimony as to alimony will be denied. The proper remedy, if any, is by supplementary bill in the nature of a bill of review. Jordan *v.* Jordan, 53 Mich. 550.

9. *Ante*, pp. 408, 412.

10. Rees *v.* Rees, 3 Phillim. 387; Cox *v.* Cox, 3 Add. Ecc. 276.

11. 2 Bish. on M., D., & S. § 1067; Lovett *v.* Lovett, 11 Ala. 763. Though see, for a different opinion on the latter point, Prescott *v.* Prescott, 59 Me. 146. And even though this is the proper practice, yet it is too late to object that this has not been done after the court

The Methods of Praying Alimony in this country are various, as by the original bill or libel,[1] by motion supported by affidavits,[2] or by petition alleging the faculties.[3]

b. WHEN TEMPORARY ALIMONY ASKED AND GRANTED.—A decree for alimony cannot be made unless the defendant has been personally served,[4] or has appeared in the action;[5] nor can it be made after final decree.[6] These general principles apply, of course, to temporary as well as permanent alimony.[7] Therefore, alimony *pendente lite* should not be prayed before the suit is pending,[8] that

refers the matter to a master to inquire into the estate of the husband. Lovett *v.* Lovett, 11 Ala. 763.

1. Prescott *v.* Prescott, 59 Me. 146; Sheafe *v.* Laighton, 36 N. H. 243; Damon *v.* Damon, 28 Wis. 510; Countz *v.* Countz, 30 Ark. 73; Wright *v.* Wright, 3 Tex. 168.

2. Weishaupt *v.* Weishaupt, 27 Wis. 621, where it is said: "It is objected that the application should have been made on petition, and not by motion. Of course the moving papers should show that an action for a divorce has been actually commenced and that a meritorious cause for dissolving the marriage exists. But whether this appears by petition or by affidavits seems to us quite unimportant." Becker *v.* Becker, 15 Ill. App. 247; Pain *v.* Pain, 80 N. Car. 322; McGee *v.* McGee, 10 Ga. 477; Curtis *v.* Curtis, 54 Mo. 351; Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76; Wright *v.* Wright, 3 Tex. 168; Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145; Reeves *v.* Reeves, 82 N. Car. 348; Swearingen *v.* Swearingen, 19 Ga. 265; and the late case of Kirsch *v.* Kirsch (C. Pl.), 18 N. Y. Supp. 447.

No Notice of Motion Required.—And no notice of the motion is required to be given to the opposite party. Becker *v.* Becker, 15 Ill. App. 247. But see Covell *v.* Covell, L. R. 2 P. & M. 411; Goss *v.* Goss, 29 Ga. 109. Where notice is required by statute it need not specify time and place of hearing. Zimmerman *v.* Zimmerman, 113 N. Car. 432.

3. Becker *v.* Becker, 15 Ill. App. 247; Sheafe *v.* Laighton, 36 N. H. 243; Longfellow *v.* Longfellow, Clarke Ch. (N. Y.) 344; Mix *v.* Mix, 1 Johns. Ch. (N. Y.) 108; Culver *v.* Culver, 8 B. Mon. (Ky.) 128; Osgood *v.* Osgood, 2 Paige (N. Y.) 621; Bray *v.* Bray, 6 N. J. Eq. 27; Lewis *v.* Lewis, 3 Johns. Ch. (N. Y.) 519. And this is also the English practice. Rees *v.* Rees, 3 Phillim. 387; Cox *v.* Cox, 3 Add. Ecc. 276.

"Under our practice affidavits in support of a motion on the wife's part may take the place of allegations of faculties in showing the husband's ability; and then the matter is in the sound discretion of the chancellor." Glenn *v.* Glenn, 44 Ark. 46.

Reference to Master.—And where the husband's faculties are not at all, or not sufficiently, set out, a reference to the master will be directed to inquire into the estate of the husband. Lovett *v.* Lovett, 11 Ala. 763; Story *v.* Story, Walk. (Mich.) 421.

Notice of Application.—And where, on such an application for alimony *pendente lite*, the court passes an order requiring the husband to appear and show cause why the same should not be granted, no notice of said application is required previous to said order, Mudd *v.* Mudd, 98 Cal. 320; the notice of the divorce suit, to which alimony is but incident, being sufficient knowledge of the petition, McEwen *v.* McEwen, 26 Iowa 375; Curtis *v.* Curtis, 54 Mo. 351; Sanchez *v.* Sanchez, 21 Fla. 346. See Zimmerman *v.* Zimmerman, 113 N. Car. 432; Lochnane *v.* Lochnane, 78 Ky. 467, where it was said: "No notice of the application for an allowance is now required by the statute, especially where, as in this case, the petition specifically seeks such an allowance. For all purposes sought to be accomplished by the allegations and the prayer of the petition, the defendant must be presumed to be in court at all times after the service of process on him for the period specified in the Code."

4. *Ante*, p. 413.
5. *Ante*, p. 413.
6. *Ante*, pp. 414.
7. Cases cited *ante*, pp. 412–414.
8. Langan *v.* Langan, 91 Cal. 654.

is, until the defendant is in court, either by service or appearance,[1] So, likewise, temporary alimony and counsel fees will not be granted after final decree,[2] even although the motion therefor may have been made before;[3] nor after bill dismissed,[4] for, the

1. Russell *v.* Russell, 69 Me. 336; Weishaupt *v.* Weishaupt, 27 Wis. 621, where the court said: "The moving papers should show that an action for divorce has actually been commenced," although in the same case it was held that where a motion for suit money was *heard after* the service of complaint on defendant, the fact that the motion and the affidavit in support thereof was made before such service was immaterial.

Informal Personal Appearance Not Sufficient.—Where defendant in petition for divorce and alimony, not having been served with process, was present, however, in court at the term when the petition was filed, and made objection personally to an order granting alimony, it was held that such appearance and action did not give the cause the character of a *lis pendens*, and therefore that at such stage no order for temporary alimony could be made. Simmons *v.* Simmons, Phil. Eq. (N. Car.) 63. See Scragg *v.* Scragg, 63 Hun (N. Y.) 633, 18 N. Y. Supp. 487.

Until there is a "proceeding by bill or petition," the judge at chambers has no jurisdiction over the matter of granting alimony under the *Georgia* Code. And no such proceeding exists until the bill or petition is filed in the office of the clerk of court. The statute contemplates a suit with subpœna, or process duly issued. Yoemans *v.* Yoemans, 77 Ga. 124. So under the *Iowa* Code, providing that "the court" may order temporary alimony, the judge in vacation has no power to grant it. Prosser *v.* Prosser, 64 Iowa 378.

Application before Term to which Summons Returnable.—An application for temporary alimony is not admissible on a rule to show cause before the term to which the summons for appearance is returnable. Holland *v.* Holland, 4 Houst. (Del.) 86. But see Russell *v.* Russell, 69 Me. 336, where it was held that after service a justice in vaction might, on giving notice to defendant, grant temporary alimony, though before the return day of the writ.

English Cases.—In Deane *v.* Deane, 28 L. J. Mat. Cas. 83, it was held that where a citation for appearance had been served on the husband, but he had not in fact appeared, there could be no temporary alimony granted, the court suggesting as a reason that the cause would be, in the case of the husband's non-appearance, more quickly disposed of, and there would therefore be no need of granting a temporary allowance to the wife. The force of this reasoning may well be doubted. See also Tomkins *v.* Tomkins, 1 Swab. & T. 163.

2. Newman *v.* Newman, 69 Ill. 167.

3. Wilde *v.* Wilde, 2 Nev. 306. And it seems that it does not matter that the court in its order dismissing the action reserved to the plaintiff the right to make application for an additional allowance. Wagner *v.* Wagner, 34 Minn. 441.

After Cause Continued.—Court may hear motion for alimony *pendente lite* after a continuance of the cause and on the day of the filing of the motion. Curtis *v.* Curtis, 54 Mo. 351.

In Suit to Enforce Alimony.—Alimony *pendente lite* will not be granted in a suit by a divorced wife to enforce a decree for alimony against her former husband. McQuien *v.* McQuien, 61 How. Pr. (N. Y. C. Pl.) 280. Nor in a suit to set aside a decree altogether. Wilson *v.* Wilson, 49 Iowa 546. But see Quelin *v.* Quelin, 11 Pa. Co. Ct. Rep. 265.

4. McCulloch *v.* Murphy, 45 Ill. 256; Persons *v.* Persons, 7 Humph. (Tenn.) 183; Wagner *v.* Wagner, 34 Minn. 441. See also Rolt *v.* Rolt, 3 Swab. & T. 604; Twisleton *v.* Twisleton, L. R. 2 P. & M. 539; Anonymous, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 307.

Suit Dismissed by Husband.—But the dismissal of the suit by the husband while the application for temporary alimony is under the consideration of the court will not defeat the claim, although it may diminish the amount, Waters *v.* Waters, 49 Mo. 385; although the application must be promptly made, Twisleton *v.* Twisleton, L. R. 2 P. & M. 339. But see Hart *v.* Hart, 11 Ind. 384.

Attorney's Fees also will be allowed

suit being no longer pending, the jurisdiction of the court over the subject-matter and over the parties has ceased. So the alimony *pendente lite* already granted will cease.[1]

But at any stage of the cause between suit pending and final decree temporary alimony may be asked and granted;[2] and it may be granted by order on the final hearing.[3]

c. PERMANENT ALIMONY may be prayed at any time before final decree;[4] but where the divorce is *a mensa et thoro*, it may be prayed after the decree,[5] though not if the divorce is *a vinculo*.[6]

d. DIVORCE AND ALIMONY SEPARATELY CONSIDERED.—It is settled that, within the discretion of the court, the question of divorce and that of alimony may be separately considered, and the consideration of the latter deferred until it is found that there is to be a divorce;[7] and it seems that this is the better practice, avoid-

after reconciliation, and suit withdrawn. Burgess *v.* Burgess, 1 Duv. (Ky.) 287.

1. Langan *v.* Langan, 91 Cal. 654; Chestnut *v.* Chestnut, 77 Ill. 346; Wood *v.* Wood, 7 Lans. (N. Y.) 205. See Dunn *v.* Dunn, L. R. 13 P. & M. 91

But the verdict of a jury refusing permanent alimony does not affect temporary alimony previously granted by the judge. Gibson *v.* Patterson, 75 Ga. 549.

2. Stewart on M. & D. § 385, and cases cited *ante* and *post* in this section.

3. Dinet *v.* Pfirshing, 86 Ill. 83; Pritchard *v.* Pritchard, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 298; Shy *v.* Shy, 7 Heisk. (Tenn.) 125; Jeter *v.* Jeter, 36 Ala. 391; Kirk *v.* Kirk, 3 Scotch Sess. Cas., 4th Ser. 128; Frankfort *v.* Frankfort, 3 Curt. Ecc. 715; Melizet *v.* Melizet, 1 Pars. Eq. Cas. (Pa.) 78.

Summary.—The whole matter is thus accurately summarized by Mr. Bishop; "The rule, in the absence of adverse terms in the statute or an adverse interpretation of its effect, is that, while the wise and matter-of-course time to make the application for temporary alimony is immediately on the case being ripe therefor, it is permissible at any stage of the proceeding, either before or after a verdict or an appeal." Citing the following cases: Helden *v.* Helden, 11 Wis. 554; Blake *v.* Blake, 70 Ill. 618; Call *v.* Call, 65 Me. 407; Stanford *v.* Stanford, 1 Edw. Ch. (N. Y.) 317; Moe *v.* Moe, 39 Wis. 308; Anonymous, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 307; Jenkins *v.* Jenkins, 91 Ill. 167; Strong *v.* Strong, 5 Robt. (N. Y.) 612; Goldsmith *v.* Goldsmith, 6 Mich. 285; Leslie *v.* Leslie, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311; Nicholson *v.* Nicholson, 3 Swab. & T. 214; Jones *v.* Jones, L. R. 2 P. & M. 333; Pullen *v.* Pullen (N. J., 1889), 17 Atl. Rep. 310.

Marriage Pending Appeal. — But it will not be granted where a woman marries pending an appeal. Coad *v.* Coad, 40 Wis. 392.

Suit Money and Counsel Fees. — The rules stated in this section and the cases cited thereunder apply, generally, as well to suit money and counsel fees as to temporary alimony. 2 Bish. on M., D., & S. § 955.

4. Prescott *v.* Prescott, 59 Me. 146; Galusha *v.* Galusha, 138 N. Y. 272.

5. Cooke *v.* Cooke, 2 Phillim. 40; Westmeath *v.* Westmeath, 3 Knapp 42; McKarracher *v.* McKarracher, 3 Yeates (Pa.) 56; 2 Bish. on M., D., & S. §§ 839, 844. But see Erkenbrach *v.* Erkenbrach, 63 How. Pr. (N. Y. C. Pl.) 194, 12 Daly (N. Y.) 258, 96 N. Y. 456; Cullen *v.* Cullen, 55 N. Y. Super. Ct. 346; Anderson *v.* Cullen (C. Pl.), 8 N. Y. Supp. 643.

Notice.—But the husband should be served with notice of the petition or motion. Covell *v.* Covell, L. R. 2 P. & M. 411.

6. Wilde *v* Wilde, 36 Iowa 319. For a full discussion of this question, see *ante*, pp. 50–63.

7. Pauly *v.* Pauly, 69 Wis. 419; Call *v.* Call, 65 Me. 407; Sheafe *v.* Laighton, 36 N. H. 240; Gregory *v.* Gregory, 32 N. J. Eq. 424; Prescott *v.* Prescott, 59 Me. 146; *Ex p.* Ambrose, 72 Cal.

ing, as it does, much labor and time should the divorce be finally refused.[1] And the grant of alimony may be included in the decree of divorce, or in a subsequent and separate judgment.[2]

e. WHAT TO BE SHOWN TO WARRANT ALIMONY PENDENTE LITE.—In order that alimony *pendente lite* may be granted, it must appear to the satisfaction of the court that there has been a marriage between the parties,[3] that they are at the time of the application living separately,[4] that a suit is pending for divorce,[5] that the wife is in need of an allowance,[6] and that

398; Rea *v.* Rea, 53 Mich. 40; Covell *v.* Covell, L. R. 2 P. & M. 411.

1. Pauly *v.* Pauly, 69 Wis. 419; Rea *v.* Rea, 53 Mich. 40; Galusha *v.* Galusha, 138 N. Y. 272; Cooledge *v.* Cooledge, 1 Barb. Ch. (N. Y.) 77, 2 Bish. on M., D., & S. §§ 871, 1069.

It appears even to have been thought that until the court finds there is to be a divorce, it has no jurisdiction over the question of permanent alimony. Bradley *v.* Bradley, L. R. 3 P. & D. 50; Sidney *v.* Sidney, 36 L. J. N. S. Mat. Cas. 73, the House of Lords *overruling* L. R. 1. P. & M. 78. See also Charles *v.* Charles, L. R. 1 P. & M. 260.

2. Mangels *v.* Mangels, 6 Mo. App. 481; Campbell *v.* Campbell, 37 Wis. 206, *citing* Forrest *v.* Forrest, 6 Duer (N. Y.) 102, 3 Bosw. (N. Y.) 661, 25 N. Y. 501; Cook *v.* Cook, 1 Barb. Ch. (N. Y.) 639, 43 Am. Rep. 706; Prescott *v.* Prescott, 59 Me. 146; Williams *v.* Williams, 29 Wis. 517, 36 Wis. 362.

3. Swearingen *v.* Swearingen, 19 Ga. 265; Frith *v.* Frith, 18 Ga. 272, 63 Am. Dec. 289; McGee *v.* McGee, 10 Ga. 477; Vreeland *v.* Vreeland, 18 N. J. Eq. 43; McFarland *v.* McFarland, 51 Iowa 565; Smith *v.* Smith, 61 Iowa 138; York *v.* York, 34 Iowa 530; North *v.* North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; Humphreys *v.* Humphreys, 49 How. Pr. (N. Y. Super. Ct.) 140; Methvin *v.* Methvin, 15 Ga. 97, 60 Am. Dec. 664; Smyth *v.* Smyth, 2 Add. Ecc. 254; Mitchell *v.* Mitchell, 1 Spinks Ecc. 102; Brinkley *v.* Brinkley, 50 N. Y. 184; Wilson *v.* Wilson, 49 Iowa 544; Stewart on M. & D. § 368; Vincent *v.* Vincent, 16 Daly (N. Y. 534; Collins *v.* Collins, 71 N. Y. 269; Roseberry *v.* Roseberry, 17 Ga. 139.

"Alimony is a right which results from the marital relation, and the fact of marriage must be admitted or proved before there can be a decree for it even *pendente lite*." York *v.* York, 34 Iowa 530.

But where a bill is brought by husband for divorce on the ground of a former marriage, temporary alimony and counsel fees will not be refused on *ex parte* affidavits contradicting the denials in the wife's answer. Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76, the court saying: "To adjudge *in limine* upon *ex parte* affidavits that the complainant will probably succeed, and therefore to withhold from the defendant the means of resisting the attack, would be substantially, to a certain extent, a pre-judgment adverse to her on the merits, without lawful evidence, the consideration of which might, and probably would, be that she would be unable to defend herself." See also Kline *v.* Kline, 1 Phila. (Pa.) 383.

4. McGee *v.* McGee, 10 Ga. 477; Battey *v.* Battey, 1 R. I. 212; Anshutz *v.* Anshutz, 16 N. J. Eq. 162; Tayman *v.* Tayman, 2 Md. Ch. 393; Daiger *v.* Daiger, 2 Md. Ch. 335.

Reason of Rule.—The reason of this rule is, of course, that while a wife is living with her husband she can pledge his credit for her support. Debenham *v.* Mellon, 5 Q. B. Div. 394; Stewart on M. & D. § 384.

And an allowance of temporary alimony would be improper; but the rule does not seem so clear in the case of counsel fees and suit money. Tayman *v.* Tayman, 2 Md. Ch. 398.

5. McGee *v.* McGee, 10 Ga. 477; Weishaupht *v.* Weishaupht, 27 Wis. 621; Stewart on M. & D. § 385 and cases there cited; *ante*, 418, note 8, 419, note 1, and cases cited *supra* and *infra*.

6. Story *v.* Story, Walk. Ch. (Mich.) 421; Mix *v.* Mix, 1 Johns. Ch. (N. Y.) 108; Denton *v.* Denton, 1 Johns. Ch. (N. Y.) 364; Wood *v.* Wood, 2 Paige (N. Y.) 109; Vreeland *v.* Vreeland, 18

the husband has property out of which such an allowance can be granted.[1]

These allegations must therefore be made somewhere in the pleadings in the cause,[2] either in the original bill or libel, the petition alleging the faculties, or the affidavits supporting the motion, according to the method adopted of praying alimony. Of course the bill must present a case for relief, and be good upon its face;[3] and if it appears that the wife cannot succeed,[4] or that the bill is demurrable,[5] no temporary alimony will be granted. But it is only necessary to make out a *prima-facie* case,[6] on which an allowance will be made almost as a matter of course,[7] in spite of a plea to the merits[8] or even to the jurisdiction of the court.[9]

f. HEARING OF HUSBAND.—The husband should be allowed to

N. J. Eq. 43; McFarland *v.* McFarland, 51 Iowa 565; Coles *v.* Coles, 2 Md. Ch. 341; Daiger *v.* Daiger, 2 Md. Ch. 335; Methvin *v.* Methvin, 15 Ga. 97, 60 Am. Dec. 664; Ross *v.* Ross, 47 Mich. 185; Coad *v.* Coad, 40 Wis. 392; Porter *v.* Porter, 41 Miss. 116; Kenemer *v.* Kenemer, 26 Ind. 330; Eaton *v.* Eaton, L. R. 2 P. & M. 51; Rawson *v.* Rawson, 37 Ill. App. 491; Glasscock *v.* Glasscock, 94 Ind. 163; Farwell *v.* Farwell, 31 Me. 591; Chaffee *v.* Chaffee, 14 Mich. 463.

1. Ross *v.* Ross, 47 Mich. 185; Porter *v.* Porter, 41 Miss. 116; Lovett *v.* Lovett, 11 Ala. 763; Weishaupt *v.* Weishaupt, 27 Wis. 621; Story *v.* Story, Walk. Ch. (Mich.) 421; Mitchell *v.* Mitchell, 1 Spinks Ecc. 103; Worden *v.* Worden, 3 Edw. Ch. (N. Y.) 387; Glasscock *v.* Glasscock, 94 Ind. 163; Becker *v.* Becker, 15 Ill. App. 247; Schmidt *v.* Schmidt, 26 Mo. 235; Wright *v.* Wright, 3 Tex. 168; Sheafe *v.* Sheafe, 36 N. H. 155; Beavan *v.* Beavan, 2 Swab. & T. 652.

2. Glasscock *v.* Glasscock, 94 Ind. 163; 1 Bish. on M. D. & S. § 1069; Stewart on M. & D. § 386; and cases *supra*, p. 421, notes 3–6, p. 422, note 1.

3. Porter *v.* Porter, 41 Miss. 116, Rose *v.* Rose, 11 Paige (N. Y.) 166; Wood *v.* Wood, 2 Paige (N. Y.) 454; Rawson *v.* Rawson, 37 Ill. App. 491; Harding *v.* Harding, 40 Ill. App. 202; Collins *v.* Collins, 71 N. Y. 269; Martin *v.* Martin, 8 N. J. Eq. 563; Phelan *v.* Phelan, 12 Fla. 449.

4. Harding *v.* Harding, 40 Ill. App. 202; Jones *v.* Jones, 2 Barb. Ch. (N. Y.) 146.

5. Rose *v.* Rose, 11 Paige (N. Y.) 166; Wood *v.* Wood, 2 Paige (N. Y.) 454; Langan *v.* Langan, 91 Cal. 654. But see Mix *v.* Mix, 1 Johns. Ch. (N. Y.) 108; Chaffee *v.* Chaffee, 14 Mich. 463.

6. Coles *v.* Coles, 2 Md. Ch. 341; Daiger *v.* Daiger, 2 Md. Ch. 335; McCurley *v.* McCurley, 60 Md. 189, 45 Am. Rep. 717; Little *v.* Little, 63 N. Car. 22; Porter *v.* Porter, 41 Miss. 116; Brinkley *v.* Brinkley, 50 N. Y. 184; McGee *v.* McGee, 10 Ga. 477; Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76; cases cited *supra*, notes 3–5; Stewart on M. & D. § 386, and cases there cited; Gray *v.* Gray (Supreme Ct.), 28 N. Y. Supp. 856; Newsome *v.* Newsome (Ky., 1894), 25 S. W. Rep. 878; Daniels *v.* Daniels, 9 Colo. 133.

7. Wright *v.* Wright, 1 Edw. Ch. (N. Y.) 62; Tayman *v.* Tayman, 2 Md. Ch. 393; cases *supra*, pp. 97, 98; Am. & Eng. Ency. Law, tit. ALIMONY.

8. McGee *v.* McGee, 10 Ga. 478; Story *v.* Story, Walk. Ch. (Mich.) 421.

9. Coles *v.* Coles, 2 Md. Ch. 341; Brinkley *v.* Brinkley, 50 N. Y. 184; Moe *v.* Moe, 39 Wis. 308. See Bradstreet *v.* Bradstreet, 6 Mackey (D. C.) 502, where it was held that, although as a general rule temporary alimony could be allowed before a plea to the jurisdiction was disposed of, yet where it appeared that the suit was brought at the instigation of the plaintiff's relatives, who promised to provide means therefor, it would be refused.

Next Friend Responsible.—The grant of temporary alimony and suit money is not entirely a matter of course, for the wife sues by next friend. He is responsible until it is found that she has a meritorious cause of action. Worden *v.* Worden, 3 Edw. Ch. (N. Y.) 387.

be heard, but only, it seems, in order that the court may form some idea of the amount to be granted,[1] and he may be in default. But if he is complainant, temporary alimony will be awarded, whether he has means or not; and if he does not pay, he will not be allowed to prosecute his suit.[2]

g. PARTIES.—The wife's bill may join as parties those to whom in fraud of her rights the husband has conveyed his property;[4] and even alimony *pendente lite* may be decreed against them.[5]

h. HOW WIFE SUES.—Generally in a divorce suit a wife sues and defends as *feme sole*.[6] and the application for alimony must be made in the name of the wife, not that of counsel.[7]

1. Story *v.* Story, Walk. Ch. (Mich.) 421; Wright *v.* Wright, 1 Edw. Ch. (N. Y.) 62; Jenkins *v.* Jenkins, 69 Ga. 483; Smith *v.* Smith, 1 Edw. Ch. (N. Y.) 255; Goss *v.* Goss, 29 Ga. 109.

2. Park *v.* Park, 80 N. Y. 156, 18 Hun 466; Hicks *v.* Hicks, 9 Ir. Rep. Eq. 175; Constable *v.* Constable, L. R. 2 P. & M. 17, 39 L. J. Mat. Cas. 17; Graves *v.* Graves, 2 Paige (N. Y.) 62, where it was held that if husband makes default and suffers wife's bill to be taken as confessed and a divorce is granted, he cannot afterwards set up in opposition to wife's claim for costs and alimony any matter which, if set up in the answer, would have been a sufficient ground for refusing a divorce. See also Pullen *v.* Pullen (N. J., 1889), 17 Atl. Rep. 310.

3. Mangels *v.* Mangels, 6 Mo. App. 481; Thayer *v.* Thayer, 9 R. I. 377; Purcell *v.* Purcell, 3 Edw. Ch. (N. Y.) 194; Bird *v.* Bird, 1 Lee 572, 5 Eng. Ecc. 455; Bruere *v.* Bruere, 1 Curt. Ecc. 566, 6 Eng. Ecc. 391; Moss *v.* Moss, 15 W. R. 532; Rublinsky *v.* Rublinsky (Super. Ct.), 24 N. Y. Supp. 920. But see Kock *v.* Kock, 42 Barb. (N. Y.) 515; Jenkins *v.* Jenkins, 69 Ga. 483; Sanchez *v.* Sanchez, 21 Fla. 346, where, in a suit for divorce brought by the husband, an order for temporary alimony and suit money was set aside, it not appearing in the record that the husband had notice of the motion or an opportunity to be heard.

4. Damon *v.* Damon, 28 Wis. 510. And the bill will not be multifarious because such grantees claim under several conveyances executed with the same common intent. Hinds *v.* Hinds, 80 Ala. 225.

Intervening Party.—A woman who intervenes in an action on the ground of having contracted marriage with one of the parties thereto, the validity of which marriage may be affected by a judgment in the case, may be allowed alimony and counsel fees. Anonymous, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 307.

5. Black *v.* Black, 5 Mont. 15.

Order Void Against One Not a Party.—In the case of a divorce for insanity, where the court orders the guardian to pay alimony, the order will be void where he has not been made a party to the suit. Tiffany *v.* Tiffany, 84 Iowa 122.

6. 2 Bish. on M., D., & S. § 513; Stewart on M. & D. § 322; Wright *v.* Wright, 3 Tex, 168. But not where the proceeding is in equity, 2 Bish. on M., D., & S. § 513; or the bill is for a separation, Wood *v.* Wood, 2 Paige (N. Y.) 454; or the wife is an infant, Wood *v.* Wood, 2 Paige (N. Y.) 108. But see Jones *v.* Jones, 18 Me. 308, 36 Am. Dec. 723; Besore *v.* Besore, 49 Ga. 378; also Beavan *v.* Beavan, 2 Swab. & T. 652.

7. Tayman *v.* Tayman, 2 Md. Ch. 393. See also Creamer *v.* Creamer, 36 Ga. 618; Kelly *v.* Kelly, 32 L. J. Mat. Cas. 181; McCulloch *v.* Murphy, 45 Ill. 256.

Conditions.—Usually temporary alimony is not granted on conditions, as that of a consent to a reference, Strong *v.* Strong, 5 Robt. (N. Y.) 612; or waiving a jury trial, Lowenthal *v.* Lowenthal, 68 Hun (N. Y.) 366, *disapproving* Siegel *v.* Siegel (Super. Ct.), 19 N. Y. Supp. 906, wherein the plaintiff, by insisting on her constitutional right to trial by jury and thereby postponing the case for a year, the defendant being ready, was deprived, by order, of alimony already granted.

Amendment.—A bill for divorce *a mensa et thoro* may be amended by in-

3. Evidence—Wife's Affidavit.—The wife's prayer for alimony must, in general, be supported by her own affidavit,[1] and should also be supported by those of other parties.[2]

The Husband's Answer ought also to be under oath,[3] but there is no uniform rule of practice in this country.[4]

And Affidavits and Depositions are commonly filed on both sides,[5] as

serting *a viniculo*. Turner *v.* Turner, 44 Ala. 437.

1. Glenn *v.* Glenn, 44 Ark. 46; Schonwald *v.* Schonwald, Phillips Eq. (N. Car.) 215; Bayly *v.* Bayly, 2 Md. Ch. 326; Countz *v.* Countz, 30 Ark. 73; McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Daniels *v.* Daniels, 9 Colo. 133; Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76; Glasser *v.* Glasser, 28 N. J. Eq. 22; Wright *v.* Wright, 1 Edw. Ch. (N. Y.) 62; Edwards *v.* Edwards, Wright (Ohio) 308; and Wright *v.* Wright, 3 Tex. 168, where the court said: "As a rule of practice the courts should require applications for alimony to be sustained by the oath of the party or evidence *aliunde*, otherwise they cannot act advisedly in determining upon the amount which, under all the circumstances, the husband should contribute to the support of the wife."

North Carolina.—In this state it is required by statute. Code, vol. 1, § 1287.

New York.—It has been held in this state that where adultery is charged in the husband's bill, the wife will be required to deny this charge under oath before she can obtain an award of temporary alimony and suit money; but such denial under oath is conclusive when made so far as the temporary allowance is concerned. Wood *v.* Wood, 2 Paige (N. Y.) 108; Osgood *v.* Osgood, 2 Paige (N. Y.) 621; Williams *v.* Williams, 3 Barb. Ch. (N. Y.) 628; Rublinsky *v.* Rublinsky (Super. Ct.), 24 N. Y. Supp. 920. See also Clark *v.* Clark, 7 Robt. (N. Y.) 284, and Rawson *v.* Rawson, 37 Ill. App. 491, where depositions to prove such adultery were allowed to be read in evidence.

2. Brinkley *v.* Brinkley, 50 N. Y. 184; McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Bayly *v.* Bayly, 2 Md. Ch. 326. See Daniels *v.* Daniels, 9 Colo. 133.

Though Not Indispensable.—For where she swears absolutely, even the writ of *ne exeat* may be granted. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Bayly *v.* Bayly, 2 Md. Ch. 326.

It is curious to note that at one time it was doubted whether the wife could make affidavit in such a case. See Bayly *v.* Bayly, 2 Md. Ch. 326; Denton *v.* Denton, 1 Johns. Ch. (N. Y.) 441; Shaftoe *v.* Shaftoe, 7 Ves. Jr. 171; Sedgwick *v.* Walkins, 1 Ves. Jr. 49.

3. Wright *v.* Wright, 3 Tex. 168.

4. 2 Bish. on M., D., & S. § 1081.

English Practice.—Under the ecclesiastical practice, as under that of the later divorce court, the husband's answer to the wife's petition for alimony was required to be under oath. Constable *v.* Constable, L. R. 2 P. & M. 17; Mumby *v.* Mumby, L. R. 1 P. & M. 701; Snowdon *v.* Snowdon, L. R. 2 P. & M. 200. And, by rule of court, the wife is allowed to force the husband to a fuller disclosure of his faculties, or even to examine him as a witness. Anderson *v.* Anderson, L. R. 1 P. & M. 512; Jennings *v.* Jennings, L. R. 1 P. & M. 35; Nokes *v.* Nokes, 3 Swab. & T. 529; Williams *v.* Williams, L. R. 1 P. & M. 370.

Vermont has a similar provision in her statutes. Rev. Laws, § 2381.

Where a husband has not filed his answer under oath, he cannot cross-examine witnesses on a motion for an allotment of temporary alimony or contradict their evidence. Constable *v.* Constable, L. R. 2 P. & M. 17.

The wife need in no case accept the answer, but may furnish additional testimony if she desires. Brisco *v.* Brisco, 2 Hag. Con. 199; Higgs *v.* Higgs, 3 Hag. Ecc. 472, 5 Eng. Ecc. 186; Durant *v.* Durant, 1 Hag. Ecc. 528, 3 Eng. Ecc. 231; Westmeath *v.* Westmeath, 3 Knapp 42.

The answer is always construed most strongly against the husband. Robinson *v.* Robinson, 2 Lee 593, 6 Eng. Ecc. 255. And he will be presumed "to have made every possible deduction in his favor." Rees *v.* Rees, 3 Phillim. 387.

5. Dougherty *v.* Dougherty, 8 N. J. Eq. 540; Cray *v.* Cray, 32 N. J. Eq. 25; Wooley *v.* Wooley, 24 Ill. App. 431; Rawson *v.* Rawson, 37 Ill. App.

well as other evidence adduced.[1]

The Burden of Proving facts necessary in order to authorize a decree for alimony is upon the wife,[2] and it is error to exclude the testimony offered by the husband in rebuttal of the same[3] but the wife need only make out a *prima-facie* case,[4] which, when

491; Simonds *v.* Simonds, 10 N. Y. Supp. 606.

1. Martin *v.* Martin, 8 N. J. Eq. 563; Wright *v.* Wright, 3 Tex. 168; Jenkins *v.* Jenkins, 69 Ga. 483; Janvrin *v.* Janvrin, 59 N. H. 23; Bardin *v.* Bardin (S. Dak., 1893), 56 N. W. Rep. 1069.

Oral Testimony.—So the court does not err in hearing oral testimony in support of an application for temporary alimony. Lochnane *v.* Lochnane, 78 Ky. 467; McFarland *v.* McFarland, 64 Miss. 449.

Accessions of Property.—So on the hearing of a petition for alimony filed after the husband has procured an *ex parte* divorce in another state, the wife may introduce evidence to show that he has received large accessions of property since the date of the decree, and the court may consider the same in making its award. Cox *v.* Cox, 20 Ohio St. 439.

2. Collins *v.* Collins, 71 N. Y. 274; Countz *v.* Countz, 30 Ark. 73; Glasser *v.* Glasser, 28 N. J. Eq. 22; Wright *v.* Wright, 1 Edw. Ch. (N. Y.) 62; Carpenter *v.* Carpenter, 19 How. Pr. (N. Y. Supreme Ct.) 539; McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Worden *v.* Worden, 3 Edw. Ch. (N. Y.) 387; Freeman *v.* Freeman, 49 N. J. Eq. 102; Vincent *v.* Vincent, 16 Daly (N. Y.) 534; Glasscock *v.* Glasscock, 94 Ind. 163; Cray *v.* Cray, 32 N. J. Eq. 25; Becker *v.* Becker, 15 Ill. App. 247.

General Admissions.—An affidavit of the plaintiff showing general admissions made to her by the defendant husband, coupled with a denial of the specific act charged in the bill of complaint, will not be sufficient to supply the defect in a bill unsupported by affidavits and denied under oath in the answer. *Quære*, whether the introduction into an affidavit of such admissions of the husband does not contravene the rule forbidding the wife to divulge private communications. Monk *v.* Monk, 7 Robt. (N. Y.) 153. And a general assertion, in the moving papers, of adultery "on information and belief" is not sufficient where the husband denies the charge. Moriarty *v.* Moriarty (Super. Ct.), 10 N. Y. Supp. 228. See also Clark *v.* Clark, 7 Robt. (N. Y.) 284.

Divorce in Another State.—Where an answer sets up a prior divorce in another state and issue is joined, no temporaty alimony can be granted until the determination of this issue. Kiefer *v.* Kiefer (Colo. App., 1894), 36 Pac. Rep. 621.

3. Jenkins *v.* Jenkins 69 Ga. 483; Wright *v.* Wright, 1 Edw. Ch. (N. Y.) 62; Story *v.* Story, Walk. Ch. (Mich.) 421; Roseberry *v.* Roseberry, 17 Ga. 139.

Where, on a motion for alimony pending a bill for divorce, the husband moved to continue, showing that a material witness was absent without his consent, that he had been subpœnaed, etc., it was error to refuse the continuance on the ground that the granting of alimony *pendente lite* was wholly in the discretion of the court, and that there was no necessity for the presence of all the witnesses. Wardlaw *v.* Wardlaw, 39 Ga. 53.

Where Husband Complainant. — It seems he will not be heard as to wife's means or his own. Mangels *v.* Mangels, 6 Mo. App. 481; Thayer *v.* Thayer, 9 R. I. 377; Bird *v.* Bird, 1 Lee 572. But see Jenkins *v.* Jenkins, 69 Ga. 483.

Affidavits Taken Before Husband's Solicitor.—Where affidavits in support of the defense set up to an application for temporary alimony are sworn to before the solicitor of the party offering them, they cannot be read in evidence. Pullen *v.* Pullen (N. J., 1889), 17 Atl. Rep. 310.

4. Finkelstein *v.* Finkelstein (Mont., 1894), 34 Pac. Rep. 1090; Bardin *v.* Bardin (S. Dak., 1893), 56 N. W. Rep. 1069; Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76; and cases cited *ante*, p. 422, notes 6–9.

It was held in Walsh *v.* Walsh (Buffalo Super. Ct.), 24 N. Y. Supp. 335, that where the marriage was denied, but there was yet sufficient evidence for a jury to find it if it had been

done, shifts the burden of proof onto the husband to establish any affirmative defense he may have, as that she has separate property,[1] or that there was no marriage.[2]

Only Legal Evidence is, of course, resorted to, not hearsay.[3]

Decision on Affidavits.—The case cannot be decided on its merits on mere affidavits.[4]

Unaided Admissions.—The doctrine which makes mere unaided admissions of a party to a divorce suit inadmissible as evidence does not apply to statements relating to the property of the parties.[5]

Reference.—Where the question of the husband's faculties is referred to an officer to determine the facts, the reference is in equity to a master;[6] at law, generally to a commissioner or ref-

submitted to them, temporary alimony would not be refused. So an affidavit denying the marriage does not overcome the presumption of its validity. Vincent *v.* Vincent, 16 Daly (N. Y.) 534.

1. Glenn *v.* Glenn, 44 Ark. 46.

2. Vincent *v.* Vincent, 16 Daly (N. Y.) 534.

Where the testimony as to the marriage is in equipoise, and a disinterested witness swears that he knows the parties and was present at the ceremony, this is sufficient evidence on which to base an order for a temporary allowance. Smith *v.* Smith, 61 Iowa 138.

3. Freeman *v.* Freeman, 49 N. J. Eq. 102.

Authority to Sue.—But the court in its inquiry as to the authority of counsel to bring suit will not be restricted to strictly legal testimony, but may satisfy its conscience by the statements of even interested parties. Swearingen *v.* Swearingen, 19 Ga. 265.

Motion to Vacate a Decree.—On a motion to vacate a decree for divorce and alimony, all relevant evidence, including evidence used on the original trial and evidence not so used, but which might have been then presented by the exercise of due diligence, is to be received. Ela *v.* Ela, 63 N. H. 116.

Modification of Decree.—When an important modification of a judgment for alimony is asked and resisted, it is error to decide the matter on petition, answer, and papers, instead of a reference to take testimony, or a hearing, if either party desires to introduce further evidence or to cross-examine witnesses. Bacon *v.* Bacon, 34 Wis. 594.

Appeal.—Where, if wrongly admitted evidence is eliminated and what remains is sufficient to uphold the order for alimony, it will not be disturbed on appeal because such evidence was received. Walsh *v.* Walsh (Buffalo Super. Ct.), 24 N. Y. Supp. 335.

4. Wooley *v.* Wooley, 24 Ill. App. 431; Gruhl *v.* Gruhl, 123 Ind. 86, where it was said that "the court could determine no question relating to the merits of the controversy except on the final trial, when ample opportunity would be afforded to examine and cross-examine witnesses. The affidavits were mere *ex parte* statements limited in their compass."

5. 1 Bish. on M., D., & S. § 1080. The reason ceasing, the rule also ceases; and this is probably true as regards all facts which the wife must show in order to entitle her to temporary alimony so far, of course, only as the grant itself is concerned. *Ante*, p. 422, notes 1–9.

See Wright *v.* Wright, 3 Tex. 168, where the court said: "The provisions of the statute exempting defendants in suits for divorce from answering on oath and rendering the admissions of the parties incompetent as proof have reference only to the main object of the suit—the dissolution of the marriage. They do not apply to such statements in the pleadings as relate to the property of the parties and upon which the restraining order of the court is to be grounded. These must be verified by the affidavit of the party."

6. Mulock *v.* Mulock, 1 Edw. Ch. (N. Y.) 14; Gerard *v.* Gerard, 2 Barb. Ch. (N. Y.) 73; Forrest *v.* Forrest, 6 Duer (N. Y.) 102; Peckford *v.* Peckford, 1 Paige (N. Y.) 274; Barrere *v.*

cree of the court.[1]

4. Decree—*a.* Form—Allowance in Instalments.—Under the ecclesiastical practice, the decree for alimony, whether temporary or permanent, always took the form of an allowance payable in instalments at fixed periods.[2] This is true also under the unwritten law of the United States, where the decree for alimony does not award specific property[3] or a sum in gross;[4] though this may be done by consent of parties;[5] and a fair and *bona-fide* agreement the court will adopt as its decree.[6]

Sum in Gross—Specific Property.—But the old rule is not now of general application, and in many of the United States, under statutes,[7]

Barrere, 4 Johns. Ch. (N. Y.) 187; Amos *v.* Amos, 4 N. J. Eq. 171; Shover *v.* Shover, 10 N. J. Eq. 261; Miller *v.* Miller, 1 N. J. Eq. 386; Richmond *v.* Richmond, 2 N. J. Eq. 294; Bray *v.* Bray, 6 N. J. Eq. 27; Soules *v.* Soules, 3 Grant's Ch. (U. C.) 121.

1. Brotherton *v.* Brotherton, 12 Neb. 75; Forrest *v.* Forrest, 8 Bosw. (N. Y.) 640; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661; Forrest *v.* Forrest, 25 N. Y. 501; Shaw *v.* Shaw, 9 Mich. 164; Hoffman *v.* Hoffman, 55 Barb. (N. Y.) 269.

2. 1 Stewart on M. & D. § 374; Cooke *v.* Cooke, 2 Phillim. 40, 1 Eng. Ecc. 178; Miller *v.* Clark, 23 Ind. 370; Calame *v.* Calame, 24 N. J. Eq. 440; Hyde *v.* Hyde, 4 Swab. & T. 80; Bacon *v.* Bacon, 43 Wis. 197.

3. Shaw *v.* Shaw, 114 Ill. 586; Doe *v.* Doe, 52 Hun (N. Y.) 405; Russell *v.* Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112; Maguire *v.* Maguire, 7 Dana (Ky.) 181; Phelan *v.* Phelan, 12 Fla. 449.

4. Calame *v.* Calame, 26 N. J. Eq. 548, 24 N. J. Eq. 440; Phelan *v.* Phelan, 12 Fla. 449. Though see Doole *v.* Doole, 144 Mass. 278; Burr *v.* Burr, 10 Paige (N. Y.) 20, where the proposition in the text seems to be questioned.

Maintenance.—And this rule also holds good in cases of maintenance. Almond *v.* Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507; Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52.

5. Doole *v.* Doole, 144 Mass. 278; Crews *v.* Mooney, 74 Mo. 26.

6. Storey *v.* Storey, 125 Ill. 608, 8 Am. St. Rep. 417, *overruling* 23 Ill. App. 558; Calame *v.* Calame, 24 N. J. Eq. 440. "If the parties have made an agreement, that should be the standard; if not, I would take the practice of the court in analogous cases." Almond *v.* Almond, 4 Rand. (Va.) 62, 15 Am. Dec. 781.

Execution cannot be ordered on a mere agreement to pay alimony pending suit, where there has been no order or decree therefor. Brigham *v.* Brigham, 147 Mass. 159.

Temporary Alimony.—The making of a consent order for temporary alimony does not conclude the court from making an order for further alimony. Grant *v.* Grant (S. Dakota, 1894), 57 N. W. Rep. 948.

Ante-Nuptial Agreement that wife shall have a certain sum out of husband's estate after his death in lieu of all claim against same is no bar to the granting of alimony. Janvrin *v.* Janvrin, 59 N. H. 23. See Stearns *v.* Stearns (Vt., 1894), 28 Atl. Rep. 875. See further on the question of agreement, Fletcher *v.* Holmes, 25 Ind. 458; Miller *v.* Miller, 64 Me. 484; Allison *v.* Allison (S. Dak., 1894), 58 N. W. Rep. 563; Stratton *v.* Stratton, 77 Me. 377, 52 Am. Rep. 779; Buck *v.* Buck, 60 Ill. 242; Carson *v.* Murray, 3 Paige (N. Y.) 483; 2 Bish. on M., D., & S. §§ 882–886.

A decree consented to by the solicitor of the defendant is valid unless impeached for fraud or mistake. Brick *v.* Brick, 65 Mich. 230.

7. Statutes.—This whole matter is one of statutory provision or construction, and the statutes themselves must be consulted. These may be found collected in Stewart on M. & D. § 364; and see Am. & Eng. Ency. Law, vol. 1, tit. ALIMONY.

In a Texas Case it was held that certain lots owned in common by the parties to a divorce suit might by de-

both a sum in gross[1] and specific property of any description[2] may be awarded, as will best meet the necessities of the case.[3] Alimony, though granted in gross, may be made payable in instalments.[4]

The Order for Temporary Alimony is, of course, in form, *pendente lite*.[5]

In the Case of Permanent Alimony, where the divorce is *a mensa et*

cree be adjudged to one party in satisfaction of her interest in the entire estate, in spite of art. 2864 of the Rev. Sts., which provides that neither party to a divorce proceeding shall be compelled to divest himself or herself of the title to real estate. Young *v.* Young (Tex. Civ. App., 1893), 23 S. W. Rep. 83.

1. Robinson *v.* Robinson, 79 Cal. 511; Ifert *v.* Ifert, 29 Ind. 473; Winemiller *v.* Winemiller, 114 Ind. 540; Taylor *v.* Gladwin, 40 Mich. 232; Benedict *v.* Benedict, 58 Conn. 326; Campbell *v.* Campbell, 37 Wis. 206.

Gross Sum in Lieu of Dower.—But the court has no power in its decree to make a woman accept a gross sum in lieu of dower. Crain *v.* Cavana, 62 Barb. (N. Y.) 109, 36 Barb. (N. Y.) 410; Russell *v.* Russell, Smith (Ind.) 356. See Madison *v.* Madison, 1 Wash. Ter. 60. And the dower interest, which, under Gen. Sts. 1878, ch. 62, § 24, is allowed to a woman who has obtained a divorce for her husband's adultery, cannot be set off in a divorce suit. Holmes *v.* Holmes, 54 Minn. 352.

Where a statute allows the court to set off part of husband's estate as alimony, and he owns only realty that cannot be divided, a gross sum of money may be decreed. Benedict *v.* Benedict, 58 Conn. 326.

2. Simpson *v.* Simpson, 80 Cal. 237; Powell *v.* Campbell, 20 Nev. 232, 19 Am. St. Rep. 350; Brick *v.* Brick, 65 Mich. 230; Halleman *v.* Halleman, 65 Ga. 476; Jolly *v.* Jolly, 1 Iowa 9; Wiggin *v.* Smith, 54 N. H. 213; Dinet *v.* Eigenmann, 80 Ill. 275; Blankenship *v.* Blankenship, 19 Kan. 159; Broadwell *v.* Broadwell, 21 Ohio St. 657; Donovan *v.* Donovan, 20 Wis. 586; Bacon *v.* Bacon, 43 Wis. 197; Hopkins *v.* Hopkins, 40 Wis. 462; Williams *v.* Williams, 36 Wis. 367; Damon *v.* Damon, 28 Wis. 510; Wilke *v.* Wilke, 28 Wis. 296; Webster *v.* Webster, 64 Wis. 438.

Temporary alimony may include the use of a house. Cowan *v.* Cowan (Colo., 1893), 35 Pac. Rep. 547.

The decree which sets off land to one of the parties must sufficiently describe it. Young *v.* Young (Tex. Civ. App. 1893), 23 S. W. Rep. 83.

3. **Discretion.**—Where the court has a discretion in the matter, it seems to be deemed the better plan to award an allowance, and not either a sum in gross or specific property, unless there are special reasons why the latter should be done, as to avoid further litigation, or where there is danger of the husband's delaying payments. McClung *v.* McClung, 40 Mich. 494; Williams *v.* Williams, 36 Wis. 362; Ross *v.* Ross, 78 Ill. 402.

The following cases on this point may also be consulted: Wheeler *v.* Wheeler, 18 Ill. 39; Miller *v.* Clark, 23 Ind. 370; Ross *v.* Ross, 78 Ill. 402; Armstrong *v.* Armstrong, 35 Ill. 109; Jolliff *v.* Jolliff, 32 Ill. 527; Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267; Daily *v.* Daily, 64 Ill. 329; Von Glahn *v.* Von Glahn, 46 Ill. 134; Graves *v.* Graves, 108 Mass. 314; Burrows *v.* Purple, 107 Mass. 428; Prescott *v.* Prescott, 59 Me. 146; Petersine *v.* Thomas, 28 Ohio St. 596; Taylor *v.* Taylor, 93 N. Car. 418, 53 Am. Rep. 460; Bacon *v.* Bacon, 43 Wis. 197; Thomas *v.* Thomas, 41 Wis. 229; Coad *v.* Coad, 41 Wis. 23; Chenault *v.* Chenault, 5 Sneed (Tenn.) 248; Gholston *v.* Gholston, 31 Ga. 265; Close *v.* Close, 25 N. J. Eq. 434; Boggess *v.* Boggess, 6 Baxt. (Tenn.) 299.

4. Taylor *v.* Gladwin, 40 Mich. 493; Ifert *v.* Ifert, 29 Ind. 473; Winemiller *v.* Winemiller, 114 Ind. 540. See Williams *v.* Williams, 36 Wis. 362.

5. **Order must be as Prayed.**—Where respondent petitioned for alimony *pendente lite*, it was error to decree alimony "until the further order of the court." Heilbron *v.* Heilbron, 158 Pa. St. 297. But an order to pay temporary alimony is not erroneous because not expressly limited to such time as the action should be pending. By necessary implication the order ceases to have any operation after the entry of judgment. Langan *v.* Langan, 91 Cal. 654.

thoro, the decree is usually in terms until the reconciliation of the parties,[1] or until they are completely divorced.[2]

Award During Joint Lives.—And whether the divorce is *a mensa et thoro* or *a vinculo*, the award of alimony should only be made during the joint lives of the parties.[3]

When Allowance Commences.—Where permanent alimony takes the form of a periodic allowance, the decree usually directs that it shall run from the date of the final decree,[4] though sometimes it runs from the filing of the bill, when this is just under the circumstances.[5]

1. Rogers *v.* Vines, 6 Ired. (N. Car.) 293; Tiffin *v.* Tiffin, 2 Binn. (Pa.) 202; Lockwood *v.* Krum, 34 Ohio St. 2.

Maintenance.—In this connection the cases on maintenance may be referred to where the practice in making the decree is the same. Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; *ante*, p. 410, note 3.

2. Blaker *v.* Cooper, 7 S. & R. (Pa.) 500; Smith *v.* Smith, 3 S. & R. (Pa.) 250.

3. Pearce *v.* Pearce (Ky., 1891), 16 S. W. Rep. 271; Francis *v.* Francis, 31 Gratt. (Va.) 283; Gaines *v.* Gaines, 9 B. Mon. (Ky.) 299, 48 Am. Dec. 425; Rogers *v.* Vines, 6 Ired. (N. Car.) 293; Casteel *v.* Casteel, 38 Ark. 477; Dewees *v.* Dewees, 55 Miss. 315, where it was said that alimony should be decreed, not "during the natural life of the wife," but until the dissolution of the marriage by the death of either party; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Wallingsford *v.* Wallingsford, 6 Har. & J. (Md.) 485; Knapp *v.* Knapp, 134 Mass. 353. In Lennahan *v.* O'Keefe, 107 Ill. 620, it was said: "In the absence of language showing unequivocally that the intention was to bind the heir by such a decree, we are of opinion that it does not do so, but that its life terminates with the death of the defendant."

Presumption.—The decree is presumed to be for the joint lives of the parties. Field *v.* Field, 66 How. Pr. (N. Y. Supreme Ct.) 346, 15 Abb. N. Cas. (N. Y.) 434, *disapproving* Burr *v.* Burr, 10 Paige (N. Y.) 20.

Contra.—But where the decree expressly awards alimony to continue during the natural life of wife, it seems the award will be sustained. Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779; Miller *v.* Miller, 64 Me. 489; Burr *v.* Burr, 10 Paige (N. Y.) 20, 7 Hill (N. Y.) 207; Carson *v.* Murray, 3 Paige (N. Y.) 483; Lennahan *v.* O'Keefe, 107 Ill. 620; Storey *v.* Storey, 125 Ill. 608, 8 Am. St. Rep. 417, reversing 23 Ill. App. 558; *Ex p.* Hart, 94 Cal. 254. And, of course, it may be so under a statute. Smythe *v.* Banks, 73 Ga. 303.

No Period Specified.—A decree awarding alimony is not void where no period is specified during which it shall be paid. *Ex p.* Hart, 94 Cal. 254.

4. Durant *v.* Durant, 1 Hagg. Ecc. 528, 3 Eng. Ecc. 231; Kempe *v.* Kempe, 1 Hagg. Ecc. 532, 3 Eng. Ecc. 233; Cooke *v.* Cooke, 2 Phillim. 40; Soules *v.* Soules, 3 Grant's Ch. (U. C.) 113; Ricketts *v.* Ricketts, 4 Gill (Md.) 105; Holmes *v.* Holmes, 29 N. J. Eq. 9.

5. Forrest *v.* Forrest, 25 N. Y. 501, 6 Duer (N. Y.) 102; Burr *v.* Burr, 10 Paige (N. Y.) 20, 7 Hill (N. Y.) 207.

Where the wife was adjudged entitled to a divorce, but the question of alimony was reserved, it was held that the husband's liability for temporary alimony, which had previously been granted, continued until the decision as to permanent alimony. *Ex p.* Ambrose, 72 Cal. 398.

Conditions.—Under the English practice alimony is sometimes decreed to a wife to continue *dum casta et sola vixerit*. But this practice is said not to obtain in the *United States*. 2 Bish. on M., D., & S. § 1057. But see Pearce *v.* Pearce (Ky., 1891), 16 S. W. Rep. 271, where the allowance was made for as long as plaintiff remained a single woman. And see Storey *v.* Storey 125 Ill. 608, 8 Am. St. Rep. 417, a case of decree for alimony entered upon consent, allowance to continue while plaintiff remained single.

In Middleton *v.* Middleton, 18 Ill. App. 472, it was said that where there were articles of separation, alimony should be granted, conditioned upon the husband's failure to pay the amount agreed upon under such articles.

b. MODIFICATION.—Decrees for alimony are, and, on principle, should be, subject to change or modification as circumstances may require.[1]

Temporary Alimony may be increased or diminished at any time during the pendency of the suit.[2]

Permanent Alimony.—And this is so also in the case of permanent alimony, where the divorce granted is *a mensa et thoro*,[3] or the decree is alimony without divorce;[4] but not, it seems, where the divorce is *a vinculo*,[5] unless this right has been reserved by the court in the decree itself[6] or is given by statute, which it generally is.[7]

Maintenance for Child.—A divorce decree which gives the wife alimony and the custody of a child will not be reversed because it does not specify the amount intended for the wife and child respectively, although it is proper to do so. Johnson *v.* Johnson, 36 Ill. App. 152, *affirmed* in 125 Ill. 510.

Arrears of Alimony.—A decree of divorce should not direct payment by the defendant of arrears of alimony previously ordered. They should be enforced by plaintiff in the ordinary way. Hoffman *v.* Hoffman, 55 Barb. (N. Y.) 269. As to arrears of alimony generally, see Am. & Eng. Ency. Law, tit. ALIMONY.

1. By alimony is, of course, here meant the alimony of the unwritten law, not the statutory alimony granted on total dissolution of the marriage bond. Smith *v.* Smith, 45 Ala. 264.

2. Cox *v.* Cox, 3 Add. Ecc. 276, 2 Eng. Ecc. 531; McGee *v.* McGee, 10 Ga. 477; Amos *v.* Amos, 4 N. J. Eq. 171; Sigel *v.* Sigel, 28 Abb. N. Cas. (N. Y. Super. Ct.) 308; King *v.* King, 38 Ohio St. 370; Moe *v.* Moe, 39 Wis. 308; Simonds *v.* Simonds (Supreme Ct.) 10 N. Y. Supp. 606; Williams *v.* Williams, 29 Wis. 517; Waters *v.* Waters, 49 Mo. 385.

3. Rogers *v.* Vines, 6 Ired. (N. Car.) 293; Taylor *v.* Taylor, 93 N. Car. 418, 53 Am. Rep. 460; Smith *v.* Smith, 45 Ala. 264; Miller *v.* Miller, 6 Johns. Ch. (N. Y.) 93; Sloan *v.* Cox, 4 Hayw. (Tenn.) 75; Otway *v.* Otway, 2 Phillim. 109, 1 Eng. Ecc. 203; De Blaquiere *v.* De Blaquiere, 3 Hagg. Ecc. 322, 5 Eng. Ecc. 126; Saunders *v.* Saunders, 1 Swab. & T. 72; Bursler *v.* Bursler, 5 Pick. (Mass.) 427; Holmes *v.* Holmes, 4 Barb. (N. Y.) 295; Barber *v.* Barber, 1 Chand. (Wis.) 280.

4. Beck *v.* Beck, 43 N. J. Eq. 668: cases cited *ante*, p. 411, note 1.

Lien on Land.—Where a decree for maintenance is made a lien on more land than is necessary to secure payment, it will be modified on application. Thomas *v.* Thomas, 44 Ill. App. 604.

5. Sampson *v.* Sampson, 16 R. I. 456; Sammis *v.* Medbury, 14 R. I. 214; Mitchell *v.* Mitchell, 20 Kan. 665; Stratton *v.* Stratton, 73 Me. 481; Smith *v.* Smith, 45 Ala. 264; Fries *v.* Fries, 1 McArthur (D. C.) 291; Kerr *v.* Kerr, 59 How. Pr. (N. Y. C. Pl.) 255; Shepherd *v.* Shepherd, 1 Hun (N. Y.) 240; Pertersine *v.* Thomas, 28 Ohio St. 596; Hardin *v.* Hardin, 38 Tex. 616; Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466.

Principle.—The principle on which this doctrine rests is the same that prevents the granting of alimony after final decree in an action completely divorcing the parties. Kamp *v.* Kamp, 59 N. Y. 212; *ante*, p. 414, and cases there cited.

6. Olney *v.* Watts, 43 Ohio St. 499; Pearce *v.* Pearce (Ky., 1891), 16 S. W. Rep. 271; Beck *v.* Beck, 43 N. J. Eq. 668; Fries *v.* Fries, 1 McArthur (D. C.) 291; Petersine *v.* Thomas, 28 Ohio St. 596; Williams *v.* Williams, 29 Wis. 517; Severn *v.* Severn, 7 Grant's Ch. (U. C.) 109; Bennett *v.* Bennett, Deady (U. S.) 299. See also Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Sampson *v.* Sampson, 16 R. I. 456.

Yet it was held in Cullen *v.* Cullen, 55 N. Y. Super. Ct. 346, that even where a decree refusing alimony was only *a mensa et thoro*, and expressly reserved the right to the court to make future modifications of it for the support of the wife as circumstances should require, this could not be done; though it is different where the defendant consents. Stahl *v.* Stahl, 59 Hun (N. Y.) 621, 12 N. Y. Supp. 854.

7. Kempster *v.* Evans, 81 Wis. 247; Bacon *v.* Bacon, 43 Wis. 197; Hopkins

When Power Exercised.—But this power will only be exercised where a change of circumstances in the parties is clearly shown,[1] or on the presentation of newly discovered evidence of which the petitioner was excusably ignorant.[2]

v. Hopkins, 40 Wis. 462; Campbell *v.* Campbell, 37 Wis. 206; Blake *v.* Blake, 75 Wis. 339, 68 Wis. 303; Coad *v.* Coad, 41 Wis. 23; Williams *v.* Williams, 29 Wis. 517; Thomas *v.* Thomas, 41 Wis. 229; Bennett *v.* Bennett, Deady (U. S.) 299; Robbins *v.* Robbins, 101 Ill. 416; Lennahan *v.* O'Keefe, 107 Ill. 620; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21; Cole *v.* Cole, 142 Ill. 19, *affirming* 35 Ill. App. 544; Foote *v.* Foote, 22 Ill. 425; Wheeler *v.* Wheeler, 18 Ill. 39; Alderson *v.* Alderson, 84 Iowa 198; Galusha *v.* Galusha, 138 N. Y. 272; Richmond *v.* Richmond, 2 N. J. Eq. 90; Amos *v.* Amos, 4 N. J. Eq. 171; Sheafe *v.* Sheafe, 36 N. H. 155; Sparhawk *v.* Sparhawk, 120 Mass. 390; Graves *v.* Graves, 108 Mass. 314; Albee *v.* Wyman, 10 Gray (Mass.) 222; Waters *v.* Waters, 49 Mo. 385; Olney *v.* Watts, 43 Ohio St. 499; Ellis *v.* Ellis, 13 Neb. 91; Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171; Bowman *v.* Worthington, 24 Ark. 522; Perkins *v.* Perkins, 12 Mich. 456; Goodman *v.* Goodman, 26 Mich. 417; McGee *v.* McGee, 10 Ga. 477; Wilde *v.* Wilde, 36 Iowa 319; Shaw *v.* McHenry, 52 Iowa 182; Fisher *v.* Fisher, 32 Iowa 20; Blythe *v.* Blythe, 25 Iowa 266; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Call *v.* Call, 65 Me. 407; Weld *v.* Weld, 28 Minn. 33; Semrow *v.* Semrow, 23 Minn. 214; Sheafe *v.* Sheafe, 36 N. H. 155; Buckminster *v.* Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

In Campbell *v.* Campbell, 37 Wis. 206, it was held that the court could not by any form of judgment divest itself of the authority given it by statute to revise such judgment. So also in Thomas *v.* Thomas, 41 Wis. 229. And an annual allowance is not a final distribution of the estate of the parties, although the decree may declare it to be so. Kempster *v.* Evans, 81 Wis. 247, 15 L. R. A. 391. See Blake *v.* Blake, 75 Wis. 339, 68 Wis. 303. But a decree, in so far as it vests title to real estate in the wife, is final and cannot be modified after the term of court in which it was given has closed. Webster *v.* Webster, 64 Wis. 438. See Shepherd *v.* Shepherd, 1 Hun (N. Y.) 240, *affirmed in* 58 N. Y. 644; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661.

Presumption.—But a decree for alimony is not temporary in its character, and the presumption that it remains unchanged can only be overcome by record evidence, Bennett *v.* Bennett, Deady (U. S.) 299.

Agreement.—And an agreement is no bar to the modification of a judgment. Blake *v.* Blake, 75 Wis. 339, 68 Wis. 303. See Galusha *v.* Galusha, 138 N. Y. 272.

1. Rogers *v.* Vines, 6 Ired. (N. Car.) 293; Graves *v.* Graves, 108 Mass. 314; Simonds *v.* Simonds (Supreme Ct.), 10 N. Y. Supp. 606; Blake *v.* Blake, 75 Wis. 339, 68 Wis. 303; Cole *v.* Cole, 142 Ill. 19, 35 Ill. App. 544; Richmond *v.* Richmond, 2 N. J. Eq. 90; Wilde *v.* Wilde, 36 Iowa 319; Semron *v.* Semron, 23 Minn. 214; Perkins *v.* Perkins, 12 Mich. 456; Goodman *v.* Goodman, 26 Mich. 417; Petersine *v.* Thomas, 28 Ohio St. 596; De Blaquiere *v.* De Blaquiere, 3 Hagg. Ecc. 322, 5 Eng. Ecc. 126; Fisher *v.* Fisher, 32 Iowa 20; Halsted *v.* Halsted, 5 Duer (N. Y.) 659; Holmes *v.* Holmes, 4 Barb. (N. Y.) 295; Buckminster *v.* Buckminster, 38 Vt. 248, 88 Am. Dec. 652; Bowman *v.* Worthington, 24 Ark. 522; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21; Albee *v.* Wyman, 10 Gray (Mass.) 222; Fisher *v.* Fisher, 2 Swab. & T. 411; Sidney *v.* Sidney, 4 Swab. & T. 180. See also Sloan *v.* Cox, 4 Hayw. (Tenn.) 75; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661. And a petition to modify a decree which does not show this change is demurrable. Reid *v.* Reid, 74 Iowa 681.

Agreement.—A petition may be modified by agreement, and the agreement upheld. Allison *v.* Allison (S. Dak., 1894), 58 N. W. Rep. 563.

Death of Child.—A decree for permanent alimony for the support of wife and child will not be reformed and the amount reduced on the death of the child, where the necessities of the wife remain the same as before the death of the child; and in such case she will be allowed a counsel fee in resisting the application for such reformation. Thurston *v.* Thurston, 38 Ill. App. 464.

2. Straus *v.* Straus (Supreme Ct.),

Application for Modification.—Generally an application for the modification of a decree for alimony should not be made by a new bill,[1] but by summary motion or petition,[2] or an application for an order to show cause, filed in the original cause;[3] and it must set out fully the facts relied on.[4]

c. ENFORCING DECREE—**By What Tribunal.**—A decree for alimony

14 N. Y. Supp. 671; Semron *v.* Semron, 23 Minn. 214.

Where Husband is Unable to Pay the decree should be modified. State *v.* Second Judicial Dist. (Mont., 1894), 36 Pac. Rep. 757. Or where a divorced wife marries again. McCracken *v.* Swartz, 5 Oregon 62.

1. Snover *v.* Snover, 13 N. J. Eq. 261; Paff *v.* Paff, Hopk. (N. Y.) 584, where the court said: "When any difficult question arises upon such an application, the court may direct that a bill be filed, or may award an issue for a more complete investigation of the case. But it cannot be tolerated that either party should, of course, and without leave of the court, institute a new suit in full form for the purpose of varying a final decree of this nature. If such bills were permitted upon every change in the circumstance of a party, they might become very oppressive; and such a practice is wholly unnecessary. Applications to vary allowances have hitherto been made to this court by motion or petition, and this practice must be enforced." But it was said in Jordan *v.* Jordan, 53 Mich. 550, a case in which neither the libel nor the decree made any mention of alimony, that the decree could not be amended by adding a reference to take proofs concerning alimony, but that the proper remedy, if there was any, was by supplemental bill in the nature of a bill of review.

Where Allowance Inadequate when granted, the remedy is by appeal, not by bill of review. Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

2. McPike *v.* McPike, 10 Ill. App. 332; Neil *v.* Neil, 4 Hagg. Ecc. 273; Cox *v.* Cox, 3 Add. Ecc. 276; Perkins *v.* Perkins, 12 Mich. 456; Snover *v.* Snover, 13 N. J. Eq. 261; Paff *v.* Paff, Hopk. (N. Y.) 584; Rogers *v.* Rogers (Ohio, 1894), 36 N. E. Rep. 310; Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

Upon a petition to make absolute a divorce from bed and board, the court may increase the alimony originally granted without a distinct petition therefor. Graves *v.* Graves, 108 Mass. 314; Sparhawk *v.* Sparhawk, 120 Mass. 390.

3. Wade *v.* Wade (Cal., 1892), 31 Pac. Rep. 258.

4. Perkins *v.* Perkins, 12 Mich. 456; Saunders *v.* Saunders, 1 Swab. & T. 72; Shirley *v.* Wardropp, 1 Swab. & T. 317.

Evidence.—Facts proved in evidence but not made ground for relief in the petition cannot be considered by the court in reaching its conclusion. Perkins *v.* Perkins, 12 Mich. 456.

Where the wife did not oppose the reduction of alimony, it has been made on motion founded on the mere affidavit of the husband. Cox *v.* Cox, 3 Add. Ecc. 276. But where an important modification of a judgment is asked and resisted, it is error to decide the matter upon petition, answer, and accompanying papers, instead of a reference to take testimony or a hearing in court, if either party wishes to introduce further evidence or to cross-examine the witnesses. Bacon *v.* Bacon, 34 Wis. 594.

Venue.—A petition for a change of alimony is a "suit" within the meaning of a statute which provides for a change of venue; and there is no force in the objection that this proceeding is a mere adjunct of divorce, and that the court to which it may be removed will have nothing on which to base its action, as records in divorce cases are not removable; since if any records are needed, transcripts are obtainable under statutory provisions. McPike *v.* McPike, 10 Ill. App. 332. *Contra*, Hopkins *v.* Hopkins, 40 Wis. 462; Bacon *v.* Bacon, 34 Wis. 594.

When Power to Alter Exercised.—The statutory power of a court to alter an allowance of alimony "from time to time" may be exercised after the term at which the decree for alimony was rendered. Cole *v.* Cole, 142 Ill. 19.

can be enforced within the state in which it is granted only by the tribunal which granted it.[1]

In Other States.—But we have seen before that such a decree is within the "full faith and credit" clause of the Constitution of the United States, and can be enforced in a state other than that in which it was passed,[2] by a suit in equity[3] or an ordinary action

1. Allen *v.* Allen, 100 Mass. 373; Van Buskirk *v.* Mulock, 18 N. J. L. 184; Barber *v.* Barber, 1 Chand. (Wis.) 280; Guenther *v.* Jacobs, 44 Wis. 354. See also Hansford *v.* Van Auken, 79 Ind. 302.

No other court, without leave of the court which has granted the divorce, can take jurisdiction of an action on the bond given to secure the payment of alimony awarded by the divorce court. Guenther *v.* Jacobs, 44 Wis. 354. The general question of jurisdiction is somewhat fully discussed in this case, the court concluding as follows: "In all ordinary circumstances, therefore, the remedy to enforce the payment of alimony is exclusively in the court which grants it. The cases, with rare exceptions, recognize the exclusive jurisdiction of the court granting a divorce to enforce its own judgment for alimony. Campbell *v.* Campbell, 37 Wis. 206; Bacon *v.* Bacon, 43 Wis. 197; Barber *v.* Barber, 2 Pin. (Wis.) 297; Allen *v.* Allen, 100 Mass. 373; Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; De Blaquiere *v.* De Blaquiere, 3 Hagg. Ecc. 322; Vandergucht *v.* De Blaquiere, 8 Sim. 315. This doctrine is too well settled in this court to admit of question here."

Reason of Rule.—The reasons on which this principle is sustained seem to be the general doctrine that an action at law will not lie for the recovery of money directed to be paid by the decree of a court of equity, Hugh *v.* Higgs, 8 Wheat. (U. S.) 697; Van Buskirk *v.* Mulock, 18 N. J. L. 184; or that an alimony decree has not the force of a judgment and cannot therefore be the subject of an action at law, Barber *v.* Barber, 1 Chand. (Wis.) 280; or that a decree for alimony is not final in its character, Guenther *v.* Jacobs, 44 Wis. 354; Allen *v.* Allen, 100 Mass. 373.

But an action may be maintained in one county upon a judgment rendered in another. Darrow *v.* Darrow, 43 Iowa 411.

2. *Ante*, p. 416, notes 1, 2; Borden *v.* Fitch, 15 Johns. (N. Y.) 121; Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Nunn *v.* Nunn, 8 L. R. Ir. 298; Allen *v.* Allen, 100 Mass. 373; Stewart *v.* Stewart, 27 W. Va. 167; Rigney *v.* Rigney (Supreme Ct.), 6 N. Y. Supp. 141; Wood *v.* Wood (C. Pl.), 28 N. Y. Supp. 154; and particularly Dow *v.* Blake, 148 Ill. 76.

The reasons offered in support of the rule that a decree for alimony, within the state in which it was granted, can only be enforced by the court awarding it would, of course, in strict logic, apply with equal force to suits brought for the purpose of enforcing foreign judgments or decrees, and have, in fact, been so applied. Van Buskirk *v.* Mulock, 18 N. J. L. 184; Barber *v.* Barber, 1 Chand. (Wis.) 280. But, by the great weight of authority, the rule is not generally observed in the latter class of cases, probably on the ground of preventing a failure of justice which would otherwise frequently occur. See Allen *v.* Allen, 100 Mass. 373, where the court said: "It is manifest that a foreign and a domestic decree stand on a very different footing in respect to the appropriate measures for their enforcement. It may be that, within the jurisdiction of a chancery or ecclesiastical court, its powers and processes to compel obedience to its own decrees are so ample and potent that other tribunals will not entertain independent suits for that purpose; while, in the case of a foreign court or one in another state, the remedy of a suit to enforce such a decree may be necessary to prevent failure of justice."

What Relief Granted.—But in an action on a foreign judgment no other relief can be had than a recovery for past-due alimony. In such an action there is no jurisdiction in equity to sequestrate defendant's property or compel him to give security for future payments. Wood *v.* Wood (C. Pl.), 28 N. Y. Supp. 154.

3. Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364; Stewart *v.* Stewart, 27 W. Va. 167.

at law.[1]

United States Courts.—It can also be enforced on the equity side of the United States courts where the parties reside in different states.[2]

The Methods Employed to enforce the alimony decree or order vary in the different states according as statutes provide or the usual practice of the court authorizes.[3] If the action is in chancery, then as an ordinary decree, or by other modes consistent with chancery practice,[4] or by supplemental proceedings.[5] And the court often has the right of election between different methods.[6] In some states an action of assumpsit has been sustained;[7] in some, debt,[8] or an ordinary suit on a judgment,[9] or other similar action.[10]

The following are the methods principally in use in this country: the writ of *scire facias*,[11] which method is sometimes preferred

1. Traylor *v.* Richardson, 2 Ind. App. 452; Allen *v.* Allen, 100 Mass. 373. In the following cases debt was sustained: Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Dow *v.* Blake, 148 Ill. 76. *Compare* Stewart *v.* Stewart, 27 W. Va. 167; Rigney *v.* Rigney (Supreme Ct.), 6 N. Y. Supp. 141.

The Terms of the Decree, and whether the court is one of law or equity, may perhaps affect the question. Chestnut *v.* Chestnut, 77 Ill. 346.

2. Barber *v.* Barber, 21 How. (U. S.) 582. See also Cheever *v.* Wilson, 9 Wall. (U. S.) 108; Bennett *v.* Bennett, Deady (U. S.) 299, *ante*, p. 416.

3. Prescott *v.* Prescott, 59 Me. 146; Coughlin *v.* Ehlert, 39 Mo. 285; Barker *v.* Dayton, 28 Wis. 367; Damon *v.* Damon, 28 Wis. 510.

4. Becker *v.* Becker, 15 Ill. App. 247; Blake *v.* People, 80 Ill. 11; Coughlin *v.* Ehlert, 39 Mo. 285; Damon *v.* Damon, 28 Wis. 510; Casteel *v.* Casteel, 38 Ark. 477; Burrows *v.* Purple, 107 Mass. 428; Slade *v.* Slade, 106 Mass. 499; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Sparhawk *v.* Sparhawk, 120 Mass. 390.

5. Barker *v.* Dayton, 28 Wis. 367.

Temporary Alimony in a suit by divorced wife to enforce a decree for alimony cannot be granted. McQuien *v.* McQuien, 61 How. Pr. (N. Y. C. Pl.) 280. So also it will be refused in a suit to set aside a decree altogether. Wilson *v.* Wilson, 49 Iowa 544.

6. Becker *v.* Becker, 15 Ill. App. 247; Blake *v.* People, 80 Ill. 11; Waters *v.* Waters, 49 Mo. 385; Bouslough *v.* Bouslough, 68 Pa. St. 495; Sheafe *v.* Laighton, 36 N. H. 240; Sheafe *v.* Sheafe, 36 N. H. 155; Staples *v.* Staples, 87 Wis. 592; Wightman *v.* Wightman, 45 Ill. 167.

7. Wheeler *v.* Wheeler, 1 Dane Ab. (Mass.) 358; Davol *v.* Davol, 13 Mass. 264.

8. Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779; Clark *v.* Clark, 6 W. & S. (Pa.) 85; to which non-assumpsit is not a proper plea. Lancaster *v.* Lancaster, 29 Ill. App. 510; Howard *v.* Howard, 15 Mass. 196, *overruled* together with Wheeler *v.* Wheeler, 1 Dane Ab. (Mass.) 358, and Davol *v.* Davol, 13 Mass. 264, by Allen *v.* Allen, 100 Mass. 373.

9. Hansford *v.* Van Auken, 79 Ind. 302; Blecknell *v.* Blecknell, 110 Ind. 42; where it was said that a judgment for alimony was a debt of record and sufficient to support an action in the same or a different court from that in which it was rendered, even though execution would collect the same.

10. Bates *v.* Bates, 74 Ga. 105.

Sequestration is sometimes resorted to. Clinton *v.* Clinton, L. R. 1 P. & M. 215; Dent *v.* Dent, L. R. 1 P. & M. 366; Sansom *v.* Sansom, 4 P. D. 69. And where the husband is complainant the payment of temporary alimony is often enforced by refusing to hear the cause until alimony is paid, Bird *v.* Bird, 1 Lee 572, 5 Eng. Ecc. 455; or by denying the husband a decree absolute, Latham *v.* Latham, 2 Swab. & T. 299.

11. Morton *v.* Morton, 4 Cush. (Mass.) 518; Chestnut *v.* Chestnut, 77 Ill. 346;

to any other,[1] *fiere facias*,[2] attachment of property,[3] or execution generally.[4]

McCracken *v.* Swartz, 5 Oregon 62; Slade *v.* Slade, 106 Mass. 499; Knapp *v.* Knapp, 134 Mass. 353.

See for what is necessary to be set out in the declaration or verified petition in a proceeding in the nature of *scire facias*, McCracken *v.* Swartz, 5 Oregon 62.

1. As where execution is desired against the estate of a deceased person for arrears of alimony. Knapp *v.* Knapp, 134 Mass. 353.

Massachusetts.—This method seems to be popular in this state. See for an elaborate discussion of the reasons therefor, Morton *v.* Morton, 4 Cush. (Mass.) 518. But it is not the exclusive remedy, the court saying in Slade *v.* Slade, 106 Mass. 499, that "a petition is usually preferable to a *sci. fa.* because the proceeding is more speedy and flexible." See Downs *v.* Flanders, 150 Mass. 92.

Amount Must Be Certain.—But a *sci. fa.* will not lie upon the record of an order for the payment of alimony pending a suit for divorce when a resort to evidence *dehors* the record would be necessary to ascertain the amount due. Chestnut *v.* Chestnut, 77 Ill. 346.

2. Bouslough *v.* Bouslough, 68 Pa. St. 495; Gibson *v.* Patterson, 75 Ga. 549; preceded by an order to show cause, Hewitt *v.* Hewitt, 1 Bland (Md.) 101; and the petition for the writ need not state the amount of alimony due. An allegation that none has been paid is sufficient. It is also said that there is no authority for the issuance of a *ca. sa.* Elmer *v.* Elmer, 150 Pa. St. 205. But see Goss *v.* Goss, 29 Ga. 109.

3. Wharton *v.* Wharton, 57 Iowa 696; Goss *v.* Goss, 29 Ga. 109; Bouslough *v.* Bouslough, 68 Pa. St. 495; Daniels *v.* Lindley, 44 Iowa 567; Waters *v.* Waters, 49 Mo. 385. But where an attachment has been laid by the wife on property of the husband before the decree of divorce, the decree cannot direct it should date back and become a lien on said property from the date of the attachment, to the exclusion of the rights of intervening judgment creditors. Daniels *v.* Lindley, 44 Iowa 467.

4. *Illinois.*—Becker *v.* Becker, 15 Ill. App. 247, Blake *v.* People, 80 Ill. 11; Dinet *v.* Eigenmann, 80 Ill. 274; Yelton *v.* Handley, 28 Ill. App. 640; Blake *v.* Blake, 80 Ill. 523.

Massachusetts.—Foster *v.* Foster, 130 Mass. 189; Newcomb *v.* Newcomb, 12 Gray (Mass.) 28; Orrok *v.* Orrok, 1 Mass. 341; Burrows *v.* Purple, 107 Mass. 428; French *v.* French, 4 Mass. 587; Chase *v.* Chase, 105 Mass. 385; Downs *v.* Flanders, 150 Mass. 92; Slade *v.* Slade, 106 Mass. 499.

Missouri.—Waters *v.* Waters, 49 Mo. 385; State *v.* St. Louis Court, 99 Mo. 216; Coughlin *v.* Ehlert, 39 Mo. 285; Schmidt *v.* Schmidt, 26 Mo. 235.

Iowa.—Daniels *v.* Lindley, 44 Iowa 367; Allen *v.* Allen, 72 Iowa 502.

Ohio.—Wooley *v.* Wooley, Wright (Ohio) 245; Piatt *v.* Piatt, 9 Ohio 37; Olin *v.* Hungerford, 10 Ohio 268.

California.—Robinson *v.* Robinson, 79 Cal. 511; Van Cleave *v.* Bucher, 79 Cal. 600.

Michigan.—Taylor *v.* Gladwin, 40 Mich. 232; Haines *v.* Haines, 35 Mich. 138; North *v.* North, 39 Mich. 67.

Maine.—Call *v.* Call, 65 Me. 407; Russell *v.* Russell, 69 Me. 336; Prescott *v.* Prescott, 59 Me. 146.

New Hampshire.—Sheafe *v.* Laighton, 36 N. H. 240; Sheafe *v.* Sheafe, 36 N. H. 155.

Other States.—Fletcher *v.* Henley, 13 La. Ann. 150; Casteel *v.* Casteel, 38 Ark. 477; Bouslough *v.* Bouslough, 68 Pa. St. 495; Gibson *v.* Patterson, 75 Ga. 549; Weaver *v.* Weaver, 7 Utah 296; Andrew *v.* Andrew, 62 Vt. 495; Staples *v.* Staples, 87 Wis. 592. But see Groves's Appeal, 68 Pa. St. 143, where it was held that an order for temporary alimony was not such a judgment that execution could issue, nor a "decree in equity for the payment of money," within the meaning of a statute making such decrees liens upon real estate, the court saying that the remedy for enforcement was by attachment.

In Whose Name Execution Issues.—Execution can be issued in the name of the plaintiff alone. Robinson *v.* Robinson, 79 Cal. 511.

Order to Show Cause.—Execution is not void because issued without an order to show cause why defendant had not obeyed the order of court. Van Cleave *v.* Bucher, 79 Cal. 600. But see Slade *v.* Slade, 106 Mass. 499;

The decree may also be enforced by sequestration of the husband's property,[1] or by the appointment of a receiver[2] or trustee.[3] Another method frequently employed, at least in the case of temporary alimony, to enforce payment of the order or decree, is that of taking away the privileges in a cause[4] by dismissing the plaintiff's bill,[5] or refusing to proceed with the trial,[6] or striking the answer of the defendant from the files and proceeding with the case *ex parte*,[7] if the order or decree is not com-

Newcomb *v.* Newcomb, 12 Gray (Mass.) 28.

Agreement.—The court cannot order execution unless there is a decree for alimony. It cannot issue on a mere agreement. Brigham *v.* Brigham, 147 Mass. 159.

1. Becker *v.* Becker, 15 Ill. App. 247; Blake *v.* People, 80 Ill. 11; Blake *v.* Blake, 80 Ill. 523; Isaacs *v.* Isaacs, 61 How. Pr. (N. Y. C. Pl.) 369; Wightman *v.* Wightman, 45 Ill. 167; McQuien *v.* McQuien, 61 How. Pr. (N. Y. C. Pl.) 280; Gane *v.* Gane, 45 N. Y. Super. Ct. 355; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Guenther *v.* Jacobs, 44 Wis. 354; Coughlin *v.* Ehlert, 39 Mo. 285; Forrest *v.* Forrest, 9 Bosw. (N. Y.) 686; Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779; Hills *v.* Hills, 76 Me. 486; Donnelly *v.* Shaw, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 264; State *v.* St. Louis Court, 99 Mo. 216.

Does Not Supersede Contempt.—Sequestration does not supersede contempt proceedings, the court saying in O'Callaghan *v.* O'Callaghan, 69 Ill. 552: "But the sequestration of property was not intended to supersede proceedings by contempt, but, on the contrary, it was in aid of it [*sic*], and resorted to either where the contemnor could not be arrested upon process, or where, having been arrested, he remained in prison, without paying obedience to the court." *Citing* 2 Dan. Ch. Prac. 1046. But see Isaacs *v.* Isaacs, 61 How. Pr. (N. Y. C. Pl.) 369.

Impounding Income.—Where a defendant who has been decreed to pay alimony in annual instalments leaves the state, so that the decree cannot be enforced by any statutory remedy, the court, in the exercise of its ordinary equitable jurisdiction, may compel the trustee of a fund held in the state for the benefit of the defendant to apply the income thereof to the satisfaction of the decree. Wetmore *v.* Wetmore (Supreme Ct.), 28 N. Y. Supp. 377, *affirmed* in 29 N. Y. Supp. 440.

2. Murray *v.* Murray, 84 Ala. 363; Barker *v.* Dayton, 28 Wis. 367; Holmes *v.* Holmes, 29 N. J. Eq. 9; Bergen *v.* Bergen, 22 Ill. 187; Carey *v.* Carey, 2 Daly (N. Y.) 424; Questel *v.* Questel, Wright (Ohio) 492; Stillman *v.* Stillman, 7 Baxt. (Tenn.) 186.

3. Ricketts *v.* Ricketts, 4 Gill (Md.) 105; Murray *v.* Murray, 84 Ala. 363. And see Greenland *v.* Brown, 1 Desaus. Eq. (S. Car.) 196.

4. 2 Bish. on M., D., & S. § 1095; McClung *v.* McClung, 40 Mich. 293.

5. Casteel *v.* Casteel, 38 Ark. 477; Peel *v.* Peel, 50 Iowa 521; Mangels *v.* Mangels, 6 Mo. App. 481.

But the husband's suit will not be dismissed where he gives a good excuse for his default. Newhouse *v.* Newhouse, 14 Oregon 290. And this remedy will not be employed save in extreme cases. Peel *v.* Peel, 50 Iowa 521.

6. Waters *v.* Waters, 49 Mo. 385; Winter *v.* San Francisco, 70 Cal. 295; State *v.* St. Louis Court, 99 Mo. 216; Bird *v.* Bird, 1 Lee 572, 5 Eng. Ecc. 455; Latham *v.* Latham, 2 Swab. & T. 299.

7. Zimmerman *v.* Zimmerman, 7 Mont. 114; Quigley *v.* Quigley, 45 Hun (N. Y.) 23; Brisbane *v.* Brisbane, 67 How. Pr. (N. Y. Supreme Ct.) 184; Walker *v.* Walker, 82 N. Y. 260, 59 How. Pr. (N. Y.) 476 (*affirming* 20 Hun (N. Y.) 400), where the court said: "We are brought to the conclusion that there has long been exerted by the Court of Chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the courts of chancery of this country." But see *contra*, McCrea *v.* McCrea, 58 How. Pr. (N. Y. Supreme Ct.) 220; Gordon *v.* Gordon, 141 Ill. 160; Baily *v.* Baily, 69 Iowa 77. See Shaw *v.* Shaw, 114 Ill. 586.

plied with.[1]

Attachment for Contempt.— Another and by far the most common method of enforcing orders or decrees for alimony is that of attachment for contempt.[2] This proceeding being criminal in its nature,[3] the attachment, therefore, is not granted as of course, but only on proof that the defendant has been duly served with notice of the judgment or award,[4] and that payment has been

1. But this will not be done where the defendant can show a good excuse for being in default. Allen *v.* Allen, 72 Iowa 502; Baily *v.* Baily, 69 Iowa 77; Cason *v.* Cason, 15 Ga. 405. And see Johnson *v.* San Francisco, 63 Cal. 578.

It is only used in extreme cases. Peel *v.* Peel, 50 Iowa 521.

Notice to the defendant's attorney is notice to the defendant, where the defendant had personal notice of the original order for alimony, and the modified order was made at the instigation of the attorney. Zimmerman *v.* Zimmerman, 7 Mont. 114.

2. *New York.*—Gerard *v.* Gerard, 2 Barb. Ch. (N. Y.) 73; Lansing *v.* Lansing, 4 Lans. (N. Y.) 377, 41 How. Pr. (N. Y.) 248; Grimm *v.* Grimm, 1 E. D. Smith (N. Y.) 190; Strobridge *v.* Strobridge, 21 Hun (N. Y.) 288; Pritchard *v.* Pritchard, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 298; Ford *v.* Ford, 10 Abb. Pr. N. S. (N. Y. Super. Ct.) 74, 41 How. Pr. (N. Y.) 169; Ryer *v.* Ryer, 67 How. Pr. (N. Y. Supreme Ct.) 369; Allen *v.* Allen, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 175, 58 How. Pr. (N. Y.) 381; *In re* Clark, 20 Hun (N. Y.) 551; Ryckman *v.* Ryckman, 34 Hun (N. Y.) 235; Isaacs *v.* Isaacs, 61 How. Pr. (N. Y. C. Pl.) 369; Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466; McQuien *v.* McQuien, 61 How. Pr. (N. Y. C. Pl.) 280; *In re* Sims, 57 Hun (N. Y.) 433; Winton *v.* Winton, 117 N. Y. 623; Holtham *v.* Holtham (Brooklyn City Ct.), 26 N. Y. Supp. 762; Carey *v.* Carey, 2 Daly (N. Y.) 424.

Illinois.—Wightman *v.* Wightman, 45 Ill. 167; Errissman *v.* Errissman, 25 Ill. 136; Buck *v.* Buck, 60 Ill. 105; Blake *v.* Blake, 80 Ill. 523; Andrews *v.* Andrews, 69 Ill. 609; O'Callaghan *v.* O'Callaghan, 69 Ill. 552; Becker *v.* Becker, 15 Ill. App. 247; Blake *v.* People, 80 Ill. 11; Petrie *v.* People, 40 Ill. 334.

California.—Galland *v.* Galland, 44 Cal. 475, 13 Am. Rep. 167; *Ex p.* Wilson 73 Cal. 97; *Ex p.* Perkins, 18 Cal. 60; *Ex p.* Hart, 94 Cal. 254; *Ex p.* Cottrell, 59 Cal. 417; *Ex p.* Cottrell, 59 Cal. 420; Spencer *v.* Lawler, 79 Cal. 215.

Georgia.—Pinkard *v.* Pinkard, 23 Ga. 286; Cason *v.* Cason, 15 Ga. 405; Bates *v.* Bates, 74 Ga. 105; Carlton *v.* Carlton, 44 Ga. 216; Lewis *v.* Lewis, 80 Ga. 706, 12 Am. St. Rep. 281; Gibson *v.* Patterson, 75 Ga. 549.

Michigan.—Potts *v.* Potts, 68 Mich. 492; Steller *v.* Steller, 25 Mich. 159; Haines *v.* Haines, 35 Mich. 138; North *v.* North, 39 Mich. 67; *In re* Bissell, 40 Mich. 63; Brown *v.* Brown, 22 Mich. 299; Ross *v.* Griffin, 53 Mich. 5; Filer *v.* Filer, 77 Mich. 469.

Pennsylania.—Elmer *v.* Elmer, 150 Pa. St. 205; Groves's Appeal, 68 Pa. St. 143; Ormsby *v.* Ormsby, 1 Phila. (Pa.) 578; Waldron *v.* Waldron, 55 Pa. St. 231; Wallen *v.* Wallen, 11 Pa. Co. Ct. Rep. 41.

Ohio.—Stewart *v.* Stewart, 23 Wkly. L. Bull. (Ohio) 38; Hand *v.* Hand, 25 Wkly. L. Bull. (Ohio) 214.

Massachusetts.—Foster *v.* Foster, 130 Mass. 189; Chase *v.* Ingalls, 97 Mass. 524.

North Carolina.—Wood *v.* Wood, Phil. (N. Car.) 538; Zimmerman *v.* Zimmerman, 113 N. Car. 432.

New Hampshire.—Sheafe *v.* Laighton, 36 N. H. 240; Sheafe *v.* Sheafe, 36 N. H. 155.

Maine.—Dwelly *v.* Dwelly, 46 Me. 377; Russell *v.* Russell, 69 Me. 336.

Vermont.—Andrew *v.* Andrew, 62 Vt. 495; Curtis *v.* Gordon, 62 Vt. 340.

Other States.—Murray *v.* Murray, 84 Ala. 363; Casteel *v.* Casteel, 38 Ark 477; Lyon *v.* Lyon, 21 Conn. 185; Twing *v.* O'Meara, 59 Iowa 326; *In re* Fanning, 40 Minn. 4; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; O'Haley *v.* O'Haley, 31 Tex. 502; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507; Staples *v.* Staples, 87 Wis. 592; State *v.* Second Judicial Dist. Ct. (Mont., 1894), 36 Pac. Rep. 757.

3. State *v.* Dent, 29 Kan. 416.

4. Ryckman *v.* Ryckman, 32 Hun

specifically demanded and refused;[1] unless there has been a prior refusal to pay, which renders a formal demand unnecessary.[2] But the refusal must be wilful,[3] amounting to "contemptuous disobedience;"[4] and there will be no contempt and the attachment will not be granted where the defendant is *bona fide* unable to pay,[5] unless he is otherwise in fault.[6] The question of ability is one of fact, to be determined by the court on the evidence before it;[7] and it seems that the burden of proof lies on the defendant to establish his poverty.[8]

Application for Attachment.—The attachment cannot issue on an *ex-parte* application, even though the decree provides for it,[9] as the defendant is generally entitled to notice of some kind, commonly an order to show cause.[10]

(N. Y.) 193; Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466; Edison *v.* Edison, 56 Mich. 185.

And it has been held that where husband, even though he is complainant, has no notice of the motion for temporary alimony, an order for the same will be set aside, and that all subsequent proceedings based thereon are void. Sanchez *v.* Sanchez, 21 Fla. 346.

Service of Order.—Mere delivery to defaulting husband in another state of a certified copy of the order is not sufficient. Johnson *v.* San Francisco, 63 Cal. 578.

Yet an order for alimony is not such original process as need be served within the territorial limits over which a municipal court has jurisdiction. Edison *v.* Edison, 56 Mich. 185.

And where no copy of the order for alimony was served, but the husband was present in court when it was made, and afterwards refused to obey it, this is sufficient. *Ex p.* Cottrell, 59 Cal. 417; *Ex. p.* Cottrell, 59 Cal. 420.

1. Ryckman *v.* Ryckman, 32 Hun (N. Y.) 193; Gane *v.* Gane, 45 N. Y. Super. Ct. 355; Noland *v.* Noland, 29 Hun (N. Y.) 630; Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466; Edison *v.* Edison, 56 Mich. 185.

2. Potts *v.* Potts, 68 Mich. 492. But see Slade *v.* Slade, 106 Mass. 499.

3. Blake *v.* Blake. 80 Ill. 523; Blake *v.* People, 80 Ill. 11; State *v.* Dent, 29 Kan. 416; Hand *v.* Hand, 25 Wkly. L. Bull. (Ohio) 214; Stewart *v.* Stewart, 23 N. Y. Wkly. L. Bull. 38.

4. Slade *v.* Slade, 106 Mass. 499.

5. Lewis *v.* Lewis, 80 Ga. 706, 12 Am. St. Rep. 281; Spencer *v.* Lawler, 79 Cal. 215; Russell *v.* Russell, 69 Me. 336; State *v.* Dent, 29 Kan. 416; Noland *v.* Noland, 29 Hun (N. Y.) 630; Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun 466; Staples *v.* Staples, 87 Wis. 592; Blake *v.* People, 80 Ill. 11; Newhouse *v.* Newhouse, 14 Oregon 290.

6. Ryer *v.* Ryer, 33 Hun (N. Y.) 116.

7. *Ex p.* Cottrell, 59 Cal. 417.

8. Holtham *v.* Holtham (Brooklyn City Ct.), 26 N. Y. Supp. 762; West *v.* West, 11 Pa. Co. Ct. Rep. 254. But see Lewis *v.* Lewis, 80 Ga. 706, 12 Am. St. Rep. 281.

The petition for the writ of attachment need not allege husband's ability to pay. Andrew *v.* Andrew, 62 Vt. 495; Curtis *v.* Gordon, 62 Vt. 340.

Mandamus.—Where the defendant is adjudged to be in contempt after an examination into his ability, a mandamus will not lie to compel the judge of the lower court to re-examine the case, where he replies to the petition for a mandamus that he would, if the application had been renewed, have made another examination at the expiration of ten days. Spencer *v.* Lawler, 79 Cal. 215.

9. Stahl *v.* Stahl, 59 Hun (N. Y.) 621, 12 N. Y. Supp. 854.

10. Isaacs *v.* Isaacs, 61 How. Pr. (N. Y. C. Pl.) 369; Slade *v.* Slade, 106 Mass. 499; French *v.* French, 4 Mass. 587; Edison *v.* Edison, 56 Mich. 185; *In re* Sims, 57 Hun (N. Y.) 433. But see, *contra*, O'Callaghan *v.* O'Callaghan, 69 Ill. 552; *Ex p.* Petrie, 38 Ill. 498, and Petrie *v.* People, 40 Ill. 334, where the court said: "While in the English courts the practice requires notice to be given to the opposite party, to his attorney or some officer of the court on his behalf, before any step is taken, and while in cases of

When Remedy by Attachment.—It is a remedy only used in extreme cases,[1] and in some jurisdictions it should not be employed where the wife has already ample security,[2] or unless it has been previously determined by the court that other methods will not be effective.[3] The attachment issues by a court of chancery in the exercise of its ordinary powers.[4] Numerous conditions contribute to the election of this remedy in preference to, or its rejection in favor of, some other.[5]

Imprisonment for Debt.—A decree for alimony, by the great weight of authority, is not a debt within the meaning of statutes or constitutions which prohibit imprisonment for debt.[6]

this character it is perhaps the better practice, yet it has not been regarded as indispensable in our practice. After a party has been once brought into court, the presumption is that he is present and cognizant of every step taken in the cause until it is terminated, unless there has considerable time elapsed without taking any steps in the case."

What Service Necessary. — Regular service of the petition for attachment is not necessary, only such as the rules of court require. Lyon *v.* Lyon, 21 Conn. 185. See also *Ex p.* Cottrell, 59 Cal. 417.

It is sufficient if served on attorney where the party appears by attorney. Mahon *v.* Mahon, 50 N. Y. Super. Ct., 92.

New York.—In this state the order to show cause must adjudicate in terms that the defendant has committed the offense charged, and that that offense was calculated to, or actually did, injure the rights of the plaintiff. Code Civ. Proc. § 2281. And it must also further appear in said order that the payment of the alimony awarded cannot be enforced by execution, sequestration, or resorting to the security of the party who is the subject of the order. Code Civ. Proc., § 1773; see also Stahl *v.* Stahl, 59 Hun (N. Y.) 621, 12 N. Y. Supp. 854; Whitney *v.* Whitney, 58 N. Y. Super. Ct. 335, 11 N. Y. Supp. 582; *In re* Sims, 57 Hun (N. Y.) 433; Mahon *v.* Mahon, 50 N. Y. Super. Ct. 92.

1. Haines *v.* Haines, 35 Mich. 138.

2. Andrews *v.* Andrews, 69 Ill. 609; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52.

3. Cockefair *v.* Cockefair (Supreme Ct.), 7 N. Y. Supp. 170, 23 Abb. N. Cas. (N. Y.) 219; Isaacs *v.* Isaacs, 10 Daly (N. Y.) 306, *affirming* 61 How. Pr. (N. Y.) 369, where the court said: "The intention of the legislature was to prevent the imprisonment of a party disobeying an order directing the payment of temporary alimony, until proceedings against property had failed, or the court was satisfied, from facts, of the inutility of a direction for such proceeding." See preceding col. "New York." But see Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466; Andrew *v.* Andrew, 62 Vt. 495.

4. O'Callaghan *v.* O'Callaghan, 69 Ill. 552.

5. Hand *v.* Hand, 25 Wkly. L. Bull. (Ohio) 214; Allen *v.* Allen, 72 Iowa 502; Gane *v.* Gane, 45 N. Y. Super. Ct. 355; Isaacs *v.* Isaacs, 10 Daly (N. Y.) 306, *affirming* 61 How. Pr. (N. Y.) 369; Jacquin *v.* Jacquin, 36 Hun (N. Y.) 378, 2 How. Pr. N. S. (N. Y.) 206.

In Traylor *v.* Richardson, 2 Ind. App. 452, it was said: "The statute provides that such an order may be enforced by attachment by the court or judge making it. A person having a right to enforce payment of money by proceedings in contempt may waive, if he sees proper, such summary mode of enforcing his claim, and afford the defendant the common-law rights of defense by an action."

After Final Verdict.—The failure to enforce the payment of temporary alimony during the pendency of the suit cannot deprive plaintiff of the right to sue for the same after final verdict disallowing permanent alimony. Gibson *v.* Patterson, 75 Ga. 549.

6. Lewis *v.* Lewis, 80 Ga. 706, 12 Am. St. Rep. 281; Chase *v.* Ingalls, 97 Mass. 524; *Ex p.* Perkins, 18 Cal. 60; Lyon *v.* Lyon, 21 Conn. 185; Andrew *v.* Andrew, 62 Vt. 495; Curtis *v.* Gordon, 62 Vt. 340; Hand *v.* Hand, 25 Wkly. L. Bull. (Ohio) 214; Haines

How Application Made.—The application for an attachment is usually made by motion[1] or petition.[2] The application for a remedy to enforce an alimony decree or order should be made in the original suit, and not take the form of a new proceeding.[3]

5. Securing Alimony and Defeating Frauds Thereon—*a.* SECURING ALIMONY.—There are four methods of securing the wife's claim for alimony commonly in vogue, the writ of *ne exeat*, the writ of injunction, making the alimony granted a lien on the real estate of the husband, and requiring security for its payment.

(1) **Writ of Ne Exeat.**—In *England* the writ of *ne exeat regno* was issued out of the chancery courts on the application of the wife, supported by her affidavit that her husband was about to leave the country to avoid payment of the order or decree for alimony.[4] This writ was granted in aid of the decree of the

v. Haines, 35 Mich. 138; Pain *v.* Pain, 80 N. Car. 322; Musser *v.* Stewart, 21 Ohio St. 353; Dwelly *v.* Dwelly, 46 Mo. 378. *Contra*, Coughlin *v.* Ehlert, 39 Mo. 285; and see Goodwillie *v.* Millimann, 56 Ill. 523.

Reasons.—The grounds on which this doctrine rests are that the obligation to pay alimony is more of a duty than a debt. *Ex p.* Perkins, 18 Cal. 60; Pain *v.* Pain, 80 N. Car. 322; Carlton *v.* Carlton, 44 Ga. 216; Menzie *v.* Anderson, 65 Ind. 239; Daniels *v.* Lindley, 44 Iowa 567; and that the action of the court is based upon the contemptuous refusal to pay rather than the default. O'Callahan *v.* O'Callahan, 69 Ill. 552; Coughlin *v.* Ehlert, 39 Mo. 285; Slade *v.* Slade, 106 Mass. 499.

Temporary Alimony.—A very questionable distinction has been taken in this connection between temporary and permanent alimony. Stewart *v.* Stewart, 23 Wkly. L. Bull. (Ohio) 38, *citing* Coughlin *v.* Ehlert, 39 Mo. 285.

1. Petrie *v.* People, 40 Ill. 334. See Newcomb *v.* Newcomb, 12 Gray (Mass.) 28; cases cited *ante*, p. 437, note 2.

2. Lyon *v.* Lyon, 21 Conn. 185; Andrew *v.* Andrew, 62 Vt. 495; Curtis *v.* Gordon, 62 Vt. 340; cases cited *ante*, p. 437, note 2.

Attachment Cannot Be Collaterally Attacked —The action of the court in committing for contempt cannot be reviewed on certiorari from contempt proceedings or habeas corpus, the allowance of alimony being an appealable order. Such methods are an indirect attack upon the action of the court. State *v.* Second Judicial Dist. Ct., (Mont., 1891), 36 Pac. Rep. 757.

3. Lyon *v.* Lyon, 21 Conn. 185; Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

Subsequent Term of Court.—Where a commissioner, appointed by a decree of divorce and alimony to ascertain the financial condition of the husband, reported him insolvent, and the wife brought a bill some years later to enforce the original decree, suggesting that the husband had acquired certain property since the decree was made, it was held that the bill was properly dismissed, as the decree was not final, and that the wife should have proceeded in the original cause, which was still pending. Bankston *v.* Bankston, 27 Miss. 692.

So a petition for an attachment for contempt brought at a term subsequent to the one in which the decree was made should be treated as a proceeding in the original suit. Andrew *v.* Andrew, 62 Vt. 495.

Restitution.—It has been held that on good cause shown a writ of restitution may be awarded for alimony that has been already granted in a divorce suit. Mullin *v.* Mullin, 60 N. H. 16.

4. This writ has almost entirely disappeared from modern practice, being superseded by more flexible and effective methods. But see Vandergucht *v.* De Blaquiere, 8 Sim. 315; Head *v.* Head, 3 Atk. 295; Anonymous, 2 Atk. 210; Pearne *v.* Lisle, Amb. 75; Smithson's Case, 2 Vent. 345; Howden *v.* Rogers, 1 Ves. & B. 129; Read *v.* Read, 1 Cas. Ch., 2 Ch. R. 19; *Ex p.* Whitmore, 1 Dick. 143; Haffey *v.* Haffey, 14

ecclesiastical courts, and only after the decree had been made.[1] But the writ of *ne exeat republica*—the corresponding writ in this country—may be asked simultaneously with the filing of the bill,[2] and may be granted even before the decree,[3] in fact at any time after the suit is pending.[4] It is issued on the petition of the wife, supported by her own affidavit and usually those of other parties;[5] but the affidavit of the wife alone is sufficient,[6] though the allegation that the husband is going to leave the state must be definite.[7] The writ will, in general, be discharged on the husband's giving security.[8]

Ves. Jr. 261; Oldham *v.* Oldham, 7 Ves. Jr. 410; Dawson *v.* Dawson, 7 Ves. Jr. 173; Shaftoe *v.* Shaftoe, 7 Ves. Jr. 171; Cock *v.* Ravie, 6 Ves. Jr. 283; Anonymous, 2 Ves. Jr. 489; Coglar *v.* Coglar, 1 Ves. Jr. 94; Street *v.* Street, T. & R. 322.

1. Shaftoe *v.* Shaftoe, 7 Ves. Jr. 172; Coglar *v.* Coglar, 1 Ves. Jr. 94; Newton *v.* Newton, L. R. 1 P. D. 11.

2. Harper *v.* Rooker, 52 Ill. 370.

Not Before Suit Pending.—But it must not be asked before the suit is begun, the court saying that "the proper course" is "to file the bill or petition for divorce, and after that to file a petition for the *ne exeat*, supported by the necessary affidavit, sworn subsequently to the filing of the bill." Bylandt *v.* Bylandt, 6 N. J. Eq. 28.

3. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407. See this case for a full discussion of this writ; also Bayly *v.* Bayly, 2 Md. Ch. 326, where the court said: "It would seem to be settled in England that the court of chancery will not issue the writ of *ne exeat regno* in cases of alimony unless there has been an actual decree for alimony by the spiritual courts; that it will not be granted, even where there has been such decree, pending an appeal from it by the husband, nor for interim alimony granted *pendente lite*, before a decree, nor for any other sum than that which is actually due for alimony and costs. Daniell Ch. Pr. 1926, 1927; 2 Story Com. on Equity, §§. 1471, 1472. In *New York*, however, Mr. Chancellor Kent, in Denton *v.* Denton, 1 Johns. Ch. (N. Y.) 441, did grant the writ upon the petition of the wife *pendente lite*. It is possible that the difference in regard to the stage of the cause at which this remedy will be granted in *England* and in *New York* arises from the fact that in *New York* the Court of Chancery has jurisdiction over the question of divorce and alimony, which in *England* belongs to the ecclesiastical courts, the Court of Chancery there only coming to its aid to prevent its decree from being defeated, which the former court might be unable to do."

4. Harper *v.* Rooker, 52 Ill. 370; Bylandt *v.* Bylandt, 6 N. J. Eq. 28.

The writ may be granted even while proceedings are being had to enforce the payment of alimony already decreed. Lyon *v.* Lyon, 21 Conn. 185.

5. Lyon *v.* Lyon, 21 Conn. 185; McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Harper *v.* Rooker, 52 Ill. 370; Bayly *v.* Bayly, 2 Md. Ch. 326; Yule *v.* Yule, 10 N. J. Eq. 138; Bylandt *v.* Bylandt, 6 N. J. Eq. 28; Kirby *v.* Kirby, 1 Paige (N. Y.) 261; Denton *v.* Denton, 1 Johns. Ch. (N. Y.) 364; Hammond *v.* Hammond, Clarke Ch. (N. Y.) 151; Boucicault *v.* Boucicault, 59 How. Pr. (N. Y. Supreme Ct.) 131; Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Devall *v.* Devall, 4 Desaus. Eq. (S. Car.) 79.

6. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Bayly *v.* Bayly, 2 Md. Ch. 326; Yule *v.* Yule, 10 N. J. Eq. 138; Kirby *v.* Kirby, 1 Paige (N. Y.) 261.

7. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407.

The writ should not be issued in a doubtful case, although under some circumstances an affidavit on information and belief will be sufficient. The debt or duty at least should be certain. Yule *v.* Yule, 10 N. J. Eq. 138.

8. Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Devall *v.* Devall, 4 Desaus. Eq. (S. Car.) 79; McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407.

Neither an injunction nor a *ne exeat* will be discharged upon the mere allegation by the husband in his answer that he has no intention of selling his property or leaving the

(2) *Writ of Injunction.*—This writ may be granted by any equity court in the exercise of its ordinary powers,[1] but by a common-law court only under statute. Its use in protecting and securing the wife's claim to alimony is to restrain any disposition by the husband of his property which is likely or intended to impair or defeat such claim; and it is commonly issued on the petition and affidavit of the wife.[2] This is done even though no decree or award has yet been made;[3] but there must be a proper showing[4] that the property is in peril,[5] the allegations in the petition being required to set out not only the fears of the wife but the facts on which they are grounded.[6] The mere denial in the answer of the husband will not prevail to dissolve the injunction.[7]

state. Hammond *v.* Hammond, Clarke Ch. (N. Y.) 151.

1. Gardner *v.* Gardner, 87 N. Y. 114. See Black *v.* Black, 5 Mont. 15.

New Hampshire.—It is held in this state that its equity courts, having no jurisdiction over the subject of alimony without divorce, cannot, by virtue of their ordinary power to issue injunctions, restrain a husband from getting possession of his wife's estate, where he is not asking the aid of the court, either at law or in equity, for that purpose. Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

2. *Alabama.*—Goodrich *v.* Goodrich, 44 Ala. 670; Norris *v.* Norris, 27 Ala. 519.

New York.—Gardner *v.* Gardner, 87 N. Y. 14; Hammond *v.* Hammond, Clarke Ch. (N. Y.) 151; Carey *v.* Carey, 2 Daly (N. Y.) 424; Rose *v.* Rose, 11 Paige (N. Y.) 166; Laurie *v.* Laurie, 9 Paige (N. Y.) 234; Kirby *v.* Kirby, 1 Paige (N. Y.) 261.

Illinois.—Springfield Marine, etc., Ins. Co. *v.* Peck, 102 Ill. 265; Bergen *v.* Bergen, 22 Ill. 187; Vanzant *v.* Vanzant, 23 Ill. 536; Errissman *v.* Errissman, 25 Ill. 136; Draper *v.* Draper, 68 Ill. 17.

Ohio.—Wilson *v.* Wilson, Wright (Ohio) 128; Questel *v.* Questel, Wright (Ohio) 492; Tolerton *v.* Willard, 30 Ohio St. 579.

Georgia.—Gray *v.* Gray, 65 Ga. 193; Lamar *v.* Jennings, 69 Ga. 392; Johnson *v.* Johnson, 59 Ga. 613.

Maryland.—Ricketts *v.* Ricketts, 4 Gill (Md.) 105; Gechter *v.* Gechter, 51 Md. 187.

South Carolina.—Greenland *v.* Brown, 1 Desaus. Eq. (S. Car.) 196; Wilson *v.* Wilson, 1 Desaus. Eq. (S. Car.) 219.

Tennessee.—Boils *v.* Boils, 1 Coldw. (Tenn.) 284; Stillman *v.* Stillman, 7 Baxt. (Tenn.) 169.

Other States.—Remington *v.* San Francisco, 69 Cal. 633; Frakes *v.* Brown, 2 Blackf. (Ind.) 295; Wharton *v.* Wharton, 57 Iowa 696; Fishli *v.* Fishli, 2 Litt. (Ky.) 337; Morrison *v.* Morrison, 49 N. H. 69; Gilmore *v.* Gilmore, 5 Jones Eq. (N. Car.) 284; Weaver *v.* Pickard, 7 Utah 296.

3. 2 Bish. on M., D., & S. § 1107, and note 2; Wilson *v.* Wilson, Wright (Ohio) 128; cases cited, note 2 *supra*. *Contra*, Newton *v.* Newton, L. R. 11 P. D. 11.

So an injunction will be granted where the proof fails and the cause is continued. Wilson *v.* Wilson, Wright (Ohio) 128.

4. Wharton *v.* Wharton, 57 Iowa 696.

5. Johnson *v.* Johnson, 59 Ga. 613.

Texas.—But it seems that in *Texas*, under the statute, an injunction is granted almost as a matter of course, the court having little discretion in the matter. Wright *v.* Wright, 3 Tex. 168.

6. Norris *v.* Norris, 27 Ala. 519. See Johnson *v.* Johnson, 59 Ga. 613.

Bill Demurrable.—If the bill is bad on demurrer, even in point of form merely, the injunction will not be granted. Rose *v.* Rose, 11 Paige (N. Y.) 166. See Remington *v.* San Francisco, 69 Cal. 633. But where the allegations are not sufficient to sustain an injunction, one that has already been granted may be dissolved, but the bill retained for further relief. Norris *v.* Norris, 27 Ala. 519.

7. Hammond *v.* Hammond, Clarke Ch. (N. Y.) 151.

Operation of Injunction.—An injunction operates to prevent incumbrances as well as conveyances,[1] but should not have the effect of breaking up the husband's trade.[2]

Against Whom Granted.—It may be granted against the husband and against all who coöperate with him, and the bill may join all such persons as parties;[3] but a *bona-fide* purchaser from the husband will not be affected unless he has notice of the injunction.[4]

The Terms of the injunction should be clear and explicit.[5]

Receiver.—In addition to this method of securing the wife's alimony, and sometimes as supplementary thereto, a receiver of the husband's property may be appointed.[6]

(3) *Decree as Lien on Land.*—A divorce suit is not in itself a lien on the real estate of the husband,[7] the doctrine of *lis pendens* having reference only to proceedings directly involving the thing or property in question;[8] and even the decree, being *in*

1. Vanzant *v.* Vanzant, 23 Ill. 536.

Where an injunction has been granted to restrain defendant from mortgaging his property, it seems that does not restrain him from mortgaging his property, other than the homestead, to raise money to pay alimony. Froman *v.* Froman, 53 Mich. 581.

2. Rose *v.* Rose, 11 Paige (N. Y.) 166.

In some cases the wife has even been required to give bond. Boils *v.* Boils, 1 Coldw. (Tenn.) 284.

3. Gray *v.* Gray, 65 Ga. 193; Ricketts *v.* Ricketts, 4 Gill (Md.) 105; Draper *v.* Draper, 68 Ill. 17; Wetmore *v.* Wetmore, 5 Oregon 469; Gibson *v.* Gibson, 46 Wis. 449. See also Bamford *v.* Bamford, 4 Oregon 30; Monroy *v.* Monroy, 1 Edw. Ch. (N. Y.) 382; Stewart on M. & D. § 326.

4. Frakes *v.* Brown, 2 Blackf. (Ind.) 295.

A *bona-fide* assignee of choses in action cannot be restrained from collecting them. Gilmore *v.* Gilmore, 5 Jones Eq. (N. Car.) 284.

5. Laurie *v.* Laurie, 9 Paige (N. Y.) 234, where the court said: "The language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction. And the language of the writ should at the same time be so restricted as not to deprive him of any right which the case made by the bill does not require that he should be restrained from exercising."

When It Ceases to Be Operative.—A temporary injunction which in terms is to continue in force until further order of court ceases on a final judgment in favor of plaintiff which makes no provision for its continuance; and the fact that defendant has appealed does not modify the legal effect in any particular. Gardner *v.* Gardner, 87 N. Y. 14.

6. Holmes *v.* Holmes, 29 N. J. Eq. 9; Bergen *v.* Bergen, 22 Ill. 187; Carey *v.* Carey, 2 Daly (N. Y.) 424; Questel *v.* Questel, Wright (Ohio) 492; Stillman *v.* Stillman, 7 Baxt. (Tenn.) 169; Barker *v.* Dayton, 28 Wis. 367; Kirby *v.* Kirby, 1 Paige (N. Y.) 261. See Gray *v.* Gray, 65 Ga. 193.

7. Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Daniel *v.* Hodges, 87 N. Car. 95; Sapp *v.* Wightman, 103 Ill. 150; Gilmore *v.* Gilmore, 5 Jones Eq. (N. Car.) 284; Hamlin *v.* Bevans, 7 Ohio 161. *Contra*, Vanzant *v.* Vanzant, 23 Ill. 536.

8. Scott *v.* Rogers, 77 Iowa 483; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Freeman on Judgments, § 196. This general doctrine is sustained in Daniel *v.* Hodges, 87 N. Car. 95; but it is there held that special circumstances may vary the rule, and that where a proceeding incidentally draws property in question, this is such a *lis pendens* as affects with notice a purchaser *pendente lite;* and that this result is not destroyed by a reversal of an order in the cause.

Property Specifically Described.—But

personam,[1] is not a lien on the husband's property;[2] but it may be made so by especially charging it on particular property, as is frequently done.[3]

To What Lien Attaches.—But the decree cannot be a lien on personal property,[4] nor on real estate outside of the jurisdiction of the court granting it;[5] but it may be on husband's remainder in real or personal property, vested in interest, though contingent in amount.[6]

Order to Convey Property to Trustee.—The decree may also order the husband to convey certain property to a trustee for the wife's benefit.[7]

where the petition for divorce and alimony specifically describes certain property, charging it with equities of the wife, and the court in its decree acted on and favorably to those equities, the proceeding is a *lis pendens*, and the decree a lien on said property preferable to that of a mortgagor who became so, with notice, pending such proceeding. Tolerton *v.* Williard, 30 Ohio St. 579. See also Draper *v.* Draper, 68 Ill. 17; Sapp *v.* Wightman, 103 Ill. 150; Harshberger *v.* Harshberger, 26 Iowa 503.

1. *Ante*, p. 413, note 2. See Ellison *v.* Martin, 53 Mo. 575, where it was doubted whether or not the court would have power to enter up a judgment *in rem* against the husband's property if specifically described in the petition for divorce and alimony.

2. Lawton's Petition, 12 R. I. 210, in which case the decree awarded alimony "to be paid" by the husband "out of his real and personal estate."

3. *Rhode Island.*—Lawton's Petition, 12 R. I. 210.

Illinois.—Storey *v.* Storey, 125 Ill. 608, 8 Am. St. Rep. 417; Wightman *v.* Wightman, 45 Ill. 167; Andrews *v.* Andrews, 69 Ill. 609; O'Callaghan *v.* O'Callaghan, 69 Ill. 552; Thomas *v.* Thomas, 44 Ill. App. 604.

Iowa.—Daniels *v.* Lindley, 44 Iowa 567; Sesterhen *v.* Sesterhen, 60 Iowa 301; Russell *v.* Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112; Harshberger *v.* Harshberger, 26 Iowa 503.

Ohio.—Hamlin *v.* Bevans, 7 Ohio 161; Olin *v.* Hungerford, 10 Ohio 268.

New Jersey.—Stoy *v.* Stoy, 41 N. J. Eq. 370, and note; Holmes *v.* Holmes, 29 N. J. Eq. 9.

Other States.—Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171; Robinson *v.* Robinson, 79 Cal. 511; Blankenship *v.* Blankenship, 19 Kan. 159; Lamy *v.* Catron (N. Mex., 1890), 23 Pac. Rep. 773; Galusha *v.* Galusha, 108 N. Y. 114; Stillman *v.* Stillman, 7 Baxt. (Tenn.) 169; Foster *v.* Foster, 56 Vt. 540; Keyes *v.* Scanlan, 63 Wis. 345. *Contra.*—This general doctrine is well established, but the reverse has been sometimes held. Kurtz *v.* Kurtz, 38 Ark. 119; Swansen *v.* Swansen, 12 Neb. 210; Brotherton *v.* Brotherton, 14 Neb. 186; Casteel *v.* Casteel, 38 Ark. 477, in which case the court said: "The alimony should not have been made a lien upon the lands of the complainant. This is equivalent to charging them with an annuity, which the owner might do voluntarily, but the court should not do *in invitum*, as it embarrasses alienation. If the objection had been made or were now insisted on the court might have secured the payment of the alimony by sequestration or by exacting sureties."

Description of Property Must Be Definite.—Sufficiently so to identify the particular estate designated, Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779.

A decree which, in terms, orders that defendant's real estate be sequestered to secure allowances, unless otherwise secured, does not create a lien. Hills *v.* Hills, 76 Me. 488.

4. Yelton *v.* Handley, 28 Ill. App. 640.

5. It cannot, therefore, extend to lands situated in another county, and the court cannot make it so extend. Sapp *v.* Wightman, 103 Ill. 150. *Contra*, Harshberger *v.* Harshberger, 26 Iowa 503.

6. Min Young *v.* Min Young, 47 Ohio St. 501.

7. Madison *v.* Madison, 1 Wash. Ter. 60; Ricketts *v.* Ricketts, 4 Gill (Md.) 105; or for the joint use of both, Greenland *v.* Brown, 1 Desaus. Eq. (S.

(4) *Requiring Security.*—The courts in most of our states have the power of requiring bond with approved security to ensure the payment of alimony. It is, perhaps, the most usual method.[1] It may be enforced by attachment for contempt,[2] by sequestration,[3] by the writ of *ne exeat*,[4] or by the writ of injunction.[5] Where an alimony judgment which makes no provision for security is subject to the continuing power of the court, security may nevertheless be required at a time after the entry of such judgment.[6]

A Bond for Alimony is not assignable,[7] nor suable without leave in a court other than the one having jurisdiction over the case.[8]

b. FRAUDULENT ASSIGNMENTS.—The wife's right to alimony is within the protection of statutes dealing with fraudulent conveyances. Assignments of the husband's property, if fraudulently made for the purpose of defeating the wife's claim, will be

Car.) 196; or compel the execution of a bond and trust deed as security, Storey *v.* Storey, 125 Ill. 608, 8 Am. St. Rep. 417.

So a mortgage on real estate has been required in order to stay execution pending an appeal. Galusha *v.* Galusha, 108 N. Y. 114.

1. Nearly all of the state statutes have provisions dealing with this subject, and reference must be made to them. Consult also the following cases: Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Harper *v.* Rooker, 52 Ill. 370; Gane *v.* Gane, 46 N. Y. Super. Ct. 218, 45 N. Y. Super. Ct. 355; Gardner *v.* Gardner, 87 N. Y. 14; Guenther *v.* Jacobs, 44 Wis. 354; Wright *v.* Wright, 74 Wis. 439; Dayton *v.* Drake, 64 Iowa 714; Hills *v.* Hills, 76 Me. 488; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Slade *v.* Slade, 106 Mass. 499. See also Rice *v.* Rice, 13 Ind. 562; Burnett *v.* Paine, 62 Me. 122; Galusha *v.* Galusha, 108 N. Y. 114.

2. Gibson *v.* Patterson, 75 Ga. 549; Isaacs *v.* Isaacs, 61 How. Pr. (N. Y. C. Pl.) 369; Park *v.* Park, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466; Slade *v.* Slade, 106 Mass. 499; Wright *v.* Wright, 74 Wis. 439. See Gane *v.* Gane, 46 N. Y. Super. Ct. 218, 45 N. Y. Super. Ct. 355.

3. Guenther *v.* Jacobs, 44 Wis. 354; Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52, where it was said: "The more approved and provident decree is to require a bond, with approved security, for such an annuity as shall be fixed by the court, payable in prescribed instalments, reserving the power to compel payment from time to time by attachment, sequestration, or otherwise."

4. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Prather *v.* Prather, 4 Desaus. Eq. (S. Car.) 33; Devall *v.* Devall, 4 Desaus. Eq. (S. Car.) 79.

5. Questel *v.* Questel, Wright (Ohio) 492.

6. Wright *v.* Wright, 74 Wis, 439. But no security can be required in the case of alimony granted during a proceeding to modify a judgment, the Code not providing for the exercise of such power. Blake *v.* Blake, 70 Wis. 238.

7. The reasons given are that such an assignment is contrary to public policy, and tends to lessen the chances of reconciliation. Reiffenstein *v.* Hooper, 36 U. C. Q. B. 295.

8. Guenther *v.* Jacobs, 44 Wis. 354.

By What Proceeding.—A surety can only be proceeded against by regular action on the bond, not by order in the divorce suit or other summary proceeding. Guenther's Appeal, 40 Wis. 115.

Where an alimony judgment was rendered for $200 and one-third of the husband's real estate, and the appellate court modified the judgment by giving the wife $3200 in money and no real estate, it was held, in a suit on the appeal bond, that the bond was security only for $200 in money. Rice *v.* Rice, 13 Ind. 562.

An Instalment of Alimony is not assignable before due. Kempster *v* Evans, 81 Wis. 247.

set aside; but if good when made, they cannot be subsequently attacked.[1]

6. **Appeals.**[2]—Appeals are regulated largely by statutes in the different states. It may be stated generally that whether alimony shall be granted at all is a matter of law.[3] An appeal will therefore lie from the action of the lower court for refusing[4] or granting an allowance of alimony,[5] whether temporary or permanent.[6]

Discretion as to Amount.—But the amount to be granted is said to be a matter of discretion, and rests largely with the trial court.[7]

1. See Am. & Eng. Ency. Law, tit. ALIMONY.

This subject is not properly within the scope of this article. The following cases, however, are added for reference:

Indiana.—Barrow *v.* Barrow, 108 Ind. 345; Plunkett *v.* Plunkett, 114 Ind. 484; Frakes *v.* Brown, 2 Blackf. (Ind.) 295; Metzler *v.* Metzler, 99 Ind. 384.

Massachusetts.—Burrows *v.* Purple, 107 Mass. 428; Chase *v.* Chase, 105 Mass. 385; Allen *v.* Allen, 100 Mass. 373; Livermore *v.* Boutelle, 11 Gray (Mass.) 217, 71 Am. Dec. 708; Porter *v.* Wakefield, 146 Mass. 25; Stuart *v.* Stuart, 123 Mass. 370.

Illinois.—Springfield Marine, etc., Ins. Co. *v.* Peck, 102 Ill. 265; Tyler *v.* Tyler, 126 Ill. 525, 9 Am. St. Rep. 642; Draper *v.* Draper, 68 Ill. 17; Bear *v.* Bear, 145 Ill. 21.

New Hampshire.—Janvrin *v.* Curtis, 63 N. H. 312; Janvrin *v.* Janvrin, 60 N. H. 169; Morrison *v.* Morrison, 49 N. H. 69.

Iowa.—Picket *v.* Garrison, 76 Iowa 347; Boog *v.* Boog, 78 Iowa 524; Sesterhen *v.* Sesterhen, 60 Iowa 301.

Vermont.—Green *v.* Adams, 59 Vt. 602, 59 Am. Rep. 761; Foster *v.* Foster, 56 Vt. 540.

Georgia.—Odom *v.* Odom, 36 Ga. 286; Halleman *v.* Halleman, 65 Ga. 476.

Texas.—Lott *v.* Kaiser, 61 Tex. 665; Berg *v.* Ingalls, 79 Tex. 522.

Wisconsin.—Damon *v.* Damon, 28 Wis. 510; Way *v.* Way, 67 Wis. 662.

Other States.—Goodrich *v.* Goodrich, 44 Ala. 670; Gregory *v.* Filbeck, 12 Colo. 379; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Reeg *v.* Burnham, 55 Mich. 39; Atkins *v.* Atkins, 18 Neb. 474; Powell *v.* Campbell, 20 Nev. 232, 19 Am. St. Rep. 350; Tolerton *v.* Williard, 30 Ohio St. 579; Wetmore *v.* Wetmore, 5 Oregon 469; Bouslough *v.* Bouslough, 68 Pa. St. 495; Nix *v.* Nix, 10 Heisk. (Tenn.) 546; Boils *v.* Boils, 1 Coldw. (Tenn.) 284.

England.—Brown *v.* Brown, 2 Hagg. Ecc. 5, 4 Eng. Ecc. 11.

2. The cases cited in this section touching appeals in the matter of temporary alimony refer frequently also, and sometimes exclusively, to counsel fees and suit money, the principles and doctrines applying to the three subjects being much the same.

3. Schonwald *v.* Schonwald, Phil. Eq. (N. Car.) 215; Whitsell *v.* Whitsell, 8 B. Mon. (Ky.) 50; Collins *v.* Collins, 71 N. Y. 269; Wagner *v.* Wagner, 34 Minn. 441. It is said, for instance, in Wagner *v.* Wagner, 34 Minn. 441, that any order which "determines the strict legal rights of the parties" is appealable, as an order granting an allowance *pendente lite.*

4. Whitsell *v.* Whitsell, 8 B. Mon. (Ky.) 50; Schonwald *v.* Schonwald, Phil. Eq. (N. Car.) 215; Taylor *v.* Taylor, 1 Jones (N. Car.) 528; Chaires *v.* Chaires, 10 Fla. 308; Blair *v.* Blair, 74 Iowa 311; Boggess *v.* Boggess, 4 Dana (Ky.) 307; Reynolds *v.* Reynolds, 92 Mich. 104; Dickerson *v.* Dickerson, 26 Neb. 318.

Alabama.—It seems that under Civ. Code of 1886, vol. i., § 2331, the right to temporary alimony is absolute, and not in any sense a matter of judicial discretion. Edwards *v.* Edwards, 80 Ala. 97.

5. Leslie *v.* Leslie, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 193; Jenkins *v.* Jenkins, 91 Ill. 167; Blair *v.* Blair, 74 Iowa 311; Chaires *v.* Chaires, 10 Fla. 308; Boggess *v.* Boggess, 4 Dana (Ky.) 307; Mangels *v.* Mangels, 6 Mo. App. 481.

A reversal of a decree of divorce does not necessarily reverse a decree for alimony, although both may be part of one entry in the trial court. Mangels *v.* Mangels, 6 Mo. App. 481; Jenkins *v.* Jenkins, 91 Ill. 167.

6. Cases cited *supra*, notes 3–5.

7. Cases *infra*, p. 447, notes 1–4.

This discretion, however, is judicial, not arbitrary.[1]

Abuse of Discretion.—And appeals from all orders or decrees, either for permanent [2] or for temporary alimony, will be allowed where an abuse of discretion in the trial court can be clearly shown.[3]

Alimony Pendente Lite.—Yet it has been held in some jurisdictions that an order for alimony *pendente lite* is not final, but interlocutory, and therefore not appealable,[4] the amount to be awarded

1. Foss *v.* Foss, 100 Ill. 576; Countz *v.* Countz, 30 Ark. 73; Rossman *v.* Rossman, 62 Mich. 429; De Llamosas *v.* De Llamosas, 62 N. Y. 618; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21; Foote *v.* Foote, 22 Ill. 425; Wooley *v.* Wooley, 24 Ill. App. 431; Jones *v.* Jones, L. R. 2 P. & M. 333; Burr *v.* Burr, 7 Hill (N. Y.) 207; Cooke *v.* Cooke, 2 Phillim. 40, wherein Sir John Nicholl said: "Now, although alimony—that is, the allowance to be made to a wife for her maintenance, either during a matrimonial suit or when she has proved herself entitled to a separate maintenance—is said to be discretionary with the court; but it is a judicial, not an arbitrary, discretion which is to be exercised; and therefore it is clearly a subject of appeal: at the same time, upon a point where there is no other rule or criterion to guide than the *boni viri arbitrium*, it is only upon a strong difference of opinion where the court of appeal would be disposed to disturb the sentence." This case was referred to and affirmed in Street *v.* Street, 2 Add. Ecc. 1. See also Brinkley *v.* Brinkley, 50 N. Y. 203.

2. Chaires *v.* Chaires, 10 Fla. 308; Peck *v.* Peck, 113 Ind. 168; Cox *v.* Cox, 19 Ohio St. 502; Street *v.* Street, 2 Add. Ecc. 1; Powell *v.* Powell, 53 Ind. 513; Stillman *v.* Stillman, 99 Ill. 196; 39 Am. Rep. 21; Andrews *v.* Andrews, 69 Ill. 609; Ressor *v.* Ressor, 82 Ill. 442; Varney *v.* Varney, 58 Wis. 19; Taylor *v.* Gladwin, 40 Mich. 232; Maguire *v.* Maguire, 7 Dana (Ky.) 181; Vinson *v.* Vinson (Ga. 1894), 19 S. E. Rep. 898; Lake *v.* Lake, 17 Nev. 230; Burr *v.* Burr, 7 Hill (N. Y.) 207; Jeter *v.* Jeter, 36 Ala. 391.

Yet it has been held that a decree for permanent alimony, as well as one providing for the support of a child, is entirely within the discretion of the trial court, and that exceptions will not lie thereto. Call *v.* Call, 65 Me. 407; Sparhawk *v.* Sparhawk, 120 Mass. 390. So an order for the support of children is but an incident of divorce, and no appeal will lie from that order alone. Thompson *v.* Thompson, 5 Utah 401.

3. *Illinois.*—Wooley *v.* Wooley, 24 Ill. App. 431; Lane *v.* Lane, 22 Ill. App. 529; Burgess *v.* Burgess, 25 Ill. App. 525; Lind *v.* Lind, 37 Ill. App. 178; Jenkins *v.* Jenkins, 91 Ill. 167; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21.

California.—Sharon *v.* Sharon, 68 Cal. 326; Sharon *v.* Sharon, 75 Cal. 1; Turner *v.* Turner, 80 Cal. 141; Langan *v.* Langan, 91 Cal. 654; Bohnert *v.* Bohnert, 91 Cal. 428.

New York.—Brinkley *v.* Brinkley, 50 N. Y. 184; De Llamosas *v.* De Llamosas, 62 N. Y. 618; Aldrich *v.* Aldrich (Supreme Ct.), 26 N. Y. Supp. 344.

Georgia.—McGee *v.* McGee, 10 Ga. 477; Glenn *v.* Hill, 50 Ga. 94.

Arkansas.—Hecht *v.* Hecht, 28 Ark. 92; Glenn *v.* Glenn, 44 Ark. 46.

Minnesota.—Wagner *v.* Wagner, 34 Minn. 441; Wagner *v.* Wagner, 39 Minn. 394.

Michigan.—Froman *v.* Froman, 53 Mich. 581; Rose *v.* Rose, 53 Mich. 585.

Other States.—Dickerson *v.* Dickerson, 26 Neb. 318; Miller *v.* Miller, 43 Iowa, 325; State *v.* Seddon, 93 Mo. 520; Bardin *v.* Bardin (S. Dak., 1893), 56 N. W. Rep. 1069; Grant *v.* Grant (S. Dak., 1894), 57 N. W. Rep. 948.

England.—Cooke *v.* Cooke, 2 Phillim. 40; Street *v.* Street, 2 Add. Ecc. 1; Jones *v.* Jones, L. R. 2 P. & M. 333.

See Rossman *v.* Rossman, 62 Mich. 429, where the court said: "The making of these allowances, in matters of divorce, is placed by the statute with the circuit judge. The amount to be allowed and the time and manner of payment are to be governed by his discretion, and we should hesitate to override his action without a strong and positive showing of an abuse of judicial discretion." See also Brinkley *v.* Brinkley, 50 N. Y. 203.

4. Lapham *v.* Lapham, 40 Mich. 527; Cooper *v.* Mayhew, 40 Mich. 528.

being entirely within the discretion of the trial court;[1] but the weight of authority is clearly to the effect that such an order or decree is sufficiently final to permit an appeal therefrom.[2] It is abundantly well established, as a general rule,[3] that pending an appeal a wife is entitled to alimony and counsel fees whether she was complainant or defendant below,[4] or whether she is appellant[5] or appellee above [6] provided the wife has no means [7] and the

See the opinion of Walker, C.J., in Jeter *v.* Jeter, 36 Ala. 391.

1. Taylor *v.* Taylor, 25 Ohio St. 71; Earp *v.* Earp, 1 Jones Eq. (N. Car.) 120; Taylor *v.* Taylor, 1 Jones (N. Car.) 528; Schonwald *v.* Schonwald, Phil. Eq. (N. Car.) 215; Webber *v.* Webber, 79 N. Car. 572; Gordon *v.* Gordon, 88 N. Car. 45, 43 Am. Rep. 729; Collins *v.* Collins, 71 N. Y. 269; Call *v.* Call, 65 Me. 407, where it was said: "Obviously the object of this provision is to provide for the immediate wants of the wife. The allowance of exceptions to such an order, and the delay that would be thereby occasioned, would in many cases leave the wife to starve, or force her to become a public charge, or to accept support at the hand of charity. Such could never have been the intention of the legislature. The court is, therefore, of the opinion that exceptions to such an order do not lie; and that the exceptions in this case should not have been allowed."

Order Committing for Contempt.—But although an order awarding temporary alimony is not appealable, an order based thereon, committing defendant for contempt for refusal to pay the same, may be reviewed in the court above. Ross *v.* Ross, 47 Mich. 185.

2. Glenn *v.* Glenn, 44 Ark. 46; Hecht *v.* Hecht, 28 Ark. 92; Countz *v.* Countz, 30 Ark. 73; *In re* Finkelstein (Mont., 1893), 34 Pac. Rep. 847; State *v.* Second Judicial District Court (Mont., 1894), 36 Pac. Rep. 757; State *v.* Seddon, 93 Mo. 520; Daniels *v.* Daniels, 9 Colo. 133; Sharon *v.* Sharon, 67 Cal. 185; Lochnane *v.* Lochnane. 78 Ky. 467, where the court said: "That an appeal may be taken from a decree making an allowance to support the wife pending a suit for divorce cannot now be questioned. It possesses all the essential elements of a final judgment. It may be enforced by rule or execution, and is in every respect independent of the final determination of the court as to the rights of the party in regard to the question of divorce." So it was held in Leslie *v.* Leslie, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 193, that an order which imposes the payment of money absolutely, as an order for temporary alimony, is one which affects a "substantial right," and was therefore appealable under the terms of the statute. Abbey *v.* Abbey, 6 How. Pr. (N. Y. Supreme Ct.) 340, note; Moncrief *v.* Moncrief, 10 Abb. Pr. (N. Y. Supreme Ct.) 315, and Griffin *v.* Griffin, 23 How. Pr. (N. Y. Supreme Ct.) 189, apparently *overruled.*

An appeal lies from an order awarding counsel fees without waiting for final judgment. Traylor *v.* Richardson, 2 Ind. App. 452. Or from an order awarding costs and counsel fees, even when asked for appeal. Rohrback *v.* Rohrback, 75 Md. 317.

But an order for temporary alimony and counsel fees cannot be reviewed on an appeal from a judgment decreeing a divorce. Sharon *v.* Sharon, 67 Cal. 185.

3. See cases in the notes *infra.*

4. Whitmore *v.* Whitmore, 49 Mich. 417; Disborough *v.* Disborough (N. J., 1893), 28 Atl. Rep. 3, where the court said: "When an appeal is taken in good faith by a wife, whether she was complainant or defendant below, the expense must be borne by the husband when it appears that the appellant is otherwise without the means to prosecute her appeal."

But the wife must make a fresh application for this allowance. Wood *v.* Wood, 7 Lans. (N. Y.) 205.

5. Van Voorhis *v.* Van Voorhis, 90 Mich. 276; Chaffee *v.* Chaffee, 14 Mich. 463; Whitmore *v.* Whitmore, 49 Mich. 417; Holthoefer *v.* Holthoefer, 47 Mich. 643; Pleyte *v.* Pleyte, 15 Colo. 125.

6. Rohrback *v.* Rohrback, 75 Md. 317; McBride *v.* McBride, 119 N. Y. 519, 55 Hun. (N. Y.) 401.

7. Disborough *v.* Disborough (N. J., 1893), 28 Atl. Rep. 3; Clarkson *v.*

appeal is made in good faith[1] and its merits are at least doubtful.[2] But where the appeal is obviously without merits,[3] or appears frivolous or vexatious,[4] or the wife has been guilty of laches,[5] or the court is left in doubt as to the ability of the husband to pay any greater amount,[6] no extra allowance will be made.

Grant by Appellate Court.—Temporary alimony and counsel fees may be granted by the appellate court pending an appeal,[7] but the usual practice is that this shall be done by the trial court,[8] which is deemed still to have sufficient jurisdiction for this purpose as long as the action is pending,[9] i. e., while the appeal is

Clarkson, 20 Mo. App. 94; Pleyte *v.* Pleyte, 15 Colo. 125. See Grant *v.* Grant (S. Dak., 1894), 57 N. W. Rep. 1130; Becker *v.* Becker, 15 Ill. App. 247.

1. Zeigenfuss *v.* Zeigenfuss, 21 Mich. 414; Goldsmith *v.* Goldsmith, 6 Mich. 285; Holthoefer *v.* Holthoefer, 47 Mich. 643; Van Voorhis *v.* Van Voorhis, 90 Mich. 276.

Certificate of Counsel.—It seems that there should be a certificate of counsel, being members of the bar in good standing, or other showing made by them to this effect. Van Voorhis *v.* Van Voorhis, 90 Mich. 276; Holthoefer *v.* Holthoefer, 47 Mich. 643.

Good Conduct of Wife Pending Appeal.—But an allowance of alimony already granted has been rescinded on proof by affidavits that the wife has been guilty of repeated acts of adultery pending appeal. Goldsmith *v.* Goldsmith, 6 Mich. 285.

2. Clarkson *v.* Clarkson, 20 Mo. App. 94; Pleyte *v.* Pleyte, 15 Colo. 125.

3. Friend *v.* Friend, 65 Wis. 412; Krause *v.* Krause, 23 Wis. 354.

4. Jones *v.* Jones, L. R. 2 P. & M. 333.

5. Jones *v.* Jones, L. R. 2 P. & M. 333; Loveden *v.* Loveden, 1 Phillim. 208.

6. Grant *v.* Grant (S. Dak., 1894). 57 N. W. Rep. 1130.

7. Chaffee *v.* Chaffee, 14 Mich. 463; Krause *v.* Krause, 23 Wis. 354; Goldsmith *v.* Goldsmith, 6 Mich. 285; Zeigenfuss *v.* Zeigenfuss, 21 Mich. 417; Holthoefer *v.* Holthoefer, 47 Mich. 643; Whitmore *v.* Whitmore, 49 Mich. 417; Grant *v.* Grant (S. Dak., 1894), 57 N. W. Rep. 1130; Clarkson *v.* Clarkson, 20 Mo. App. 94; Pleyte *v.* Pleyte, 15 Colo. 125; Van Voorhis *v.* Van Voorhis, 90 Mich. 276; Lake *v.* Lake, 16 Nev. 363; Lake *v.* Lake, 17 Nev. 230.

In Discretion of Court.—Though in such case the award seems to be entirely within the discretion of the court, even where there is a certificate or other showing of counsel that the appeal is taken in good faith. Holthoefer *v.* Holthoefer, 47 Mich. 643. And it will not be granted before the return of the appeal bond where the wife is defendant and the decree is against her. Whitmore *v.* Whitmore, 49 Mich. 417.

8. *Exp.* King, 27 Ala. 387; Jones *v.* Jones, L. R. 2 P. & M. 333; Rohrback *v.* Rohrback, 75 Md. 317; Bohnert *v.* Bohnert, 91 Cal. 428; Storke *v.* Storke, 99 Cal. 621; Razor *v.* Razor, 42 Ill. App. 504; State *v.* St. Louis Court, 99 Mo. 216; State *v.* St. Louis Court, 88 Mo. 135; State *v.* Seddon, 93 Mo. 520; Peavey *v.* Peavey, 76 Iowa 443; Miller *v.* Miller, 43 Iowa 325; Jenkins *v.* Jenkins, 91 Ill. 167. See also Butler *v.* Butler, 15 P. D. 13.

After Appeal Perfected.—Though possibly the trial court does not have this right after the appeal has been perfected. Lake *v.* Lake, 17 Nev. 238; State *v.* Seddon, 93 Mo. 522; Cralle *v.* Cralle, 81 Va. 773. And where an additional allowance had been made by the trial court to meet the expenses of appeal, but the appeal had not been perfected, it was held that the appeal had been abandoned, and that the allowance should be set aside. Peavey *v.* Peavey, 76 Iowa 443.

9. Reilly *v.* Reilly, 60 Cal. 624.

It was held in Ross *v.* Griffin, 53 Mich. 5, that, pending an appeal from an order of commitment for contempt, the trial court still had sufficient jurisdiction over the parties to make a further order of the same kind upon the defendant's subsequent refusal to pay alimony after the appeal had been taken.

Contra.—Cralle *v.* Cralle, 81 Va. 773, where it was held that, pending an ap-

undetermined;[1] and it has been held in several jurisdictions that where no application for temporary alimony has been made in the trial court, it cannot for the first time be made in the higher tribunal on appeal.[2]

An Order Modifying a Decree for permanent alimony is appealable.[3]

Collateral Attack.—An allowance of alimony should be appealed from and not attacked collaterally.[4]

IV.—SUIT MONEY, COUNSEL FEES, AND COSTS—1. Definitions.—At the time of granting alimony *pendente lite* the court frequently awards, on the application of the wife, in addition to that allowance, a certain sum to enable the wife to employ counsel—counsel fees[5]—and a further amount to be used in meeting the necessary expenses of the litigation.[6] This latter is called suit money in

peal which had been perfected by giving bond, the trial court could not decree temporary alimony; that the only orders it had power to make during such time were those necessary to preserve the *rem* in litigation, and that where the amount thus erroneously decreed was less than the minimum jurisdictional sum of the appellate court, the remedy was by writ of prohibition from the appellate court to the execution of the decree. See also State *v.* Seddon, 93 Mo. 520.

1. McBride *v.* McBride, 55 Hun (N. Y.) 401, *affirmed in* 119 N. Y. 519, the court *citing* and relying on Beadleston *v.* Beadleston, 103 N. Y. 402, and *overruling* Winton *v.* Winton, 31 Hun (N. Y.) 290.

2. Hunter *v.* Hunter, 100 Ill. 477; Reilly *v.* Reilly, 60 Cal. 624; State *v.* St. Louis Court, 99 Mo. 216; State *v.* St. Louis Court, 88 Mo. 135; State *v.* Seddon, 93 Mo. 520, where the court said: "The decree having been appealed from, the suit is still pending, and the Circuit Court had power to make the order allowing alimony pending the suit in the appellate court, pending the application for an appeal in the divorce suit, and before such appeal was perfected. It was the only court having juridiction to make such order, and it would have had no such jurisdiction after the appeal had been perfected." State *v.* Seddon, 93 Mo. 522. See Cralle *v.* Cralle, 81 Va. 773.

3. Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21.

4. Taylor *v.* Gladwin, 40 Mich. 232.

Minor Points connected with the subject of appeals will be found decided in the following list of cases. They will not admit of separate amplification. Edwards *v.* Edwards, 80 Ala. 97; Chaffee *v.* Chaffee, 14 Mich. 463; *Ex p.* King, 27 Ala. 387; Froman *v.* Froman, 53 Mich. 581; Walsh *v.* Walsh (Buffalo Super. Ct.), 24 N. Y. Supp. 335; Jenkins *v.* Jenkins, 91 Ill. 167; Mullin *v.* Mullin, 60 N. H. 16; McIntire *v.* McIntire, 80 Mo. 470; Moe *v.* Moe, 39 Wis. 308; *Ex p.* Cottrell, 59 Cal. 417; *Ex p.* Cottrell, 59 Cal. 420; Dow *v.* Blake, 148 Ill. 76; Galusha *v.* Galusha, 108 N. Y. 114; Robertson *v.* Robertson, 1 Edw. Ch. (N. Y.) 360; Collins *v.* Collins, 71 N. Y. 269.

5. Cooke *v.* Newell, 40 Conn. 596; Sprayberry *v.* Merk, 30 Ga. 81, 76 Am. Dec. 637; Glenn *v.* Hill, 50 Ga. 94; Dow *v.* Eyster, 79 Ill. 254; Petrie *v.* People, 40 Ill. 334; Ray *v.* Adden, 50 N. H. 82, 9 Am. Rep. 175; Dorsey *v.* Goodenow, Wright (Ohio) 120; Wing *v.* Hurlburt, 15 Vt. 607, 40 Am. Dec. 695; Sumner *v.* Sumner, 54 Wis. 642.

6. D'Aiguilar *v.* D'Aigular, 1 Hagg. Ecc. 773, 3 Eng. Ecc. 338; Belcher *v.* Belcher, 1 Curt. Ecc. 444, 6 Eng. Ecc. 372; Holmes *v.* Holmes, 2 Lee 90, 6 Eng. Ecc. 49; Fitzgerald *v.* Fitzgerald, 1 Lee 649, 5 Eng. Ecc. 472; Bird *v.* Bird, 1 Lee 572, 5 Eng. Ecc. 455; Cook *v.* Walton, 38 Ind. 228; Call *v.* Call, 65 Me. 407; Daiger *v.* Daiger, 2 Md. Ch. 335; Coles *v.* Coles, 2 Md. Ch. 341; Tayman *v.* Tayman, 2 Md. Ch. 393; Goldsmith *v.* Goldsmith, 6 Mich. 285; Mix *v.* Mix, 1 Johns. Ch. (N. Y.) 108; North *v.* North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; Kendall *v.* Kendall, 1 Barb. Ch. (N. Y.) 610; Smith *v.* Smith, 3 Oregon 363; Graves *v.* Cole, 19 Pa. St. 171; Waldron *v.* Waldron, 55 Pa. St. 231; Thompson *v.* Thompson, 3 Head (Tenn.) 527; Moe *v.* Moe, 39 Wis. 308.

this country, though in *England* it is usually termed costs.[1] But the word "costs" with us is commonly and properly applied to the necessary and legitimate charges of the suit which are taxed by the proper officer of the court, and which one or both of the parties must settle.[2] Costs in this, the ordinary American sense, bear, therefore, a character entirely different from that of suit money.

2. Suit Money.—Suit money and counsel fees are awarded on the same principles as those which govern the granting of alimony *pendente lite*,[3] and so it has been universally held by the English courts,[4] as well as by most of those in our own country,[5] that this allowance to a wife is a common-law right and grantable without statutory aid.[6]

The term "alimony" (temporary) in this country is frequently but incorrectly used to designate the whole allowance granted to a wife, meaning thereby both suit money and counsel fees, as well as the award for her support, which latter is alone alimony in the proper sense. 2 Bish. on M., D., & S. § 907. The terms will be correctly applied, so far as possible, in the following sections.

1. 2 Bish. on M., D., & S. §§ 810, 907, 973; Bird *v.* Bird, 1 Lee 572, 5 Eng. Ecc. 455; Fitzgerald *v.* Fitzgerald, 1 Lee 649, 5 Eng. Ecc. 472; Furst *v.* Furst, Poynter on M. & D. 260, note; Davis *v.* Davis, Poynter on M. & D. 261, note; Weber *v.* Weber, 1 Swab. & T. 219.

The term costs, as used in *England*, seems to designate sometimes suit money, sometimes what is termed costs with us. See cases *supra*.

2. 2 Bish. on M., D., & S. §§ 810–820; Stewart on M. & D. § 398.

3. Dorsey *v.* Goodenow, Wright (Ohio) 120; North *v.* North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; Tayman *v.* Tayman, 2 Md. Ch. 393; Am. & Eng. Ency. Law, tit. ALIMONY.

Rhode Island.—But suit money has been refused in this state, there being no precedent for an application of the kind, although it appears that temporary alimony would be allowable. Sanford *v.* Sanford, 2 R. I. 64.

A statute subsequently gave power to award suit money. Thayer *v.* Thayer, 9 R. I. 377.

4. D'Aguilar *v.* D'Aguilar, 1 Hagg. Ecc. 773, 3 Eng. Ecc. 329; Belcher *v.* Belcher, 1 Curt. Ecc. 444, 6 Eng. Ecc. 372; Holmes *v.* Holmes, 2 Lee 90, 6 Eng. Ecc. 49; Fitzgerald *v.* Fitzgerald, 1 Lee 649, 5 Eng. Ecc. 472; Bird *v.* Bird, 1 Lee 572, 5 Eng. Ecc. 455.

5. Story *v.* Story, Walk. (Mich.) 421; Daiger *v.* Daiger, 2 Md. Ch. 335; Coles *v.* Coles, 2 Md. Ch. 341; Tayman *v.* Tayman, 2 Md. Ch. 393; Waldron *v.* Waldron, 55 Pa. St. 231; Thompson *v.* Thompson, 3 Head (Tenn.) 527; State *v.* St. Louis Court, 88 Mo. 135; Westerfield *v.* Westerfield, 36 N. J. Eq. 195; Powers' Appeal, 120 Pa. St. 320; Wagner *v.* Wagner, 36 Minn. 239; Larkin *v.* Larkin, 71 Cal. 330; Collins *v.* Collins, 80 N. Y. 1; McCurley *v.* McCurley, 60 Md. 185, 45 Am. Rep. 717; Black *v.* Black, 5 Mont. 15; Dawson *v.* Dawson, 37 Mo. App. 207; Wuest *v.* Wuest, 17 Nev. 217; Lake *v.* Lake, 17 Nev. 230; Lake *v.* Lake, 16 Nev. 367, where the court said: "At common law a wife destitute of means was entitled to an allowance sufficient to enable her to defray the expenses in the suit. The power to make such allowance was considered incident to divorce suits, and the allowance appears to have been made as frequently as circumstances required." *Citing* Graves *v.* Cole, 19 Pa. St. 173.

6. **Conflicting Decisions.**—There are a few cases which hold that an allowance for temporary alimony and suit money cannot be granted without statutory authority. Wilson *v.* Wilson, 2 Dev. & B. (N. Car.) 377; Harrington *v.* Harrington, 10 Vt. 505; Hazen *v.* Hazen, 19 Vt. 603; Shannon *v.* Shannon, 2 Gray (Mass.) 285. But legislation has in nearly all such cases subsequently conferred the jurisdiction.

Extension of Doctrine.—The doctrine of suit money has sometimes obtained in suits other than for divorce, as in

Of What it Consists.—It is usually a sum in gross designed to meet all expenses, usual or unusual,[1] to which the wife may be put in prosecuting or defending the suit,[2] including therein the fees of witnesses,[3] and even a reasonable amount for investigating and acquiring information as to the circumstances of the case.[4]

When Made.—Like temporary alimony,[5] this allowance will only be made where the wife is in need;[6] and it will not be granted where she has a separate estate,[7] at least until that is exhausted,[8] the husband being required to make up the deficiency.[9]

The Entire Object is to do justice to both parties, and in one way or another to adjust expenses and costs so as to accomplish this end.[10]

On Final Hearing.—And where allowances for suit money are not made pending the suit,[11] they may be allowed on final hearing and subsequently taxed in the bill of costs,[12] generally even where the wife fails,[13] although sometimes in such case they will not be allowed.[14]

the case of a bill filed by wife to enforce her husband's agreement to make a marriage settlement. Wilson *v.* Wilson, 1 Desaus. Eq. (S. Car.) 225.

1. So, where a decree was reopened and wife allowed to defend, it appearing that husband had induced his wife to go into another state so that he might obtain a divorce in her absence, an order was entered requiring him to provide the expenses of her return, though the order was required to contain provisions against diverting the money to any other purpose. Smith *v.* Smith, 3 Oregon 363.

2. Cook *v.* Walton, 38 Ind. 228; Dorsey *v.* Goodenow, Wright (Ohio) 120; Smith *v.* Smith, 3 Oregon 363; Waldron *v.* Waldron, 55 Pa. St. 231; Sumner *v.* Sumner, 54 Wis. 642.

3. Graves *v.* Cole, 19 Pa. St. 171; Allen *v.* Allen, 2 Swab. & T. 107. But see Dent *v.* Dent, L. R. 1 P. & M. 125.

4. Allen *v.* Allen, 2 Swab. & T. 111. See Sumner *v.* Sumner, 54 Wis. 642.

5. *Ante*, p. 421, note 6.

6. Kenemer *v.* Kenemer, 26 Ind. 330; Coad *v.* Coad, 40 Wis. 392; Campbell *v.* Campbell, 73 Iowa 482; Tayman *v.* Tayman, 2 Md. Ch. 393.

7. Thompson *v.* Thompson, 3 Head (Tenn.) 527; Westerfield *v.* Westerfield, 36 N. J. Eq. 195; Maxwell *v.* Maxwell, 28 Hun (N. Y.) 566; Fyler *v.* Fyler, Deane & S. 175; Daiger *v.* Daiger, 2 Md. Ch. 335; Coles *v.* Coles, 2 Md. Ch. 341.

8. Porter *v.* Porter, 41 Miss. 116; Eaton *v.* Eaton, L. R. 2 P. & M. 51.

9. Belcher *v.* Belcher, 1 Curt. Ecc. 444, 6 Eng. Ecc. 372; Logan *v.* Logan, 2 B. Mon. (Ky.) 142; Collins *v.* Collins, 2 Paige (N. Y.) 9; Rose *v.* Rose, 11 Paige (N. Y.) 166.

10. Phillips *v.* Phillips, 27 Wis. 252; Weaver *v.* Weaver, 33 Ga. 172; Kittle *v.* Kittle, 8 Daly (N. Y.) 72; Clark *v.* Clark, 4 Swab. & T. 111; Nicholson *v.* Nicholson, 3 Swab. & T. 214; Powell *v.* Powell, L. R. 3 P. & M. 186; Ling *v.* Ling, 1 Swab. & T. 180; Milne *v.* Milne, L. R. 2 P. & M. 202; Whitmore *v.* Whitmore, L. R. 1 P. & M. 96; Dent *v.* Dent, L. R. 1 P. & M. 125; Carstairs *v.* Carstairs, 3 Swab. & T. 538; Heal *v.* Heal, L. R. 1 P. & M. 300.

11. Weber *v.* Weber, 1 Swab. & T. 219.

12. Griffin *v.* Griffin, 47 N. Y. 134; Williams *v.* Monroe, 18 B. Mon. (Ky.) 514; Ricketts *v.* Ricketts, 4 Gill (Md.) 105; Ellaytt *v.* Ellaytt, 3 Swab. & T. 504; Hall *v.* Hall, 3 Swab. & T. 390.

13. *Post*, p. 456, note 1.

14. Fyler *v.* Fyler, Deane & S. 175; Keats *v.* Keats, 1 Swab. & T. 334; Heal *v.* Heal, L. R. 1 P. & M. 300. And it was held in Wagner *v.* Wagner, 34 Minn. 441, that no counsel fees or expenses could be granted to wife after termination of the suit by judgment against her on the merits, even though there were an agreement that this question should be heard and determined after judgment.

Discretion of Court.—But the whole matter is within the discretion of the court, which will not be reviewed unless an abuse thereof is shown.[1]

3. Counsel Fees.—Since a wife can neither bind herself nor her husband to pay for her legal assistance,[2] she would, unless she had means of her own, be utterly unable to prosecute or defend her rights in a divorce suit without the assistance of the court. Of necessity, therefore, the court will award her a suitable sum to enable her to employ counsel.[3] This is granted on her application,[4] generally at the time of awarding temporary alimony,[5] although it may be done on final decree, in which case the allowance is more in the nature of costs, and is usually taxed therewith.[6]

1. Campbell *v.* Campbell, 73 Iowa 482; Sharon *v.* Sharon, 75 Cal. 1; Small *v.* Small, 42 Iowa 111; Harrison *v.* Harrison, 49 Mich. 240; Sumner *v.* Sumner, 54 Miss. 642. But see Call *v.* Call, 65 Me. 407.

To Whom Suit Money Paid.—Suit money must be directed to be paid to the wife alone; the court has no power to order it paid to her attorneys. Sharon *v.* Sharon, 75 Cal. 1; Parker *v.* Parker (Miss., 1893), 14 So. Rep. 459.

Various Doctrines of minor importance obtain with regard to suit money, but they have been discussed in connection with temporary alimony under their proper headings, such as Jurisdiction, Pleadings, Appeals, etc., to which reference must be made.

2. Am. & Eng. Ency. Law, tit. ALIMONY.

3. Waldron *v.* Waldron, 55 Pa. St. 231.

4. Creamer *v.* Creamer, 36 Ga. 618; Tayman *v.* Tayman, 2 Md. Ch. 393; Mercer *v.* Mercer (Supreme Ct.) 25 N. Y. Supp. 867.

In *Illinois* the application may be made by counsel. McCulloch *v.* Murphy, 45 Ill. 256.

5. Cooke *v.* Newell, 40 Conn. 596; Sprayberry *v.* Merk, 30 Ga. 81, 76 Am. Dec. 637; Glenn *v.* Hill, 50 Ga. 94; Dow *v.* Eyster, 79 Ill. 254; Petrie *v.* People, 40 Ill. 334; Ray *v.* Adden, 50 N. H. 82, 9 Am. Rep. 175; Dorsey *v.* Goodenow, Wright (Ohio) 120; Sumner *v.* Sumner, 54 Wis. 642.

Where the order allowing temporary alimony is silent on the point, it will be presumed that an allowance for counsel fees was included in the amount. Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171. See Waters *v.* Waters, 49 Mo. 385.

To Whom Paid.—But the allowance should be directed to be paid to wife, not counsel. Parker *v.* Parker (Miss., 1893), 14 So. Rep. 459; Sharon *v.* Sharon, 75 Cal. 1; Tayman *v.* Tayman, 2 Md. Ch. 393. And the court has no authority to decree to counsel a tract of land in payment of his counsel fees. Firman *v.* Firman, 109 Ill. 63.

6. Williams *v.* Monroe, 18 B. Mon. (Ky.) 514; Thorndike *v.* Thorndike, 1 Wash. Ter. 175; Ricketts *v.* Ricketts, 4 Gill (Md.) 105; Graves *v.* Graves, 2 Paige (N. Y.) 62. Lowell *v.* Lowell, 55 Cal. 316; Meyar *v.* Meyar, 3 Metc. (Ky.) 298; Weaver *v.* Weaver, 33 Ga. 172; Harrell *v.* Harrell, 39 Ind. 185; Dugan *v.* Dugan, 1 Duv. (Ky.) 289. See Thompson *v.* Thompson, 3 Head (Tenn.) 527; Waters *v.* Waters, 49 Mo. 385. *Contra*, Mercer *v.* Mercer (Supreme Ct.), 25 N. Y. Supp. 867.

Dismissal of Divorce Suit During Vacation.—Notwithstanding a dismissal of a suit for divorce by the plaintiff in person during vacation, under Ind. Rev. Sts. 1881, § 334, the court retains a general power over the case until final judgment sufficient to compel the husband to pay the wife's attorney's fees. Courtney *v.* Courtney (Ind. App.), 30 N. E. Rep. 914.

New York.—But it seems that in this state an allowance for counsel fees and expenses cannot be made on final judgment—certainly not for past expenses. Beadleston *v.* Beadleston, 103 N. Y. 402; Straus *v.* Straus, 67 Hun (N. Y.) 491; McCarthy *v.* McCarthy, 137 N. Y. 500; Pountney *v.* Pountney (Supreme Ct.), 10 N. Y. Supp. 192.

So an allowance for past services of counsel will not be granted, although it is shown that counsel are unwilling to act further without it, as such state-

The Amount allowed should be reasonable,[1] depending somewhat on the wealth of the husband,[2] the character of the services to be performed,[3] and the practice of the court.[4]

The Number of Attorneys permitted will depend on the character of the case[5] and the practice of the court;[6] the wife not having power to employ as many as she pleases and make the husband pay for them.[7]

No Proof is Necessary to help the court fix the amount of counsel fees.[8]

When Allowance Refused.—The allowance will not be made where the woman admits her guilt,[9] where the bill is not good upon its face,[10] or where her counsel are faithfully acting on a contingent fee.[11]

ment does not show that payment is necessary in order that plaintiff may further maintain and prosecute her rights. Emerson *v.* Emerson (Supreme Ct.), 26 N. Y. Supp. 292. But see McBride *v.* McBride, 53 Hun (N.Y.) 448.

1. Parker *v.* Parker (Miss., 1893), 14 So. Rep. 459; Baldwin *v.* Baldwin, 6 Gray (Mass.) 341; Dugan *v.* Dugan, 1 Duv. (Ky.) 289; Blake *v.* Blake, 70 Ill. 628; Chaffee *v.* Chaffee, 14 Mich. 463; Graves *v.* Graves, 2 Paige (N. Y.) 62; Jeter *v.* Jeter, 36 Ala. 391; Sharon *v.* Sharon, 75 Cal. 1.

2. Blair *v.* Blair, 74 Iowa 311. But the court may base its allowance solely on the husband's ability to earn money. Peyre *v.* Peyre, 79 Cal. 336.

3. Blair *v.* Blair, 74 Iowa 311; Baldwin *v.* Baldwin, 6 Gray (Mass.) 341; Williams *v.* Williams, 29 Wis. 517; Jeter *v.* Jeter, 36 Ala. 391; Collins *v.* Collins, 29 Ga. 517, where, the wife having been charged with adultery, the court said: "As nothing can be dearer to a lady than her character for chastity, so nothing could justify greater expense in its defense."

4. Sopwith *v.* Sopwith, 2 Swab. & T. 105; Pearson *v.* Darrington, 32 Ala. 227; Lowell *v.* Lowell, 55 Cal. 316; Collins *v.* Collins, 29 Ga. 517; Weaver *v.* Weaver, 33 Ga. 172; Blake *v.* Blake, 70 Ill. 618; Meyar *v.* Meyar, 3 Metc. (Ky.) 298; Dugan *v.* Dugan, 1 Duv. (Ky.) 289; Prescott *v.* Prescott, 59 Me. 146; Chaffee *v.* Chaffee, 14 Mich. 463; Waters *v.* Waters, 49 Mo. 385; De Llamosas *v.* De Llamosas, 62 N. Y. 618; Thompson *v.* Thompson, 3 Head (Tenn.) 527; Williams *v.* Williams, 29 Wis. 517; Coffin *v.* Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769.

5. Blake *v.* Blake, 70 Ill. 618.

6. Money *v.* Money, 1 Spinks 117; Suggate *v.* Suggate, 1 Swab & T. 497.

7. Dugan *v.* Dugan, 1 Duv. (Ky.) 289; Sharon *v.* Sharon, 75 Cal. 1; Williams *v.* Williams, 29 Wis. 517. So two counsel will not be allowed for unless it is affirmatively shown that both are necessary; but where they have been already paid the court will not direct a restitution of the money, nor order the same applied to their future services. Uhlman *v.* Uhlman, 51 N. Y. Super. Ct. 361.

8. Peyre *v.* Peyre, 79 Cal. 336; De Llamosas *v.* De Llamosas, 62 N. Y. 618. But see Jeter *v.* Jeter, 36 Ala. 391; Blair *v.* Blair, 74 Iowa 311.

Where a decree dissolving marriage adjudged the wife $1500 alimony, upon which counsel filed lien for their fees, the court has power to summon the attorneys to determine what lien they may have and what would be a reasonable fee for their services. State *v.* Sachs, 3 Wash. 371.

9. Newman *v.* Newman, 69 Ill. 167.

10. Phelan *v.* Phelan, 12 Fla. 449. So they will not be granted to a plaintiff who, five years after she has procured a divorce in another state, brings another suit against the same person, alleging that the former divorce is void. Ober *v.* Ober (Supreme Ct.), 7 N. Y. Supp. 843.

But the wife need not establish that she is entitled to a divorce. If she shows probable grounds and her own need, that is all that is necessary. Jenkins *v.* Jenkins, 91 Ill. 167; De Llamosas *v.* De Llamosas, 62 N. Y. 618.

11. Sharon *v.* Sharon, 75 Cal. 1. But the fact that one of the wife's attor-

Discretion of Court.—Counsel fees, like temporary alimony and suit money, are largely within the discretion of the trial court, and are not reviewable unless this discretion is abused.[1]

On Appeal.—They are allowable on appeal by the trial,[2] or by the appellate court;[3] and may be granted to enable a wife to resist a motion to reduce alimony.[4]

Statutes.—This allowance is grantable without statutory aid,[5] but statutes generally provide for it.[6]

4. Costs.—Costs in the ordinary American sense were unknown to the common law.[7] They are entirely statutory in origin, and are given to the prevailing party in a common-law suit, and generally also in an equity suit, in reimbursement to him of certain ordinary and necessary expenses. This is so also in the divorce suit, wherein costs, in the American sense, may be given to the prevailing party.[8]

Costs Against Wife.—Costs are usually taxed against the husband,[9]

neys has an arrangement for a contingent fee does not prevent an allowance by the court for the others. White *v.* White, 86 Cal. 216.

1. White *v.* White, 86 Cal. 212; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21; Sharon *v.* Sharon, 75 Cal. 1; Van Wormer *v.* Van Wormer, 57 Hun (N. Y.) 496; *Ex p.* Winter, 70 Cal. 291; Thorndike *v.* Thorndike, 1 Wash. Ter. 175; Traylor *v.* Richardson, 2 Ind. App. 452; Jenkins *v.* Jenkins, 91 Ill. 167. See Jeter *v.* Jeter, 36 Ala. 391; De Llamosas *v.* De Llamosas, 62 N. Y. 618.

2. Shy *v.* Shy, 7 Heisk. (Tenn.) 125; Larkin *v.* Larkin, 71 Cal. 330; *Ex p.* Winter, 70 Cal. 291.

3. Blair *v.* Blair, 74 Iowa 311.

4. Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21.

5. McGee *v.* McGee, 10 Ga. 477; Petrie *v.* People, 40 Ill. 334; the principle being the same that governs the grant of temporary alimony or suit-money, viz.: that the allowance is incident to divorce and part of the common-law jurisdiction. Dow *v.* Eyster, 79 Ill. 254.

6. Jenkins *v.* Jenkins, 91 Ill. 167.

7. Am. & Eng. Ency. of Law, tit. Costs; Turnham *v.* Shouse, 8 Dana (Ky.) 3, 33 Am. Dec. 473; State *v.* Kinne, 41 N. H. 238; Hart *v.* Skinner, 16 Vt. 138, 42 Am. Dec. 500.

In the ecclesiastical practice the word was used to designate suit money. It seems also to have been used to designate costs in the proper sense. Symons *v.* Symons, 2 Swab. & T. 435; Kaye *v.* Kaye, 4 Swab. & T. 239; Beavan *v.* Beavan, 2 Swab. & T. 652; Ellayatt *v.* Ellaytt, 3 Swab. & T. 504.

8. Williamson *v.* Williamson, 1 Johns. Ch. (N. Y.) 488; Black *v.* Black, 5 Mont. 15; Thornberry *v.* Thornberry, 2 J. J. Marsh. (Ky.) 322; Graves *v.* Graves, 2 Paige (N. Y.) 62; Germond *v.* Germond, 1 Paige (N. Y.) 83; Stevens *v.* Stevens, 1 Met. (Mass.) 279; Thorndike *v.* Thorndike, 1 Wash. Ter. 175; Kendall *v.* Kendall, 1 Barb. Ch. (N. Y.) 610; Robinson *v.* Robinson, 79 Cal. 511.

But the word "costs," even in this country, is often inaccurately used, and is sometimes intended to include both counsel fees and suit money, which are frequently allowed on final decree. Stewart on M. & D. § 398; Dugan *v.* Dugan, 1 Duv. (Ky.) 289, where it was held that the word "costs," as used in the statute, included compensation to counsel. See also Kendall *v.* Kendall, 1 Barb. Ch. (N. Y.) 610; Germond *v.* Germond, 1 Paige (N. Y.) 83; Meyar *v.* Meyar, 3 Metc. (Ky.) 298; White *v.* White (Cal., 1893), 33 Pac. Rep. 399. But *compare* Prescott *v.* Prescott, 59 Me. 146.

9. Word *v.* Word, 29 Ga. 281, where it was said: "The common law puts alimony, fees to the wife's counsel, and costs all on the same footing, and makes the question who is to pay them depend on the ability to pay them of the parties respectively. As, however, marriage bestows the wife's property on the husband in the ab-

even where he prevails,[1] unless the wife has a separate estate,[2] or sues by next friend.[3]

Discretion of Court.—But costs are largely within the discretion of the court, and are given to or withheld from the wife or divided between the parties as circumstances may require,[4] though they

sence of a marriage contract, the presumption *prima facie* is that the husband is the only party able to pay them, and consequently the husband is *prima facie* liable to pay them. This he may rebut by showing that the wife is able to them."

Increase of Alimony.—Where the wife applies for an increase of alimony and obtains it, she may have her costs in that proceeding. Bursler *v.* Bursler, 5 Pick. (Mass.) 427.

1. Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; DeRose *v.* DeRose, Hopk. (N. Y.) 100; Finley *v.* Finley, 9 Dana (Ky.) 52; Wood *v.* Wood, 2 Paige (N. Y.) 454; Reavis *v.* Reavis, 2 Ill. 242; Thatcher *v.* Thatcher, 17 Ill. 66; Sumner *v.* Sumner, 54 Wis. 642; Newton *v.* Newton, L. R. 11 P. D. 11; McKay *v.* McKay, 6 Grant's Ch. (U. C.) 380. *Contra*, Keats *v.* Keats, 1 Swab. & T. 334.

Yet the husband will not be compelled to pay the wife's costs where she is plainly in fault, Dugan *v.* Dugan, 1 Duv. (Ky.) 289; Meyar *v.* Meyar, 3 Metc. (Ky.) 298; or where it appears on the face of the bill that it is improperly filed, Wood *v.* Wood, 2 Paige (N. Y.) 454. See also Shoop's Appeal, 34 Pa. St. 233; De Camp *v.* De Camp, 2 N. J. Eq. 294; Warren *v.* Clemence, 44 Conn. 308; Nikirk *v.* Nikirk, 3 Metc. (Ky.) 432; Dugan *v.* Dugan, 1 Duv. (Ky.) 289; Errissman *v.* Errissman, 25 Ill. 136; Whipp *v.* Whipp, 54 N. H. 580; Miller *v.* Miller, L. R. 2 P. & M. 13; Eldred *v.* Eldred, 2 Curt. Ecc. 376.

Where Probable Cause.—But they may be allowed where there was probable cause for instituting the suit. Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538. So where an injunction that had been granted was dissolved, costs were allowed the wife on the ground of the reasonableness of the application. Newton *v.* Newton, L. R. 11 P. D. 11.

2. Balkum *v.* Kellum, 83 Ala. 449; Dugan *v.* Dugan, 1 Duv. (Ky.) 289, Meyar *v.* Meyar, 3 Metc. (Ky.) 298; Fyler *v.* Fyler, Deane & S. 175. Of which there must be evidence. Wood *v.* Wood, 2 Paige (N. Y.) 454.

3. Jones *v.* Fawcett, 2 Ph. 278; Mosser *v.* Mosser, 29 Ala. 313; Cornelius *v.* Cornelius, 31 Ala. 479; Hughes *v.* Hughes, 44 Ala. 698; Gray *v.* Gray, 15 Ala. 779; Ward *v.* Ward, 2 Dev. Eq. (N. Car.) 553; Balkum *v.* Kellum, 83 Ala. 449; Rose *v.* Rose, 11 Paige (N. Y.) 166; Lawrence *v.* Lawrence, 3 Paige (N. Y.) 267; Jones *v.* Jones, 2 Barb. Ch. (N. Y.) 146; Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538. See also Worden *v.* Worden, 3 Edw. Ch. (N. Y.) 387.

Where Next Friend Insolvent—The court can stay proceedings until security is given or a responsible person is substituted, and if this is not done within a reasonable time the bill will be dismissed. Lawrence *v.* Lawrence, 3 Paige (N. Y.) 267. But see Jones *v.* Fawcett, 2 Ph. 278; Dowden *v.* Hook, 3 Beav. 399. And the wife's application to change her next friend will not be granted if there is reason to believe that the husband's security for costs will thereby be diminished. Jones *v.* Fawcett, 2 Ph. 278. See Ward *v.* Ward, 2 Dev. Eq. (N. Car.) 553.

Intruder Taxed with Costs.—Where one, not a party to the suit, intrusively petitions the court to set aside a decree of divorce on the ground of fraud, he may be charged with the proper costs, Simmons *v.* Simmons, 32 Hun (N. Y.) 551; and even expenses and counsel fees, Black *v.* Black, 5 Mont. 15.

But Legal Discretion.—Though it is said to be a legal discretion to be exercised in accordance with general rules and former precedents, Gray *v.* Gray, 15 Ala. 779; and will be reversed in a clear case of abuse, Dickerson *v.* Dickerson, 26 Neb. 318. But see *contra*, Prescott *v.* Prescott, 59 Me. 146.

4. Dickerson *v.* Dickerson, 26 Neb. 318; Jones *v.* Jones, L. R. 2 P. & M. 333; Prescott *v.* Prescott, 59 Me. 146; Firman *v.* Firman, 109 Ill. 63; Black *v.* Black, 5 Mont. 15; Wilson *v.* Wilson, 1 Desaus. Eq. (S. Car.) 225; Gray *v.* Gray, 15 Ala. 779; Mosser *v.* Mos-

cannot be awarded against the wife's solicitor,[1] and it seems that the costs of the husband cannot in any case be awarded against the wife.[2]

Motion and Decree.—A motion for costs may be made after the decree of divorce and alimony.[3] Costs may be collected by proceedings for contempt.[4]

ser, 29 Ala. 313; Cornelius *v.* Cornelius, 31 Ala. 479; Hughes *v.* Hughes, 44 Ala. 698; Soper *v.* Soper, 29 Mich. 305; Cox *v.* Cox, 35 Mich. 461; Lapham *v.* Lapham, 40 Mich. 527; Welch *v.* Welch, 33 Wis. 534; Word *v.* Word, 29 Ga. 281; Eckhard *v.* Eckhard, 29 Neb. 457; Beadleston *v.* Beadleston, (Supreme Ct.) 2 N. Y. Supp. 809; Whitmore *v.* Whitmore, 49 Mich. 417.

1. Wood *v.* Wood, 2 Paige (N. Y.) 454.

2. Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538, where the court said: "It was manifestly improper to render any decree against her for costs in a suit prosecuted against her husband, under any circumstances."

3. Melizet *v.* Melizet, 1 Pars. Eq. Cas. (Pa.) 68. But a rule of court requiring a petitioner to pay costs before entry of the decree is unauthorized and void. State *v.* Bates, 5 Ohio Cir. Ct. Rep. 18.

4. Only it seems, however, if it appears that payment cannot be enforced by means of the security given, or by sequestration or execution. Cockefair *v.* Cockefair, 23 Abb. N. Cas. (N. Y. C. Pl.) 219. And the husband, by attachment, may be made to give security for his wife's costs. Hepworth *v.* Hepworth, 2 Swab. & T. 414.

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See *SENTENCE.*

ALTERNATIVE PLEADINGS.

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See *DEFINITENESS AND CERTAINTY IN PLEADINGS.*

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By CHARLES C. MOORE.

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of Decrees, see *DECREES.*
of Appellate Proceedings, see *APPEALS, APPEAL BONDS.*
Defects Cured by Judgment and Verdict, see *JUDGMENTS, VERDICTS.*

I. Definition.—An amendment is the correction of an error committed in any process, pleading or proceeding, at law or in equity.[1]

1. Burrill Law Dict.; Black Law Dict.
"Amendment, in procedure, is the alteration of a pleading, writ, petition, or the like, to make it accord with the rules of practice." Sweet Law Dict.; Rapalje & Lawrence Law Dict.
"Correction of a fault, the curing of a defect, alteration for the better; improvement." Anderson Law Dict.
"The act of improving." Abbott Law Dict.
"The word 'amend' came into our language from the French 'amender,' the root or parent word being *menda*, a fault, and means in its most comprehensive sense 'to better.' It is so defined by all the leading lexicographers. Thus in Phillip's New World of Words, and in Kersey and in Bailey, one of the definitions is 'to make better'; by Johnson, 'to change from bad for the better'; by Webster, 'to change in any way for the better * * * by substituting something else in the place of what is removed.' As

II. Of Pleadings and Proceedings in Equity—1. The Cardinal Rule—*a.* Amendments Discretionary.—In reference to amendments of equity pleadings, the courts have found it impracticable to lay down a rule that will govern all cases. The allowance of amendment must at every stage of the case rest in the discretion of the court, and that discretion must depend largely on the special circumstances of each case.[1]

a law term the simple definition of amendment given by Rastall, Cowell, or Blount, our earliest expositors of law terms, is the espying out of some error in the proceedings and the correcting of it before judgment and after, if the error be not in the giving of the judgment, the remedy in that case being by writ of error." Daly, C. J., in Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, 500. *Compare* Woodruff *v.* Dickie, 31 How. Pr. (N. Y.) 164.

1. Per Harlan, J., in Hardin *v.* Boyd, 113 U. S. 761, *quoted* with approval in Richmond *v.* Irons, 121 U. S. 47. Livingston *v.* Hayes, 43 Mich. 129; Huffman *v.* Hummer, 17 N. J. Eq. 269; Prescott *v.* Hubbell, 1 Hill Eq. (S. Car.) 210; Tanner *v.* Hicks, 4 Smed. & M. (Miss.) 294; Miller *v.* Mississippi Northern Bank, 34 Miss. 412; March *v.* Mayers, 85 Ill. 177; Gordon *v.* Reynolds, 114 Ill. 118; Gregg *v.* Brower, 67 Ill. 525; Hewitt *v.* Dement, 57 Ill. 500; Mason *v.* Bair, 33 Ill. 194; Bowen *v.* Cross, 4 Johns. Ch. (N. Y.) 375; Warren *v.* Twilley, 10 Md. 39; Calvert *v.* Carter, 18 Md. 73; Ellicott *v.* Eustace, 6 Md. Ch. 506.

Restatement.—"The limit to amendments is this: they must not be allowed to prejudice the substantial rights of the defendant; but, observing due caution in that regard, the time and the extent of each are in the discretion of the court. Hewitt *v.* Dement, 57 Ill. 500; Munch *v.* Shabel, 37 Mich. 166; Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258; Camp *v.* Waring, 25 Conn. 520." Church *v.* Holcomb, 45 Mich. 40.

Injunction Bills.—Perhaps less strictness should be allowed in amending a bill where no injunction is in force or necessary to be sustained. Coster *v.* Griswold, 4 Edw. Ch. (N. Y.) 364.

In the Federal Courts.—It was said in Neale *v.* Neale, 9 Wall. (U. S.) 1, that in the federal courts amendments upon the hearing are discretionary, but that at an earlier stage the discretion is controlled by the rules in equity adopted by the court.

In Alabama, prior to the Code, amendments in equity were largely discretionary. Lanier *v.* Driver, 24 Ala. 149; Michan *v.* Wyatt, 21 Ala. 813; Cummings *v.* Gill, 6 Ala. 562; Pinkston *v.* Taliaferro, 9 Ala. 547; Bryant *v.* Peters, 3 Ala. 160. See also Rapier *v.* Gulf City Paper Co., 69 Ala. 476; Adams *v.* Phillips, 75 Ala. 461.

But the Code provides that "amendments must be allowed at any time before final decree." See Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488; Pitts *v.* Powledge, 56 Ala. 147; Martin *v.* Mohr, 56 Ala. 221; Bishop *v.* Wood, 59 Ala. 253; Stoudenmire *v.* De Bardelaben, 72 Ala. 300; Smith *v.* Coleman, 59 Ala. 260; Kingsbury *v.* Milner, 69 Ala. 502; Beatty *v.* Brown, 85 Ala. 209; Shackelford *v.* Bankhead, 72 Ala. 476; Prickett *v.* Sibert, 75 Ala. 315; Conner *v.* Smith, 74 Ala. 115; Harland *v.* Person, 93 Ala. 273 (error without prejudice); Olds *v.* Marshall, 93 Ala. 138.

Nevertheless amendments introducing an entirely new cause of action will not be allowed. Rapier *v.* Gulf City Paper Co., 69 Ala. 476; King *v.* Avery, 37 Ala. 169; Marshall *v.* Olds, 86 Ala. 296, where the decision of the lower court was reversed on that account. See *infra* 2, *b*, (4).

In Georgia the Act of 1854 provided that plaintiffs or defendants might amend at any stage of the case "as matter of right." Prior to the statute amendments were discretionary and subject to review only for abuse. Georgia R., etc., Co. *v.* Milnor, 8 Ga. 313; Martin *v.* Atkinson, 5 Ga. 390; Molyneaux *v.* Collier, 13 Ga. 406; Garner *v.* Keaton, 13 Ga. 431; McDougald *v.* Williford, 14 Ga. 665.

See, for cases subsequent to the statute and enforcing it, Canant *v.* Mappin, 20 Ga. 730; Chambless *v.* Taber, 26 Ga. 167; Oliver *v.* Persons, 29 Ga. 568; Burney *v.* Ball, 24 Ga. 505; Brown *v.* Redwyne, 16 Ga. 67; Gress Lumber Co. *v.* Rogers, 85 Ga. 587; Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68; Camp *v.* Bancroft, 25 Ga. 74; King *v.*

In Furtherance of Justice.—It may be said generally that, in passing upon applications to amend, the ends of justice should never be sacrificed to mere form or by too rigid an adherence to technical rules of practice.[1]

The Practice Liberal.—Amendments are allowed with great liberality when the pleading is not under oath.[2]

Verified Pleadings.—But greater caution is exercised in regard to amendments of pleadings that are sworn to.[3]

Special Indulgence in the way of amendment will be granted to infants, who are considered as particularly under the protection of the court.[4]

b. REVIEW OF EXERCISE OF DISCRETION.—In reviewing the exercise of discretion in granting or refusing leave to amend, an appellate court will not reverse the action of the court below unless it affirmatively appears that there was a plain abuse of discretion—that the appellant was put to serious disadvantage or materially prejudiced thereby,[5] or that some statutory provision

King, 45 Ga. 195; Hook *v.* Brooks, 24 Ga. 175; Jordan *v.* Gaulden, 73 Ga. 191.

Legislative Power to Change Practice.—The legislature has power to amend the practice in relation to pleadings in chancery so as to permit amendments which before were not allowed. Brink *v.* Morton, 2 Iowa 411.

Election Contest.—In *Illinois* a proceeding to contest an election under the Act of 1872 is to all intents and purposes a chancery proceeding, and it is proper to allow an amendment of the petition. Dale *v.* Irwin, 78 Ill. 171.

Federal Not Affected by State Practice.—The general practice of the federal courts in equity is not affected by the laws of a state in which they sit. See UNITED STATES COURTS. And provisions in state statutes relating to amendments do not apply to the equity side of the federal courts. Phelps *v.* Elliott, 26 Fed. Rep. 881.

1. Per Harlan, J., in Hardin *v.* Boyd, 113 U. S. 761, where it was also said that "undoubtedly great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite party." *Approved* in Richmond *v.* Irons, 121 U. S. 47.

2. McDougald *v.* Williford, 14 Ga. 665; Droullard *v.* Baxter, 2 Ill. 192; Belton *v.* Apperson, 26 Gratt. (Va.) 207; Morrison *v.* Mayer, 63 Mich. 238; McMann, *v.* Westcott, 47 Mich. 177; Livingston *v.* Hayes, 43 Mich. 129; Church *v.* Holcomb, 45 Mich. 29; Buckley *v.* Corse, 1 N. J. Eq. 509; Byers *v.* Franklin Coal Co., 106 Mass. 131; Miller *v.* Miller, 40 N. J. Eq. 475; Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258; Marble *v.* Bonhotel, 35 Ill. 240; Gregg *v.* Brower, 67 Ill. 525; Burlew *v.* Quarrier, 16 W. Va. 108; Moss *v.* Davidson, 9 Miss. 112; Hunt *v.* Walker, 40 Miss. 590.

Compared with English Practice.—The practice in this country in allowing amendments is said to be much more liberal than in *England.* Belton *v.* Apperson, 26 Gratt. (Va.) 207; Gregg *v.* Brower, 67 Ill. 525.

3. Gregg *v.* Brower, 67 Ill. 525; Jones *v.* Kennicott, 83 Ill. 489, an application for leave to amend a petition for a *ne exeat.*

Amendment without Proper Showing.—It was reversible error to allow an amended answer contradictory of and inconsistent with the original answer in material matters without showing by affidavit that the original was filed under a mistake of the facts. Reynolds *v.* West, 32 Ark. 244, a case much like Graham *v.* Skinner, 4 Jones Eq. (N. Car.) 94.

4. Serle *v.* St. Eloy, 2 P. Wms. 386; Plunket *v.* Joice, 2 Sch. & Lef. 159; Pritchard *v.* Quinchant, Ambl. 147, 148.

5. *United States.*—Richmond *v.* Irons, 121 U. S. 46; Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567; Chicago, etc.,

or established rule of practice was violated.[1] And the allowance

R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276; U. S. *v.* Atherton, 102 U. S. 375; Hardin *v.* Boyd, 113 U. S. 756.

Michigan.—Livingston *v.* Hayes, 43 Mich. 129; Slater *v.* Breese, 36 Mich. 77; Briggs *v.* Briggs, 20 Mich. 34.

Iowa.—Hall *v.* Doran, 6 Iowa 433.

Kentucky.—Coffman *v.* Allin, Litt. Sel. Cas. (Ky.) 201; Dunn *v.* Dunn, 1 J. J. Marsh. (Ky.) 585; Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506.

South Carolina.—Prescott *v.*. Hubbell, 1 Hill Eq. (S. Car.) 210.

Arkansas.—Miller *v.* Fraley, 23 Ark. 735.

Delaware.—Thompson *v.* Thompson, 6 Houst. (Del.) 225.

Pennsylvania.—Leach *v.* Ansbacher, 55 Pa. St. 85.

Illinois.—Jones *v.* Kennicott, 83 Ill. 484; Booth *v.* Wiley, 102 Ill. 89; Sawyer *v.* Campbell, 130 Ill. 186; Gordon *v.* Reynolds, 114 Ill. 118; Campbell *v.* Powers, 139 Ill. 128; Sawyer *v.* Campbell, 130 Ill. 186; Craig *v.* People, 47 Ill. 487; Wylder *v.* Crane, 53 Ill. 490; Hoyt *v.* Tuxbury, 70 Ill. 331; Barm *v.* Bragg, 70 Ill. 283; Gregg *v.* Brower, 67 Ill. 525; Goodbody *v.* Goodbody, 95 Ill. 456; Hewitt *v.* Dement, 57 Ill. 500; Higgins *v.* Curtiss, 82 Ill. 28; Heacock *v.* Durand, 42 Ill. 230; Curtis *v.* Sage, 35 Ill. 22.

Texas.—Hollis *v.* Border, 10 Tex. 360; Taylor *v.* Gillean, 23 Tex. 508.

West Virginia.—Burlew *v.* Quarrier, 16 W. Va. 108; Pickens *v.* Knisely, 36 W. Va. 794.

Mississippi.—Tanner *v.* Hicks, 4 Smed. & M. (Miss.) 294; Miller *v.* Misssisippi Northern Bank, 34 Miss. 412; Sharman *v.* Staten (Miss., 1891), 8 So. Rep. 851.

North Carolina.—Graham *v.* Skinner, 4 Jones Eq. (N. Car.) 94.

Fruitless Amendment.—It is not error to refuse an amendment to a bill which does not cure the defect. Sharman *v.* Staten (Miss., 1891), 8 So. Rep. 851; Curtis *v.* Leavitt, 11 Paige (N. Y.) 386; Rose *v.* Rose, 11 Paige (N. Y.) 186.

Immaterial Amendment.—Nor was it error to rescind an order granting leave to file an amendment which was not material, although the reasons given by the chancellor were not altogether accurate. Garner *v.* Keaton, 13 Ga. 431.

Inserting Substantial Equity.—It was reversible error to refuse to allow plaintiff to amend by bringing forward an equity which by mistake had been left out, which equity defendant must have known was the real cause of action. McMann *v.* Westcott, 47 Mich. 177.

Verifying Answer.—It was held reversible error not to allow defendant to verify his answer, Wheeler *v.* Wales, 3 Bush (Ky.) 225; or to verify a proposed amendment to the answer. Grace *v.* Newbre, 31 Wis. 19.

Explaining Laches.—Upon sustaining a demurrer for laches it was error to dismiss the bill without giving plaintiff an opportunity to amend by fully explaining everything savoring of laches. Cottrell *v.* Watkins, 89 Va. 801.

Curing a Variance.—Also reversible error not to permit plaintiff to amend to cure a variance in setting up a written instrument which was the foundation of the suit. Fery *v.* Pfeiffer, 18 Wis. 510.

Under the Mississippi Code of 1881, declaring that "Amendments shall be allowed on liberal terms to prevent delay and injustice," it was held error to refuse to allow plaintiff to amend to cure a variance which was first disclosed by a deposition filed less than a week before the court met. Jeffries *v.* Jeffries, 66 Miss. 216.

Amendment to Answer.—Refusal to allow an amendment to an answer was held erroneous in Hanson *v.* Michelson, 19 Wis. 498.

To Conform to Proofs.—Reversible error not to allow plaintiff to amend to conform to proofs, the evidence showing that he was entitled to relief in a bill properly framed. Connalley *v.* Peck, 3 Cal. 75.

In Maryland if the court had power to allow an amendment, the manner of exercising the discretion is not a subject of appeal. Calvert *v.* Carter, 18 Md. 73; Warren *v.* Twilley, 10 Md. 39; Ellicott *v.* Eustace, 6 Md. Ch. 506. Such is the rule in that state in respect of amendments at law. See *infra*, III, 4, *a*, (1).

In Maine, likewise, the same rule is applied in equity. Gilpatrick *v.* Glidden, 82 Me. 201, and at law. See *infra*, III, 4, *a*, (1).

1. **Making a New Case.**—It is error to

of an amendment will not be deemed erroneous if no objection was made thereto at the time.[1]

2. Of Bills—*a.* IN RESPECT OF PARTIES—**Change of Parties.**—It is the constant practice of courts of chancery to allow amendments of bills by the introduction of new plaintiffs or new defendants when the interests of justice require it,[2] or by transposing the

allow amendments making a new case. Ogden *v.* Moore, 95 Mich. 290; Green *v.* Green, 26 Mich. 437; Marshall *v.* Olds, 86 Ala. 296. See *infra*, III, 6, *a*.

Before Answer.—Reversible error to refuse leave to plaintiff to amend before answer. Droullard *v.* Baxter, 2 Ill. 192.

Injunction Bond.—It is error to dissolve an injunction for want of a good and sufficient bond without giving the plaintiff time to perfect the bond, where the statute provides for it. Smith *v.* Harrington, 49 Miss. 771.

1. Pass *v.* McRea, 36 Miss. 143.

2. Coffman *v.* Sangston, 21 Gratt. (Va.) 263; Belton *v.* Apperson, 26 Gratt. (Va.) 207; Henry *v.* Brown, 8 N. J. Eq. 245; McIntyre *v.* Easton, etc., R. Co. 26 N. J. Eq. 425; Livingston *v.* Marshall, 82 Ga. 281, a case of a sworn bill where a co-plaintiff was added and without swearing to the amendment; Gress Lumber Co. *v.* Rogers, 85 Ga. 587; McDougald *v.* Dougherty, 11 Ga. 570; Hutchinson *v.* Reed, Hoff. Ch. (N. Y.) 316; Folkerts *v.* Power, 42 Mich. 283; Douglas *v.* Butler, 6 Fed. Rep. 228; Frese *v.* Bachof, 14 Blatchf. (U. S.) 432; Fisher *v.* Rutherford, Baldw. (U. S.) 188; Maynard *v.* Tilden, 28 Fed. Rep. 688; Patterson *v.* Stapler, 7 Fed. Rep. 210; Brandon Mfg. Co. *v.* Prime, 14 Blatchf. (U. S.) 371, where the rule was applied to a cross-bill; Bohnan *v.* Sohman, 74 Ala. 507; Hook *v.* Brooks, 24 Ga. 175. See also Walden *v.* Bodley, 14 Pet. (U. S.) 156; Manghan *v.* Blake, L. R. 3 Ch. 32.

Substitution of Plaintiffs. — A new plaintiff may be substituted for the original plaintiff. Jennings *v.* Springs, Bailey Eq. (S. Car.) 181, where the original bill was filed by the agent of the parties who were substituted by amendment.

The name of a nominal plaintiff may be struck out and that of the party beneficially interested inserted when it will not produce injury. Winkelman *v.* Kiser, 27 Ill. 21· Wilson *v.* Welch, 157 Mass. 77.

Where a suit was brought by the plaintiff as guardian he was allowed to amend by substituting the name of his ward as plaintiff. Lombard *v.* Morse, 155 Mass. 136.

If a suit is properly instituted by selectmen of a town, the court may allow the town to be substituted as a plaintiff after the term of office of the selectmen has expired. Winthrop *v.* Farrar, 11 Allen (Mass.) 398.

In a Creditor's Bill the plaintiff may amend by joining the other creditors as plaintiffs. Stephenson *v.* Taverners, 9 Gratt. (Va.) 398; McDougald *v.* Dougherty, 11 Ga. 570 (even at the hearing); Richmond *v.* Irons, 121 U. S. 46; Williams *v.* Grant County Ct., 26 W. Va. 488.

Want of Parties Not Fatal.—The bill should never be dismissed for want of proper parties if they can be supplied by amendment. Thomas *v.* Adams, 30 Ill. 37; Howell *v.* Peoria, 90 Ill. 104; Marsh *v.* Green, 79 Ill. 385; Allen *v.* Smith, 1 Leigh (Va.) 231; Hoofman *v.* Marshall, 1 J. J. Marsh. (Ky.) 64; Clark *v.* Keene's First Congregational Soc. 46 N. H. 272.

Ordering Case to Stand Over.—Even in the absence of proper pleadings showing a want of necessary parties, the court may take notice of the fact and order the case to stand over in order that the necessary parties may be added. Case *v.* Minot, 158 Mass. 577.

Bringing in Personal Representatives.—An amendment of the bill is not the regular mode of bringing in the personal representatives or heirs of a deceased defendant, but it may serve the purpose of a suggestion of the death of the deceased and of the names of his legal representatives. Floyd *v.* Ritter, 65 Ala. 501.

Entirely New Defendants.—But amendments which would divest a bill of all its defendants and make a new case against new defendants cannot be allowed. Leggett *v.* Bennett, 48 Ala. 380.

Misnomer of a Party.—A mistake in the name of a party does not affect the

parties,[1] or by striking out parties.[2]

At What Stage.—Such amendments may be allowed after answer,[3] after issue joined and evidence published,[4] after demurrer sustained[5] or plea allowed for want of proper parties,[6] or on[7] or after the hearing;[8] and the appellate court, upon reversing a decree, will frequently remand the case with directions to allow amendments making proper parties.[9]

pleading or the merits of the action, and can be corrected only by motion or by the court of its own motion. Beavers *v.* Baucum, 33 Ark. 722; Pearce *v.* Bruce, 38 Ga. 444.

1. A defendant may be made a plaintiff. Elmer *v.* Loper, 25 N J. Eq. 475; Tatum *v.* Walker, 77 Ala. 563; Smith *v.* Hadley, 64 N. H. 97.

A plaintiff may be struck out and made a defendant. Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68; Hewett *v.* Adams, 50 Me. 271; Johnson *v.* Vail, 14 N. J. Eq. 423.

But parties will not be transposed at their mere caprice, as for instance to enable a party to remove his case to a federal court. Burlew *v.* Quarrier, 16 W. Va. 108.

2. Heacock *v.* Durand, 42 Ill. 230, after demurrer sustained. Conolly *v.* Taylor, 2 Pet. (U. S.) 556; Dwight *v.* Humphreys, 3 McLean (U. S.) 104.

3. Jennings *v.* Springs, Bailey Eq. (S. Car.) 181.

The name of one of the heirs complainants was inserted after one of the defendants had answered. Stevens *v.* Terrel, 3 T. B. Mon. (Ky.) 131.

4. Dana *v.* Valentine, 5 Metc. (Ky.) 8. See also Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371. *Compare* Bowen *v.* Idley, 6 Paige (N. Y.) 46.

Laches of Applicant.—A motion to amend by adding new parties defendant after replication and the production of evidence, it appearing that the plaintiff had been in a position to make the amendment at an earlier stage, was denied. Clifford *v.* Coleman, 13 Blatchf. (U. S.) 210; Ingraham *v.* Dunnell, 5 Metc. (Ky.) 118, is another case of laches in applying to amend by making new parties.

5. Frazer *v.* Legare, Bailey Eq. (S. Car.) 389; Noyes *v.* Sawyer, 3 Vt. 160; William *v.* Grant County Ct., 26 W. Va. 488; McHale *v.* Murphy, 73 Ga. 141; Gray *v.* Hays, 7 Heisk. (Tenn.) 588; Heacock *v.* Durand, 42 Ill. 230; McDowell *v.* Cochran, 11 Ill. 31.

Misjoinder of plaintiffs, if merely formal, may be cured by amendment after demurrer sustained. Clark *v.* Holbrook, 146 Mass. 366.

6. Franklin *v.* Franklin, 2 Swan (Tenn.) 521.

7. Roddy *v.* Elam, 12 Rich. Eq. (S. Car.) 343, where a formal party was added as a defendant; Elmer *v.* Loper, 25 N. J. Eq. 475, where a *cestui que trust* had been erroneously made a defendant in a suit by the trustees, and an amendment was allowed making him a co-plaintiff; Reed *v.* Reed, 16 N. J. Eq. 248; Barrett *v.* Doughty, 25 N. J. Eq. 379; Hutchinson *v.* Reed, Hoff. Ch. (N. Y.) 316; McDougald *v.* Dougherty, 11 Ga. 570; Thomas *v.* Gain, 35 Mich. 159, 24 Am. Rep. 535; Richmond *v.* Irons, 121 U. S. 46; Vermont Min., etc., Co. *v.* Windham County Bank, 44 Vt. 489; Perkins *v.* Hays, Cooke (Tenn.) 189; Webber *v.* Taylor, 5 Jones Eq. (N. Car.) 36.

Where Objection was Taken by Answer.—Where the objection for defect of parties is taken in the answer the plaintiff ought to move promptly for an amendment. Vanderwerker *v.* Vanderwerker, 7 Barb. (N. Y.) 221.

If he waits until the hearing the court may dismiss the bill. Lord *v.* Anderdunck, 1 Sandf. Ch. (N. Y.) 46; Vanderwerker *v.* Vanderwerker, 7 Barb. (N. Y.) 221.

It is, however, the usual course to permit the cause to stand over for amendment. Hutchinson *v.* Reed, Hoff. Ch. (N. Y.) 316, an excellent case; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64.

8. Henry *v.* Brown, 8 N. J. Eq. 245, where the plaintiff added a party defendant. See also Folkerts *v.* Power, 42 Mich. 283; O'Brien *v.* Heeney, 2 Edw. Ch. 242.

9. Parberry *v.* Goram, 3 Bibb. (Ky.) 107, where it was said that amendments to add proper parties are never too late while the court has control over the case; Hoofman *v.* Marshall, 1 J. J. Marsh. (Ky.) 64; Hopkins *v.*

Where Plaintiff Has No Interest.—But where a bill shows that the plaintiff has assigned his interest before suit, an amended bill cannot be filed in the name of the assignee.[1]

Effect of Amendment.—Where new parties are made defendants they may avail themselves of the running of the statute of limitations during the period when they were strangers to the proceedings.[2]

If the plaintiff amends his bill by adding new parties after the defendant's default for want of an appearance has been entered, he thereby waives the default.[3]

b. IN RESPECT OF MATTER—(1) *In General.*—If the bill be found defective in its prayer for relief,[4] or in proper parties,[5] or

Roseclare Lead Co., 72 Ill. 373; Sillings *v.* Bumgardner, 9 Gratt. (Va.) 273; Hooper *v.* Royster, 1 Munf. (Va.) 119; De Courcey *v.* Little, 19 N. J. Eq. 574; McLaughlin *v.* Van Keuren, 21 N. J. Eq. 379; Bradford *v.* Felder, 2 McCord Eq. (S. Car.) 168, where plaintiff was allowed to take out administration and sue in the capacity of administrator; Palmer *v.* Rich, 12 Mich. 414; Welton *v.* Hutton, 9 W. Va. 339; Lewis *v.* Darling, 16 How. (U. S.) 1; Arendell *v.* Blackwell, 1 Dev. Eq. (N. Car.) 358.

Amendments in Appellate Court.—In *Ohio* amendments bringing in new parties may be allowed in the Supreme Court. Grant *v.* Ludlow, 8 Ohio St. 1.

Compare, in *North Carolina*, Arendell *v.* Blackwell, 1 Dev. Eq. (N. Car.) 358; and in *Michigan*, Edinger *v.* Heiser, 62 Mich. 598, where a merely formal party plaintiff was considered as added by amendment in the Supreme Court.

Stipulation against Amendment.—While the court will take notice of the want of necessary parties and allow an amendment bringing them in, it was held that, where a case was submitted on an agreed statement, with the stipulation that "no facts, statements, or allegations are to be considered by the court except those therein agreed upon," and the bill was defective for want of necessary parties, it should be dismissed without costs and without prejudice. Beals *v.* Cobb, 51 Me. 348.

1. Keyser *v.* Renner, 87 Va. 249.

For a similar reason an amendment substituting a new party as sole plaintiff was denied, the original plaintiff having no title whatever to sue in. House *v.* Dexter, 9 Mich. 246; McKay *v.* Broad, 70 Ala. 377; King *v.* Avery, 37 Ala. 169.

2. Miller *v.* M'Intyre, 6 Pet. (U. S.) 61; Campbell *v.* Bowne, 5 Paige (N. Y.) 34.

Staleness.—The defense of staleness of demand is also open to them; and the relief sought against them must be considered in respect to the diligence with which they have been impleaded from the standpoint of the amendment alone. Tompkins *v.* Holt (Ala., 1891), 8 So. Rep. 794.

Right to Answer Amendment.—An amended bill making proper parties does not give the defendant the right to file an answer to the amended bill, the amendment not affecting him. Oldham *v.* Rowan, 4 Bibb (Ky.) 544.

3. Scudder *v.* Voorhis, 1 Barb. (N. Y.) 55.

4. Lyon *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 184; Dearing *v.* Charleston Bank, 6 Ga. 581; Livingston *v.* Marshall, 82 Ga. 281; Hardin *v.* Boyd, 113 U. S. 756; Palk *v.* Clinton, 12 Ves. Jr. 66. See also Pennock *v.* Ela, 41 N. H. 189.

Adding Prayer for General Relief.—The bill may be amended by adding to the prayer for special relief a prayer for general relief. McCrum *v.* Lee, 38 W. Va. 583. But not when the facts set forth would not authorize other relief. Halsted *v.* Meeker, 18 N. J. Eq. 136.

Upon Remand from Appellate Court.—Upon remanding the case the appellate court will grant leave to amend the prayer of the bill. Cook *v.* Bronaugh, 13 Ark. 183. *Compare* Cutler *v.* Tuttle, 19 N. J. Eq. 549.

Upon the Hearing.—Where special relief is sought in a bill, but not specially mentioned in the prayer, and the proofs make a strong case for the granting of such relief, the court may allow an amendment of the prayer, and may make a decree in accordance with such amendment. New York F. Ins. Co. *v.* Tooker, 35 N. J. Eq. 408.

5. See "*a. In Respect of Parties*," *supra*.

in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself,[1] the amendment is usually granted,[2] or, as more recently

1. Lyon *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 184.

Connected with Substance. — Where the original bill, filed by assignees of the equity of redemption against the mortgagee and purchasers from him after a sale under the mortgage, seeking an account and redemption, claims credits in reduction of the mortgage debt on account of cross-demands accruing to the mortgagor, whether by way of recoupment or set-off before the sale under the mortgage, and by him assigned to the complainants, an amendment is allowable specifying the particulars of these counterclaims, and showing how and when they accrued to the mortgagor, and when the complainants acquired them. Conner *v.* Smith, 88 Ala. 300.

2. Chancellor Kent's rubric in Lyon *v.* Tallmadge, 1 Johns. Ch. 184, holding that where on demurrer a bill is dismissed for want of equity on the merits of the case as stated, leave to amend the bill will not be granted. The statement in the text was quoted with approval in Hardin *v.* Boyd, 113 U. S. 756; Piercy *v.* Beckett, 15 W. Va. 444; Conner *v.* Smith, 88 Ala. 300; Holland *v.* Trotter, 22 Gratt. (Va.) 136; Belton *v.* Apperson, 26 Gratt. (Va.) 207; Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 46; and in Larkins *v.* Biddle, 21 Ala. 252.

In Holland *v.* Trotter, 22 Gratt. (Va.) 136, it was said that as a general rule the court will at any time before the hearing grant leave to amend the bill in the particulars stated in the text. See also Rogers *v.* Moor, 1 Root (Conn.) 472; Buckley *v.* Crose, 1 N. J. Eq. 504; Fearey *v.* Hayes, 44 N. J. Eq. 425; Delaware, etc., Canal Co. *v.* Raritan, etc., R. Co., 14 N. J. Eq. 445; Fite *v.* Kennamer, 90 Ala. 470; Pennock *v.* Ela, 41 N. H. 189; Hunter *v.* U. S., 5 Pet. (U. S.) 173.

Mistake of Counsel.—The bill may be amended by the insertion of matter which was omitted by counsel under a misapprehension that it was not necessary to be stated. McDougald *v.* Williford, 14 Ga. 665.

Clerical Mistake. — An amendment relating to the price alleged to have been given for lands is properly allowed when it can be considered as a clerical mistake. Cummings *v.* Gill, 6 Ala. 562. In Howel *v.* Ashmore, 9 N. J. Eq. 85, a clerical mistake was amended instanter.

Creditor's Bill.—A judgment creditor's bill to set aside a deed as in fraud of his rights under execution did not aver that the sheriff had levied on the land before the bill was filed. The bill was not demurred to, however, and testimony was taken on the whole issue. *Held*, proper to allow the bill to be amended at the hearing. Smith *v.* Sherman, 52 Mich. 637.

So, in a judgment creditor's bill, an error in the date of obtaining and issuing *fi. fa.* was allowed to be amended. Ayres *v.* Valentine, 2 Edw. Ch. (N. Y.) 451; and an error in the amount alleged to be due. Ryerson *v.* Minton, 3 Edw. Ch. 382.

Such amendment may be made at any time during the proceedings. Marshall First Nat. Bank *v.* Hosmer, 48 Mich. 200.

Grounds of Liability.—If, in an action against stockholders of a corporation, the liability claimed against them extended to the amount of the stock, but no specific ground for that liability was stated, an amendment may be allowed alleging loss by official mismanagement of the directors, which may properly be regarded as a specification of the claim. Hewett *v.* Adams, 50 Me. 271.

Striking Out Waiver.—An equitable petition in which discovery is waived may be amended by striking out this waiver and inserting a prayer for discovery. Price *v.* Price, 90 Ga. 244.

Alleging Loss of Document.—Where a bill is founded on an original agreement in writing and does not mention the loss of it, an amendment may be allowed. Smith *v.* Axtell, 1 N. J. Eq. 494.

Avoiding Special Defense.—If the bill is not so framed as to avoid a special defense set up by the answer, such special defense may be met by amending the bill. Connerton *v.* Millar, 41 Mich. 608.

Special replications are now abolished; and where the defense set up

stated, amendments, however considerable, the purpose of which is to bring before the court other parties to the controversy, or to strengthen, elucidate, or explain the case made by the original bill, or to put in issue some material fact directly or indirectly affecting the case so made, will be freely allowed at any stage of the proceedings.[1]

by answer is of a character to require the plaintiff to make a new issue in order to meet it, he will not be permitted to do so without amending his bill and adapting it to the case upon which he expects to sustain himself. Van Riper *v.* Claxton, 9 N. J. Eq. 302; McClane *v.* Shepherd, 21 N. J. Eq. 76; Brown *v.* Vandyke, 8 N. J. Eq. 795; Cowart *v.* Perrine, 21 N. J. Eq. 101; Hoff *v.* Burd, 17 N. J. Eq. 200; Elliot *v.* Trahern, 35 W. Va. 634; Chalfants *v.* Martin, 25 W. Va. 394; Tarleton *v.* Vietes, 6 Ill. 470; Lindsay *v.* Lynch, 4 Fla. 418.

Avoiding Implication of Laches.—An amendment of the bill may be allowed by the insertion of allegations so as to relieve the plaintiff of the charge of laches in bringing suit. Copen *v.* Flesher, 1 Bond (U. S.) 440.

Changing Form of Remedy.—If a complainant proceeds by supplemental bill where he should have proceeded by petition praying for an interlocutory order, the court may direct an amendment in point of form. Miller *v.* Saunders, 18 Ga. 492.

Immaterial Amendment.—An amendment of the bill should not be allowed if it charges no material fact not contained in the original bill. Richardson *v.* Wolfe, 31 Miss. 616.

1. Commerce Nat. Bank *v.* Smith (R. I., 1892), 24 Atl. Rep. 469.

Where enough appears upon the face of the bill to suggest to the court that the complainant is entitled to relief provided the proper allegations are made, leave to amend for that purpose will usually be granted. Wynne *v.* Alford, 29 Ga. 694.

Additional Relief.—New matter or a new claim may be introduced by amendment entitling the complainant to additional or different relief from that specially prayed for in the original bill, if it is not repugnant to its prayer and purpose. Fite *v.* Kennamer, 90 Ala. 470.

Matters of Form.—"In courts of equity, mispleading in matter of form is never allowed to prejudice any party; the real and substantial merits of the case are always looked to." Dearing *v.* Charleston Bank, 6 Ga. 584, *citing* Story Eq. Pl. §§ 678, 883; 2 Maddock Ch. Pr. 368.

Title of Bill.—A complainant may amend the title of his bill so as to make it conform to the character of the case made by it. Dearing *v.* Charleston Bank, 6 Ga. 581, where the bill was entitled in the nature of a bill of review, and it was amended by striking out the title, as it was really a bill for discovery and relief.

Waiving Discovery.—After a bill seeking a discovery has been answered, the complainant cannot amend his bill so as to waive discovery and thus get clear of the defendant's answer. Allen *v.* Woodson, 50 Ga. 53; so decided although the Code authorized a complainant to waive discovery.

Waiving Oath to Amendment.—So, although the statute permitted a complainant to waive an answer under oath, he was not, after a sworn answer filed, allowed to amend his bill so as to dispense with the oath and deprive the defendant of the benefit of it. Burras *v.* Looker, 4 Paige (N. Y.) 227.

But where no answer had been put in to an injunction bill, leave was granted to amend so as to waive an answer under oath. Bronson *v.* Green, Walk. (Mich.) 486.

Inserting Facts Set Up in Answer.—If the defendant has answered, and the complainant has thereby obtained further knowledge of facts or circumstances which may aid him in the case, he may amend his bill by inserting the facts of which he has thus become informed. Buckley *v.* Corse, 1 N. J. Eq. 504.

Where the complainant in a foreclosure bill held subsequent mortgages not referred to in his bill, and the answer of a defendant brought in as a subsequent encumbrancer referred to such intervening mortgages, and based asserted equities upon their existence, it was held competent to permit the

(2) *Matter Occurring Pending Suit.*—The general rule is that no material fact which has occurred since filing the original bill can be introduced in an amended bill, and that the party can avail himself of such fact only by filing a supplemental bill.[1] But it seems that, before answer, demurrer, or plea, the bill may be amended by adding matter that has occurred since it was filed.[2] Where an executor appointed by a foreign tribunal files a bill and subsequently takes out letters testamentary in the state where the suit is pending, he may allege such fact by way of amendment.[3]

plaintiff to amend his bill at the hearing, so as to make it aver the facts as to these mortgages. Slater *v.* Breese, 36 Mich. 77.

Facts Known to Defendant.—In Mc Mann *v.* Westcott, 47 Mich. 177, the plaintiff was allowed to amend by bringing forward an equity which by mistake had been left out of the original bill, and which the defendant must have known to have been the real cause of action.

Traversing Defensive Averments.—An amendment of the bill is neither necessary nor proper to traverse defensive averments broug'. forward by the answer. Lanier *v.* Hill, 30 Ala. 111.

Multifarious Amendment.—An amendment which would render the bill multifarious will not be allowed. Jordan *v.* Jordan, 16 Ga. 446.

1. Copen *v.* Flesher, 1 Bond (U. S.) 440; Lyster *v.* Stickney, 12 Fed. Rep. 609; Clark *v.* Hall, 7 Paige (N. Y.) 382; Candler *v.* Pettit, 1 Paige (N. Y.) 168, 19 Am. Dec. 399; Bannon *v.* Comegys, 69 Md. 411; Killinger *v.* Hartman, 21 Neb. 297; Birmingham *v.* Lesan, 77 Me. 494; Hammond *v.* Place, Harr. (Mich.) 438. See also Nichols *v.* Rogers, 139 Mass. 146; Camp *v.* Bancroft, 26 Ga. 393.

Amendment of Bill of Revivor.—New matter accruing since the bill was filed cannot be incorporated into a bill of revivor by amendment. Mason *v.* Hartford, etc., R. Co., 10 Fed. Rep. 334.

Demurrer to New Matter. — An amended bill is demurrable when it seeks relief based upon a transaction which occurred after the original bill was filed. Wright *v.* Frank, 61 Miss. 32.

Ignorance of Existing Matter.—But matter which existed at the time the bill was filed, but which was omitted by ignorance or mistake, is a proper subject for amendment. Walker *v.* Hallett, 1 Ala. 379.

Inchoate Right.—In Butler *v.* Butler, 4 Litt. (Ky.) 202, there is a dictum that, where a suit is commenced before the cause of action is consummated, but it becomes complete during the pendency of the suit, the fact may be stated by an amended bill. See also Leach *v.* Gentry, 1 J. J. Marsh. (Ky.) 349.

New Law Pending Suit.—In Sanborn *v.* Sanborn, 7 Gray (Mass.) 142, a bill for specific performance, it was held that plaintiff could not amend after master's report so as to obtain relief on the ground of fraud, that branch of equity jurisdiction having been conferred upon the court pending the suit. But *compare* Richmond *v.* Irons, 121 U. S. 27; Henry *v.* Travelers' Ins. Co., 45 Fed. Rep. 299; George *v.* Reed, 101 Mass. 378.

And in Harvey *v.* Lord, 11 Biss. (U. S.) 144, it was held that, where pending the disposition of a bill in equity a new law grants to the court enlarged powers, the complainant may file an amended bill in order to bring his suit within the provisions of the new law.

In Georgia supplemental bills are expressly dispensed with by the Code, and matters formerly proper for such bills may be set up by amendment. Merchants', etc., Nat. Bank *v.* Masonic Hall, 65 Ga. 603.

So in Alabama, Jones *v.* McPhillips, 82 Ala. 102; Alabama Warehouse Co. *v.* Jones, 62 Ala. 550; Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585, holding, however, that if the original bill does not make out a case for relief, facts subsequently occurring cannot avail the complainant.

2. Story Eq. Pl. § 885; Luft *v.* Gossran, 31 Ill. App. 530.

3. Buck *v.* Buck, 11 Paige (N. Y.) 170.

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In Georgia it has been held, under a statute making the allowance of amendments peremptory, that the defendant may amend though the result be to destroy his bill, but that in such case he may be turned out of court on demurrer or motion to dismiss. Vanderzer *v.* McMillan, 28 Ga. 339.

In Massachusetts, under special circumstances, a plaintiff was allowed to introduce substantially a new cause of action in Drew *v.* Beard, 107 Mass. 64.

New Case by Amendment to Cross-bill. —An amendment to a cross-bill was allowed although it presented a new and independent basis of relief, where the new facts were stated in the complainant's original bill and proved by the evidence. Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276.

1. Judson *v.* Courier Co., 25 Fed. Rep. 705; Walker *v.* Brown, 45 Miss. 615.

2. Judson *v.* Courier Co., 25 Fed. Rep. 705; King *v.* Avery, 37 Ala. 169.

3. Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258.

4. Hazard *v.* Hidden, 14 R. I. 356.

5. Commerce Nat. Bank *v.* Smith (R. I., 1892), 24 Atl. Rep. 469; Platt *v.* Squire, 5 Cush. (Mass.) 551; McKinley *v.* Irvine, 13 Ala. 681; Patterson *v.* Fowler, 23 Ark. 459. See also Clark *v.* Keene's First Congregational Soc., 46 N. H. 272.

6. Dodd *v.* Astor, 2 Barb. Ch. (N. Y.) 395.

7. Fenno *v.* Coulter, 14 Ark. 38; Cook *v.* Bronough, 13 Ark. 183; Squire *v.* Hewlett, 141 Mass. 597; Crabb *v.* Thomas, 25 Ala. 212.

8. See *infra*, "(5) *Inconsistent and Repugnant Amendments.*"

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(b) **Tests.**—Whether, on the exercise of the right, an amendment falls within the limitations is sometimes a subtle and difficult matter requiring nice discrimination. The usual tests are whether the original and amended bills found the right of complainant to relief on different and inconsistent titles,[1] or upon entirely inconsistent claims arising out of differing states of facts;[2] or whether the same defenses are applicable;[3] or whether the kind or char-

1. Moore *v.* Alvis, 54 Ala. 356.

Changing Fraud to Trust.—The original bill being by a wife who alleged that she had bought property through the agency of her husband, and that he had been deceived as to its value by the vendor, and that she had paid its full value, and praying that the vendor be required to make title to her and be enjoined from interfering with her possession, it could not be amended by alleging that her husband bought the land for himself, but used money belonging to her with the knowledge of the vendor, and praying that she be reimbursed. Hart *v.* Henderson, 66 Ga. 568.

Different Titles and Parties.—In Marshall *v.* Olds, 86 Ala. 296, the bill sought to enforce a resulting trust in lands, and it was held that an amendment asserting title as an heir, and bringing in the other heirs as coplaintiffs, could not be allowed. Penn *v.* Spence, 54 Ala. 35, is another instance of departure in amendment by setting up a different title to relief.

Changing Express to Resulting Trust.—A bill was filed to enforce a trust in certain lands, and alleged an express trust. The complainant was allowed to amend by inserting allegations, from which a trust resulted. Hall *v.* Congdon, 56 N. H. 279.

A Bill of Review may be amended, it seems, into a bill to impeach a decree for fraud. Massie *v.* Matthews, 12 Ohio 353.

A Bill for Partition may be amended so as to constitute a bill for an account. Hodges *v.* Pingree, 10 Gray (Mass.) 14.

A Bill for the Sale of an infant's lands may be amended into a bill for partition. Watson *v.* Godwin, 4 Md. Ch. 25.

2. Ward *v.* Patton, 75 Ala. 207.

Charging Administrator Individually.—Where a bill was filed against a defendant as administrator seeking a decree against him in such representative capacity, a demurrer to an amendment charging him individually was sustained. Smith *v.* Ardis, 49 Ga. 602.

Alleging Dissolution of Corporation.—After a decision upon a plea to the jurisdiction that a bill between members of a manufacturing corporation cannot be sustained, the court will not grant leave to amend by averring that the corporation had been dissolved. Pratt *v.* Bacon, 10 Pick. (Mass.) 123.

Creditor's Bill.—It is proper to allow a judgment creditor's bill to be amended so as to show that the legal remedy was exhausted. Earle *v.* Grove, 92 Mich. 285.

Joining Wife with Husband.—Where the original bill was filed by the husband alone, and sought to enforce a vendor's lien on land for the unpaid purchase-money, evidenced by a promissory note payable to the husband, an amended bill may be allowed joining the wife as a complainant and alleging that the land belonged to her separate estate. Pitts *v.* Powledge, 56 Ala. 147.

Mortgage and Vendor's Lien.—Where an original bill shows a sale of lands and the execution of a bond to make title to defendant, his entry under the purchase, and his execution of a note therefor reciting that it was given for the purchase-money of the lands, and his failure to pay it, and prays a sale to enforce the vendor's lien; an amendment alleging that defendant, being previously indebted to him, gave the note mentioned, and made a deed absolute of the lands described in it, to complainant to secure the note, whereupon the latter, as part of the transaction, gave defendant a bond to make title on payment of the note, and averring that the transaction constituted the deed a mortgage, and praying its foreclosure by sale of such lands—is not a departure and does not make a new case. Moore *v.* Alvis, 54 Ala 356.

3. Park *v.* Lide, 90 Ala. 246; Caldwell *v.* King, 76 Ala. 149; Winston *v.* Mitchell, 93 Ala. 554.

Suing in Behalf of a Class.—A bill filed

acter of relief, not the degree or extent, proper to one state of facts is inappropriate to the other;[1] in other words, whether the matters of the original and amended bills could have been properly stated in the alternative in the original bill.[2]

in one's own name may be amended by the addition of words sufficient to make it a bill in behalf of a class. Richmond *v.* Irons, 121 U. S. 27.

1. Rapier *v.* Gulf City Paper Co., 69 Ala. 476; Park *v.* Lide, 90 Ala. 246; Baker *v.* Graves (Ala., 1893), 13 So. Rep. 275; Winston *v.* Mitchell, 93 Ala. 554; Sanborn *v.* Sanborn, 7 Gray (Mass.) 142.

Seeking Different Relief on Bills for Specific Performance.—A bill asking for the specific performance of a contract cannot, after issue joined, be amended so as to charge that the contract was fraudulent and pray that it may be declared void. Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258. But in Papin *v.* Goodrich, 103 Ill. 86, and Parrill *v.* McKinley, 9 Gratt. (Va.) 1, 58 Am. Dec. 212, the bill was for specific performance, and the plaintiff was permitted to file an amended bill asking for a rescission of the contract. See also Belton *v.* Apperson, 26 Gratt. (Va.) 207.

Upon a bill for the specific performance of a contract for the exchange of lands, if in the progress of the cause it appears that the defendant cannot comply with his contract, the plaintiff may amend and ask for a rescission of the contract and for such other relief as he may be entitled to. Parrill *v.* McKinley, 9 Gratt. (Va.) 1, 58 Am. Dec. 212.

Where a bill for the specific performance of a contract of sale was amended by setting up false and fraudulent representations, not discovered to be false until after the filing of the original bill, and praying for a rescission of the contract, the amendment was held to have been properly allowed. Jefferson *v.* Kennard, 77 Ill. 246.

The court has no power to allow a bill for specific performance to be amended so as to stand as an action of contract, although a statute provides that suits for specific performance shall be by action of contract. The effect of the statute is to deprive the court of jurisdiction. Darling *v.* Roarty, 5 Gray (Mass.) 71.

Exactly Contrary Relief.—In Mayor *v.* Dry, 2 Sim. & Stu. 113, the plaintiff by his original bill sought to set aside a deed, and after answer was filed amended his bill and, presenting a different state of facts, sought to establish the deed, and such amendment was allowed.

Amendment Setting Up a Trust.—A wife's land having been sold under a mortgage and bid in by her husband's brother, who afterwards conveyed to the husband, a bill by her heirs charging that he had paid the debt with her money, and that the foreclosure was collusive, cannot, on failure of proof that the mortgage was not a valid and subsisting lien, be amended so as to charge him as having purchased in trust for his wife, and to compel a conveyance on repayment of his expenditures in removing the incumbrance. Park *v.* Lide, 90 Ala. 246.

Divorce Bill.—A divorce bill cannot be amended by substituting a prayer that the marriage be annulled, Schafberg *v.* Schafberg, 52 Mich. 429; or so as to make a case entirely outside of the issue in the bill, Green *v.* Green, 26 Mich. 437. A proper amendment to a divorce bill is shown in Grove's Appeal, 37 Pa. St. 443.

Equity to Law.—A bill in equity cannot be converted by amendment into an action at law. Homer *v.* Homer, 107 Mass. 82.

Law to Equity.—Where the court has no jurisdiction of the original cause (an attachment for a purely legal claim), an amended bill cannot be filed to give the court jurisdiction. Livey *v.* Winton, 30 W. Va. 554.

Amendment of Creditor's Bill.—Under a bill by a creditor in behalf of himself and all other creditors of the deceased debtor, the complainant cannot by an amended bill ask the foreclosure of a mortgage given to secure his individual debt. Scott *v.* Ware, 64 Ala. 174.

Foreclosure and Cloud on Title.—A bill asking for the reformation of a mortgage and foreclosure thereof may be amended so as to ask for reformation and removal of a cloud on complainant's title as mortgagee. Hawkins *v.* Pearson, 96 Ala. 369.

2. Ward *v.* Patton, 75 Ala. 207.

(c) **Objection How Taken.**—Where an amendment is offered which is obnoxious to the rule, it may be disallowed;[1] or, if allowed, it may be taken off the files on motion,[2] or demurred to,[3] or the bill may be dismissed without prejudice.[4]

(5) *Inconsistent or Repugnant Amendments.*—Matter inconsistent with or repugnant to the substantial allegations of the original bill cannot be introduced by amendment.[5]

Ejectment and Foreclosure.—A bill in aid of ejectment proceedings cannot be converted into a foreclosure bill by merely substituting an ordinary prayer for foreclosure. Livingston *v.* Hayes, 43 Mich. 129.

Amending Prayer of Bill.—A bill may be amended by adding to the prayer for special relief a prayer for general relief. McCrum *v.* Lee, 38 W. Va. 583.

Praying for Discovery.—A petition in which discovery is waived may be amended by striking out the waiver and inserting a prayer for discovery. Price *v.* Price, 90 Ga. 244.

Cloud on Title.—Where a bill to enjoin a foreclosure sale alleged that the mortgagor and mortgagee fraudulently concealed the existence of the mortgage from the plaintiff when he purchased the land, an amendment was allowed as not incompatible which alleged that the mortgage had been satisfied and that the mortgagee held it as a cloud on plaintiff's title. Harrison *v.* Yerby (Ala., 1893), 14 So. Rep. 321.

1. Livingston *v.* Hayes, 43 Mich. 129; Pratt *v.* Bacon, 10 Pick. (Mass.) 123.

2. Oglesby *v.* Attrill, 14 Fed. Rep. 214.

3. Ward *v.* Patton, 75 Ala. 207; Wright *v.* Frank, 61 Miss. 32, holding that failure to except to an order granting leave to amend does not preclude the defendant from questioning the propriety of the amendment by demurrer. Ansley *v.* Glendenning, 56 Ga. 286; Smith *v.* Ardis, 49 Ga. 602; Scott *v.* Turley, 9 Lea (Tenn.) 631, 639.

Waiver of Objection.—That the objection may be waived by answering the amendment, see the case last cited.

4. Tomlinson *v.* Savage, 2 Dev. & B. Eq. (N. Car.) 68.

5. Ogden *v.* Moore, 95 Mich. 290; Freeman *v.* Michigan State Bank, Harr. (Mich.) 311; Hill *v.* Hill, 53 Vt. 578; Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 38 Fed. Rep. 57; Ray *v.* Womble, 56 Ala. 32; Rumbly *v.* Stainton, 24 Ala. 712; Howell *v.* Motes, 54 Ala. 1; Winter *v.* Quarles, 43 Ala. 692, holding that repugnancy is ground for demurrer. Seborn *v.* Beckwith, 30 W. Va. 774; Milton *v.* Hogue, 4 Ired. Eq. (N. Car.) 415; Coleman *v.* Pinkard, 2 Humph. (Tenn.) 185; Bosley *v.* Phillips, 3 Tenn. Ch. 649. See also Marble *v.* Bonhotel, 35 Ill. 240.

In Injunction Bills. — Repugnant amendments are particularly objectionable in injunction bills, where the amendments must be verified. Hill *v.* Hill, 53 Vt. 578. *Compare* Hall *v.* Fisher, 3 Barb. Ch. (N. Y.) 637.

Multifariousness.—Leave to file an amendment which makes the bill multifarious may be refused. Parsons *v.* Johnson, 84 Ala. 254; Rogers *v.* Simpson, 10 Heisk. (Tenn.) 655.

Attacking Deed Admitted as Valid.—The complainant, a judgment creditor of a deceased debtor and administrator of the estate of the debtor's deceased children, filed a bill claiming a distributive share of certain slaves conveyed by the debtor to his children by deed and the subjection of the distributive share to the payment of his debt, and by an amended bill charged that the deed was fraudulent and void. It was held that the amended bill must be dismissed for repugnancy. Coleman *v.* Pinkard, 2 Humph. (Tenn.) 185.

Denying Validity of Contract Admitted.—Where an assignee of a chattel mortgage brings an action to foreclose it and to compel parties in possession of part of the property to account for the same, he cannot amend by making his assignors parties, and alleging that they procured him to accept the assignment by fraudulent representations, and praying that it be declared void and that they be required to refund to him the money paid therefor, since such amendment would be repugnant to the bill. Baker *v.* Graves (Ala., 1893), 13 So. Rep. 275.

Limitation of the Rule.—But in order to be condemned on this ground the inconsistency or repugnancy must relate to the purposes of the bill as contradistinguished from a mere modification of the relief sought.[1] Moreover, the facts originally set forth may be wrong, and it may be the legitimate purpose of the amendment to rectify the error.[2]

Alleging Judgment Void Admitted Valid.—When the only occasion for going into equity is that the judgment sought to be enjoined is conclusive at law in another suit against the complainant, an amendment to the bill, alleging that the judgment is void for want of jurisdiction in the court that rendered it, is demurrable, because it is inconsistent with and destructive of the original bill. Ansley *v.* Glendenning, 56 Ga. 286.

Contradicting Admission of Existence of Property.—In a suit to foreclose a mortgage on tangible property, a goodwill, and a share of the stock, the original bill and two amended bills alleged that the tangible property had been destroyed, and the complainant, therefore, could have no relief in that suit. *Held*, that leave to file a third amended bill alleging the existence of the tangible property for the purpose of reaching the intangible property should be denied. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 38 Fed. Rep. 57.

Contradicting Reliance on Contracts.—In Ogden *v.* Moore, 95 Mich. 290, an original bill to enforce the specific performance of an agreement to purchase land alleged a written contract and at the same time an oral agreement reserving a portion of the land from the conveyance, and that complainant relied on the oral agreement and considered it as binding as the written contract. A demurrer was sustained, and plaintiff filed an amended bill, the substantial averment of which was that complainant relied, not on the oral agreement, but on the written contract, and that by mutual mistake the covenant reserving a portion of the land was omitted. *Held*, that the amendment was repugnant, and that the bill should be dismissed.

Effect of Repugnant Amendment.—An attachment and injunction sued out under the original bill will not inure to the benefit of an antagonistic right set up by amendment. Bosley *v.* Phillips, 3 Tenn. Ch. 649.

In Texas, where the courts allow a new cause of action to be introduced by amendment, if the equity of the amendment be contradictory to that in the original bill, and the relief of a different character, the amendment will not affect a purchaser who bought previous to the amendment. Wortham *v.* Boyd, 66 Tex. 401.

Striking Out Contradicted Matter.—In Milton *v.* Hogue, 4 Ired. Eq. (N. Car.) 415, it was held that, where the amendment so contradicts the original bill that no decree can be made, the proper course is to strike out so much of the original bill as is contradicted.

In Oglesby *v.* Attrill, 14 Fed. Rep. 214, it was held that an inconsistent amendment may be stricken from the files on motion.

1. Cain *v.* Gimon, 36 Ala. 168; Ingraham *v.* Foster, 31 Ala. 123. See also Hart *v.* Clark, 54 Ala. 490; Fite *v.* Kennamer, 90 Ala. 470.

Thus, where a bill seeks the cancellation of a mortgage for certain alleged reasons, an amendment may be permitted which sets up other and even inconsistent reasons upon which the same relief is prayed. Hardie *v.* Bulger, 66 Miss. 577.

Where an original bill, seeking a settlement of a partnership in a steamboat and an ascertainment of the plaintiff's share of the profits, alleged that the plaintiff had sold his interest in the boat to a third person, who was entitled to his share of the profits accruing from the time of the sale, while the amended bill alleged that said transfer, though absolute in form, was intended only as a mortgage or security —*held*, that the repugnancy was not so great as to render the allowance of the amendment improper, as it simply enlarged the measure of relief. Ingraham *v.* Foster, 31 Ala. 123.

2. McDougald *v.* Williford, 14 Ga. 665, where it was said that, to make the amendment objectionable for repugnancy or inconsistency, the contradiction must be such that, retaining the bill, no decree could be rendered.

(6) *Of Sworn Bills.*—While the courts always act with great caution in permitting the plaintiff to amend a sworn bill,[1] especially where the purpose is to make repugnant allegations and have relief thereon,[2] such amendments are always allowed to prevent the failure of justice;[3] and where it is manifest that the plaintiff was honestly mistaken as to the facts charged in the bill, an amendment may be allowed.[4]

c. AT WHAT STAGE OF PROCEEDINGS—(1) *Before Issue.*—According to the ancient practice in chancery, the plaintiff had an unlimited power of amending his bill both before and after answer, but before replication, as often as he found it convenient to do so.[5] But this extensive liberty to amend is now frequently

1. Thomas *v.* Coultas, 76 Ill. 493; Gregg *v.* Brower, 67 Ill. 525; Jones *v.* Kennicott, 83 Ill. 484, an application for leave to amend a petition for a *ne exeat;* Swift *v.* Eckford, 6 Paige (N. Y.) 22; Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 46; Gunn *v.* Blair, 1 Barb. (N. Y.) 539; West *v.* Coke, 1 Murph. (N. Car.) 191; Molyneaux *v.* Collier, 13 Ga. 406.

2. Hill *v.* Hill, 53 Vt. 578. See also Lloyd *v.* Brewster, 4 Paige (N. Y.) 537, 27 Am. Dec. 88.

3. Gregg *v.* Brower, 67 Ill. 525; Thomas *v.* Coultas, 76 Ill. 493; Crawford *v.* Paine, 19 Iowa 172.

Before Issue.—It is of course to allow the plaintiff to amend upon the coming in of the answer, or the making of any other defense, so as to shape the pleadings for the better development of the plaintiff's case; and this is so when a plea has been filed, and before it has been set for hearing or replied to. Mount Olivet Cemetery Co. *v.* Budeke, 2 Tenn. Ch. 480.

Amending as to Parties and Prayer.—In Livingston *v.* Marshall, 82 Ga. 281, the plaintiff was allowed to amend the prayer of his bill and also to add a new and proper party plaintiff.

New Jersey.—In Buckley *v.* Corse, 1 N. J. Eq. 504, a bill for an account was amended into a bill to redeem, after the dissolution of the injunction granted on the original bill, and a new injunction was granted on the amendment. But the propriety of the amendment is perhaps doubtful. See Codington *v.* Mott, 14 N. J. Eq. 433, 82 Am. Dec. 258.

In Philhower *v.* Todd, 11 N. J. Eq. 312, after hearing upon a motion to dissolve the injunction, and after the delivery of the opinion of the court that the injunction should be dissolved and the bill dismissed for want of equity, the injunction was retained, and the party permitted to amend by altering the frame and averments of his bill.

In Henry *v.* Brown, 8 N. J. Eq. 245, which was also an injunction bill, the complainant was allowed, after her testimony was closed and after the final hearing, to amend her bill, by adding a new party, by changing the prayer for relief, and by so amending the frame of the bill that the proper relief could be administered. See also Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258.

Changing Statement of Contract.—In Lanning *v.* Heath, 25 N. J. Eq. 425, leave was given to amend an injunction bill, without prejudice to the injunction, by making the contract set forth in the bill conform to the alleged understanding of the parties.

4. Thomas *v.* Coultas, 76 Ill. 493; Hall *v.* Fisher, 3 Barb. Ch. (N. Y.) 637.

5. 1 Daniell Ch. Pr. (1st Am. ed.) 535; Story Eq. Pl. (10th ed.) § 885; Adams *v.* Phillips, 75 Ala. 461; Buckley *v.* Corse, 1 N. J. Eq. 504; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Droullard *v.* Baxter, 2 Ill. 191, where a decree was reversed for refusal to allow an amendment to the bill at that stage. See also McArtee *v.* Engart, 13 Ill. 242; Henry *v.* Travelers' Ins. Co., 45 Fed. Rep. 299; Holland *v.* Trotter, 22 Gratt. (Va.) 136; Garner *v.* Keaton, 13 Ga. 431; Stevens *v.* Terrel, 3 T. B. Mon. (Ky.) 131; Baldwin *v.* Love, 2 J. J. Marsh. (Ky.) 489; Grim *v.* Wheeler, 3 Edw. Ch. (N. Y.) 448; Beekman *v.* Waters, 3 Johns. Ch. (N. Y.) 410; French *v.* Shotwell, 4 Johns.

regulated by rules of court intended to prevent delay or vexation.[1]

(2) *After Demurrer.—Formerly*, upon the allowance of a demurrer to the whole bill, no subsequent proceedings could be taken in the cause.[2]

Ch. (N. Y.) 505; Hogan *v.* McFarland, 6 Baxt. (Tenn.) 104; Grange Warehouse Assoc. *v.* Owen, 86 Tenn. 355.

Waiving Answer Under Oath.—Where no answer had been put in to an injunction bill, leave was granted to amend so as to waive an answer under oath on payment of costs. Bronson *v.* Green, Walk. (Mich.) 486.

Irrelevant Amendment.—"When such amendment is made, the court will judge of its relevancy, and if it be impertinent or entirely foreign to the cause it will be ordered to be stricken out." Droullard *v.* Baxter, 2 Ill. 192.

Setting up Statute of Frauds.—In McArtee *v.* Engart, 13 Ill. 242, it was held that the complainant had a clear right after the coming in of the answer to amend his bill by setting up the Statute of Frauds against the new matter introduced by the answer.

To Meet Facts Disclosed by Answer.—After the filing of an answer and a cross-bill the plaintiff should be allowed to file an amended bill to enable him to present his case in the light of the facts disclosed by the answer and cross-bill. Horn *v.* Clements (N. J., 1887), 8 Atl. Rep. 530.

Injunction Bill.—In West *v.* Coke, 1 Murph. (N. Car.) 191, it was held that, after an answer to an injunction bill has been filed, the bill cannot be amended before the hearing.

Before Appearance.—An order to amend the bill obtained before defendant's appearance is regular and valid, although the defendant appears before the amendments are actually prepared. Selden *v.* Vermilya, 4 Sandf. Ch. (N. Y.) 573.

Injunction Bills.—The rule of the *New York* Court of Chancery allowing amendments of course at any time before answer, plea, or demurrer, was held not to apply to verified injunction bills. Parker *v.* Grant, 1 Johns. Ch. (N. Y.) 434.

1. See, for the English Orders in Chancery of Apr. 3, 1828, and Nov. 23, 1831, 1 Daniell Ch. Pr. (1st Am. ed.) 535, 536.

Federal Equity Rules.—*United States* Equity Rule 28 provides for amendments as of course before answer, plea, or demurrer, requiring payment of costs occasioned thereby if the amendment is material, and a copy of the amendments to be furnished to the defendant.

And *United States* Equity Rule 29 provides that, after an answer or plea or demurrer is put in, and before replication, the plaintiff may upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct.

Under this rule the plaintiff is not entitled as of right to amend after a demurrer has been allowed. Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567.

United States Equity Rule 45 declares that "no special replication to any answer shall be filed, but if any matter allowed in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."

In a suit for the infringement of a patent, if the defendant sets up a license, it is proper for the plaintiff to allege by amendment of the bill the abandonment of the license. Wilson *v.* Stolley, 4 McLean (U. S.) 275.

Objection to an amendment because leave was not obtained cannot be made for the first time in the appellate court. Clements *v.* Moore, 6 Wall. (U. S.) 299.

2. Mercantile Nat. Bank *v.* Carpenter. 101 U. S. 567; Hays *v.* Heatherly, 36 W. Va. 613. See also Lyon *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 184; McComas *v.* Minor, Walk. Ch. (Miss.) 513.

This is still the rule in Tennessee. Crowder *v.* Turney, 3 Coldw. (Tenn.) 551, holding, however, that a decree sustaining a demurrer may be vacated during the same term and the plaintiff permitted to amend.

The Old Rule Relaxed.—By virtue of statutory provisions or rules of court or judicial relaxation of the rule, leave to amend is now largely a matter of discretion.[1]

Leave Given on Argument.—It is usual, on allowing a demurrer for any cause which the court sees on the argument may be obviated by amending the bill, to give leave to amend by paying the costs of the demurrer.[2]

Application for Leave.—But if it is not plain that the objection on which the demurrer was sustained can be removed, it is necessary for the complainant to apply for leave to amend by petition setting forth the additional facts sought to be incorporated in the bill.[3]

1. Hiller *v.* Cotton, 48 Miss. 593.

Federal Equity Rule.—*United States* Equity Rule 35 provides that, if upon the hearing any demurrer shall be allowed, "the court may in its discretion upon motion of the plaintiff allow him to amend his bill upon such terms as it shall deem reasonable." See Hunt *v.* Rousmaniere, 2 Mason (U. S.) 342; Dowell *v.* Applegate, 8 Fed. Rep. 698; Riddle *v.* Whitehill, 135 U. S. 627.

If an amendment is refused the action of the court will not be reversed on appeal unless the nature of the proposed amendment appears in the record. U. S. *v.* Atherton, 102 U. S. 375; Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567.

In Alabama the dismissal of a bill on demurrer in vacation, without affording the complainant an opportunity to amend, is error. Stoudenmire *v.* De Bardelaben, 72 Ala. 476; Kingsbury *v.* Milner, 69 Ala. 502; Little *v.* Snedecor, 52 Ala. 167.

In Georgia, after a decree sustaining a general demurrer for want of equity is affirmed by the Supreme Court, the court below may, before entering judgment on the return of the *remittitur*, allow the plaintiff to amend. King *v.* King, 45 Ga. 195.

But the court below may dismiss the bill if the amendment offered still fails to make a case. Thurmond *v.* Clark, 47 Ga. 500; Picquet *v.* Augusta, 64 Ga. 516.

2. Michigan Bank *v.* Niles, Walk. (Mich.) 398; Hunt *v.* Rousmaniere, 2 Mason (U. S.) 342.

In Cotton *v.* Dacey, 61 Fed. Rep. 481, a demurrer to the bill was sustained with leave to amend.

Want of Prayer for Process.—A demurrer for want of prayer for process and of signature of counsel was sustained, with permission to the complainant to amend. Wright *v.* Wright, 8 N. J. Eq. 143.

3. Michigan Bank *v.* Niles, Walk. (Mich.) 398.

In *Tennessee*, where a demurrer to a part of the bill is sustained, leave may be given to amend at a term subsequent to that at which the demurrer was sustained. Lookout Bank *v.* Susong, 90 Tenn. 590.

After Demurrer for Laches.—Where the trial court sustains a demurrer to the complaint on the ground of laches, and enters a decree dismissing the bill, it is error to refuse to set aside such decree and permit an amendment by the plaintiff fully explaining the apparent laches. Cottrell *v.* Watkins, 89 Va. 801.

Demurrer in Class Suit.—After demurrer sustained for want of an allegation that plaintiff, a taxpayer suing to restrain the collection of an illegal tax, filed the bill on behalf of himself and all other taxpayers, the plaintiff was allowed to insert the averment by amendment. Williams *v.* Grant County Ct., 26 W. Va. 488.

Misjoinder of complainant may be cured by amendment after demurrer sustained. Clark *v.* Holbrook, 146 Mass. 366.

Demurrer for Want of Parties.—A demurrer for want of necessary parties being sustained, leave was granted to amend so as to make the proper parties. Frazer *v.* Legare, Bailey Eq. (S. Car.) 389; Barrett *v.* Doughty, 25 N. J. Eq. 379. See also Dwight *v.* Humphreys, 3 McLean (U. S.) 104; Young *v.* Bilderback, 3 N. J. Eq. 206.

Demurrer for Multifariousness.—Where

Review on Appeal.—It is not error to omit to give leave to amend upon sustaining a demurrer, where the record does not disclose that any amendment improving the bill could be made,[1] or show in what particulars the party desired to amend.[2]

Remand with Leave to Amend.—The appellate court, upon reversing a decree overruling a demurrer for want of equity, may remand with leave to complainant to amend.[3]

(3) *After Plea.*—Where the defendant has put in a plea, the plaintiff may obtain leave to amend his bill, and if no order has been obtained setting the plea down for argument, such leave is given as a matter of course.[4] And it is said that such an amend-

a demurrer for multifariousness is sustained, the plaintiff may, if the demurrer goes to only part of the bill, leaving others untouched and maintainable against the defendant, obtain leave to amend by striking out the objectionable parts. McElwee *v.* Massey, 10 Rich. Eq. (S. Car.) 377; Jefferson *v.* Gaines, 7 Baxt. (Tenn.) 368.

Demurrer for Want of Equity.—Where a demurrer going to the whole merits of a bill is sustained for want of equity, it is not the practice to allow amendments which will make a new case with new parties. March *v.* Mayers, 85 Ill. 177. See also Lyon *v.* Tallmadge, 1 Johns. Ch. 184; Seymour *v.* Long Dock Co., 17 N. J. Eq. 172.

Before Entry of Judgment on Demurrer.—*It* is within the discretion of the court to allow an amendment to the bill after having decided to sustain a demurrer thereto, but before the entry sustaining the demurrer has been made of record. Wray *v.* Hazlett, 1 Brewst. (Pa.) 295.

Suspending Judgment on Demurrer.—In Edison Electric Light Co. *v.* Mather Electric Light Co., 53 Fed. Rep. 244, after a demurrer was filed for want of certain essential allegations in the bill, the court, without passing upon the demurrer, allowed the complainant to amend upon payment of defendant's reasonable costs.

Overruling Demurrer.—And in Worth *v.* Gray, 6 Jones Eq. (N. Car.) 4, the court, under special circumstances, overruled a demurrer in order that the plaintiff might amend.

Demurrer to Injunction Bill.—Where a demurrer to a petition under oath for an injunction has been sustained, the plaintiff may amend as in other cases. McDonald *v.* Tirmon, 20 Tex. 245.

Before Final Judgment on Demurrer.—When a demurrer is filed for want of equity, and defendant desires to amend his bill, the motion should be made before final judgment on the demurrer. Holliday *v.* Riordan, 12 Ga. 417. But see McElwee *v.* Massey, 10 Rich. Eq. (S. Car.) 377, and preceding cases in this note.

Laches of Applicant.—In Newburyport Merchants' Bank *v.* Stevenson, 7 Allen (Mass.) 489, the court declined to allow the plaintiff to amend after sustaining a demurrer, the claim having become barred by the statute of limitations, and the plaintiff having been dilatory in prosecuting his suit and also in applying for leave to amend.

1. Pickens *v.* Kniseley, 36 W. Va. 794.

2. U. S. *v.* Atherton, 102 U. S. 375; Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567.

Sua sponte.—It is not the duty of the chancellor of his own motion and without application to allow plaintiff to amend. Alexander *v.* Moye, 38 Miss. 640.

3. Wilburn *v.* McCalley, 63 Ala. 436.

But where a demurrer for want of equity is sustained, the appellate court will not reverse the decree merely to give the plaintiff an opportunity to amend. State Bank *v.* Ellis, 30 Ala. 478.

See also *infra*, "(10) *Remand with Leave to Amend.*"

4. 1 Daniell Ch. Pr. (1st Am. ed.) 524, but, according to the English practice as therein stated, upon the payment to the defendant of twenty shillings costs.

United States Equity Rule 29 provides for the amendment of the bill after plea and before replication, upon motion or petition without notice, with

ment does not have the effect of allowing the plea.[1] After a plea is set down for argument, the plaintiff may have leave to amend his bill.[2] And after the allowance of a plea leave may be given to amend, but not as a matter of course.[3]

(4) *After Replication*—**By Adding Parties.**—If the plaintiff has occasion to amend his bill after replication, merely by adding parties, he may obtain leave to do so as a matter of course.[4] Orders of this nature may be obtained without withdrawing the replication.[5]

In Substance.—But where after replication filed it is intended to amend a bill by the addition of new facts or charges, the proper course is to apply for leave to withdraw the replication and amend.[6]

Excuse Must be Shown.—And the court will not grant leave to withdraw the replication for the purpose of amending the bill unless the plaintiff shows the materiality of the amendments, and why the matter to be introduced was not stated before.[7]

(5) *After Witnesses Examined.*—After witnesses have been examined the court will not, unless under very special circumstances, or in consequence of some subsequent event, allow the bill to be altered or amended.[8]

or without costs in the discretion of the court.

After the statute of limitations has been pleaded, the plaintiff may be allowed to amend his bill so as to avoid the plea. Wharton *v.* Lowrey, 2 Dall. (U. S.) 364.

1. Story Eq. Pl. (10th ed.) § 891.

2. 1 Daniell Ch. Pr. (1st Am. ed.) 525. See also Cook *v.* Mancius, 3 Johns. Ch. (N. Y.) 427.

3. 1 Daniell Ch. Pr. (1st Am. ed.) 525.

United States Equity Rule 35 provides that, if upon the hearing a plea is allowed, the court may in its discretion allow the plaintiff to amend upon such terms as it shall deem reasonable.

4. 1 Daniell Ch. Pr. (1st Am. ed.) 544.

5. 1 Daniell Ch. Pr. (1st Am. ed.) 544; Brattle *v.* Waterman, 4 Sim. 125; Andree *v.* ———, 2 Dick. 768.

6. 1 Daniell Ch. Pr. (1st Am. ed.) 545; Thorn *v.* Germand, 4 Johns. Ch. (N. Y.) 363.

The rule requiring the replication to be withdrawn before amendment of the bill can be allowed, relates only to material amendments. Moshier *v.* Knox College, 32 Ill. 155.

7. Brown *v.* Ricketts, 2 Johns. Ch. (N. Y.) 425; Dougherty *v.* Murphy, 10 Phila. (Pa.) 509; Molyneaux *v.* Collier, 13 Ga. 406; Longman *v.* Calliford, 3 Anstr. 807.

Federal Equity Rules.—*United States* Equity Rule 29 provides that, "after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause."

There is a similar rule of court in *Pennsylvania*. See Dougherty *v.* Murphy, 10 Phila. (Pa.) 509, where an amendment was refused for want of a sufficient showing of diligence.

Where an amendment was proposed and allowed in open court in the presence of the parties, it is to be presumed, as against a subsequent objection to the amendment, that it was allowed upon a sufficient compliance with the rule. Mills *v.* Scott, 43 Fed. Rep. 452.

Leave may be denied on the ground of laches in making the application. Jones *v.* Welling, 16 Fed. Rep. 655; Vertner *v.* Griffith, Walk. Ch. (Miss.) 414; Marr *v.* Wilson, 2 Lea (Tenn.) 231.

8. Story Eq. Pl. (10th ed.) § 887; 1

An exception to the rule has been admitted in the case of the plaintiff's discovering the necessity of new parties, which he may add at any time, by leave of the court, limiting his amendment to that purpose.[1]

Sometimes leave has been given at this stage of the case to amend the prayer of the bill under particular circumstances; as where the prayer has been omitted by mistake, or the prayer for the proper relief has not been made;[2] and, indeed, if no witness has been examined, an amendment has been permitted even after publication has passed.[3]

(6) *After Reference or Master's Report.*—An amendment may be made after a reference to a master and before his report;[4] also, upon proper cause shown, after the master's report.[5] But if the amendment raises new issues the defendant is entitled to a new hearing.[6]

Daniell Ch. Pr. (1st Am. ed.) 545; Thorn *v.* Germand, 4 Johns. Ch. (N. Y.) 363; Shephard *v.* Merril, 3 Johns. Ch. (N. Y.) 423; Dougherty *v.* Murphy, 10 Phila. (Pa.) 509; Evans *v.* Rolling, 5 Ala. 550; Jones *v.* Welling, 16 Fed. Rep. 655; Ross *v.* Carpenter, 6 McLean (U. S.) 382; Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371. See also Steinriede *v.* Tegge (Ky., 1890), 14 S. W. Rep. 357; Dodd *v.* Astor, 1 Barb. Ch. (N. Y.) 395; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Barton *v.* Long (N. J., 1888), 14 Atl. Rep. 566; Pinkston *v.* Taliaferro, 9 Ala. 547; Dana *v.* Valentine, 5 Met. (Mass.) 8; Hammond *v.* Place, Harr. (Mich.) 438.

After a cause has gone to the jury, the bill may be amended by the addition of copies of exhibits. Brown *v.* Redwyne, 16 Ga. 67.

1. Story Eq. Pl. (10th ed.) § 887.

Laches of Plaintiff.—A motion to amend a bill by adding new parties defendant after replication filed and the production of evidence was not allowed where it appeared that the plaintiff was in a position to make the amendment before replication. Clifford *v.* Coleman, 13 Blatchf. (U. S.) 210.

2. Story Eq. Pl. (10th ed.) § 887.

The bill may be amended after witnesses are examined where the substantial allegations are not changed. Baggot *v.* Eagleson, Hoff. Ch. (N. Y.) 377.

3. Story Eq. Pl. (10th ed.) § 887.

4. Hoyt *v.* Smith, 27 Conn. 468, where the facts were within the knowledge of the defendant, but were not disclosed until the hearing before the master.

Making a New Case.—But an amendment making a new case will not be allowed. Hazard *v.* Hidden, 14 R. I. 356.

Laches of Applicant.—When a master has finished the hearing of an intervener's claim for personal injuries and is preparing his report, an amendment setting up a distinct ground of negligence as a basis of recovery will not be allowed. Clyde *v.* Richmond, etc., R. Co., 59 Fed. Rep. 394.

5. Camp *v.* Waring, 25 Conn. 520; Drew *v.* Beard, 107 Mass. 64; Nellis *v.* Pennock Mfg. Co., 38 Fed. Rep. 379; Bailey *v.* Stiles, 3 N. J. Eq. 245.

Increasing Claim.—When the finding of the master is equivocal as to allowance of interest, the plaintiff will not be allowed more than he claimed by his bill, nor in such a case will he be allowed to amend his bill in that respect. Robinson *v.* Missisquoi R. Co., 59 Vt. 426.

Bill for Divorce.—A libel for divorce cannot be amended after the examiner's report has been filed. Pierie *v.* Pierie, 7 Phila. (Pa.) 405.

6. Camp *v.* Waring, 25 Conn. 520; Drew *v.* Beard, 107 Mass. 64.

Jury Trial after Amendment.—After all the issues between the parties had been submitted to an auditor, and report had been made and exceptions filed and overruled, one of the parties could not then amend his pleadings and carry the case to a jury on its merits. Bryant *v.* Welch, 68 Ga. 292.

(7) *At the Hearing*—**In Respect of Parties.**—If at the hearing the record appears to be defective for want of proper parties, the court will order the cause to stand over for the plaintiff to amend the bill by adding parties,[1] or, where the parties are too numerous to be brought before the court, to alter the form of the bill by making it a bill by the plaintiffs on behalf of themselves and all others of the same class.[2]

Amending Prayer.—And the court will sometimes at the hearing permit the prayer of the bill to be amended so as to make it more consistent with the case made by the plaintiff than the one he has already introduced.[3]

Perfecting Allegations.—Where a matter has not been put in issue with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration.[4]

1. 1 Daniell Ch. Pr. (6th Am. ed.) 417; Thomas *v.* Gain, 35 Mich. 155, 24 Am. Rep. 535; Folkerts *v.* Power, 42 Mich. 283; House *v.* Dexter, 9 Mich. 246; McDougald *v.* Dougherty, 11 Ga. 570; Roddy *v.* Elam, 12 Rich. Eq. (S. Car.) 343; Henry *v.* Brown, 8 N. J. Eq. 245; Elmer *v.* Loper, 25 N. J. Eq. 475; Perkins *v.* Hays, Cooke (Tenn.) 189.

This practice is not confined to amendment by adding parties; it will be extended to permit the plaintiff to show why he cannot bring the necessary parties before the court. Milligan *v.* Mitchell, 1 Myl. & C. 515; Gibson *v.* Ingo, 5 Hare 156.

2. 1 Daniell Ch. Pr. (6th Am. ed.) 417.

Creditors' Bill.—It is familiar practice to allow a creditor suing for his own debt only to amend at the hearing by converting his bill into one on behalf of himself and all other creditors. McDougald *v.* Dougherty, 11 Ga. 570; Richmond *v.* Irons, 121 U. S. 46; Milligan *v.* Mitchell, 1 Myl. & C. 433; Hichens *v.* Congreve, 4 Russ. 562; Atty. Gen. *v.* Newcombe, 14 Ves. Jr. 1.

Misnomer of Parties may be cured by amendment at the hearing. Hoboken Bldg. Ass'n *v.* Martin, 13 N. J. Eq. 427.

3. Hardin *v.* Boyd, 113 U. S. 756; Graffam *v.* Burgess, 117 U. S. 180; Codington *v.* Mott, 14 N. J. Eq. 431, 82 Am. Dec. 258; Morrison *v.* Mayer, 63 Mich. 238; Clifton *v.* Haig, 4 Desaus. (S. Car.) 330; Harding *v.* Cox, 3 Atk. 583.

Showing of Diligence.—In Jones *v.* Wadsworth, 11 Phila. (Pa.) 239, an amendment to the bill by adding a prayer for an account was not allowed after the hearing on bill, answer, and proofs; but the rule of that court required diligence, which was not shown in that case.

Foreclosure and Accounting.—A bill for the foreclosure of void securities may be so amended after hearing as to ask for an accounting of the debt. Burton *v.* Schildbach, 45 Mich. 504.

4. 1 Daniell Ch. Pr. (6th ed.) 418; Bryant *v.* Peters, 3 Ala. 160; Graffam *v.* Burgess, 117 U. S. 180; Downer *v.* O'Donnell, 92 Ill. 559.

Averment of Foreign Statute.—Where, in an action by a receiver for a corporation to set aside a mortgage, a foreign statute prohibiting such transfers was imperfectly pleaded in the bill, the complainant was allowed during the trial to amend his bill by properly pleading such statute so as to render it admissible in evidence. Boehme *v.* Rall (N. J., 1893), 26 Atl. Rep. 832.

A Formal Charge of Fraud may be added at the hearing. Wamburzee *v.* Kennedy, 4 Desaus. (S. Car.) 480.

Formal Offer to Pay.—A bill to redeem may be amended at the hearing by adding a formal offer to pay such sum as shall be found due. Green *v.* Tanner, 8 Met. (Mass.) 411.

On Argument before Full Court.—A substantial averment in a bill may properly be made more specific, even after argument before the full court, where no objection was made at the hearing. Blanchard *v.* Cooke, 147 Mass. 223.

To Conform to Proof.—Where, upon the hearing, it appears clearly from the evidence that the plaintiff has a case which entitles him to relief, but which by reason of some defect or omission in the charges or allegations of the bill is not brought fairly within the issue, he will be permitted to adapt the allegations of the bill to the case as proved;[1] especially where the facts were known to the

Averment of Levy.—A judgment creditor's bill to set aside a deed as in fraud of his rights under the execution did not aver that the sheriff had levied on the land before the bill was filed. The bill was not demurred to, however, and testimony was taken on the whole issue. It was held proper to allow the bill to be amended at the hearing. Smith *v.* Sherman, 52 Mich. 637.

Objection for Want of Equity.—Where an objection is taken at the hearing, that the petition is substantially wanting in equity, the court may grant leave to amend it. Kriechbaum *v.* Bridges, 1 Iowa 14.

After Cause Submitted.—The court may allow an amendment of the bill after replication filed and cause submitted on the evidence. Mason *v.* Bair, 33 Ill. 194.

Limitation of Power.—"The power of the court to order an amendment even on the final hearing is unquestionable, but it is a power never exercised except where the ends of justice render it absolutely necessary, and its exercise will not substantially impair or prejudice the rights of the defendant." Ogden *v.* Thornton, 30 N. J. Eq. 569.

After Submission on Bill and Answer.—In Flinn *v.* Flinn, 4 Del. Ch. 44, an amendment of the bill was permitted after the case had been submitted upon bill and answer and held under advisement for several months. See also Jefferson County *v.* Ferguson, 13 Ill. 33.

1. *Massachusetts.*—Bernard *v.* Toplitz, 160 Mass. 162.

Wisconsin.—Fery *v.* Pfeiffer, 18 Wis. 510; Winslow *v.* Crowell, 32 Wis. 662; Brayton *v.* Jones, 5 Wis. 117; District No. 3 *v.* MacLoon, 4 Wis. 79.

Missouri.—Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261.

Michigan.—Gorham *v.* Wing, 10 Mich. 486; Goodenow *v.* Curtis, 18 Mich. 298; Church *v.* Holcomb, 45 Mich. 29.

California.—Connalley *v.* Peck, 3 Cal. 75.

New Hampshire.—Clark *v.* Keene's First Congregational Soc., 46 N. H. 272; Bellows *v.* Stone, 14 N. H. 175.

United States.—Graffam *v.* Burgess, 117 U. S. 180; Neale *v.* Neale, 9 Wall. (U. S.) 1; Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276.

New Jersey.—Hampton *v.* Nicholson, 23 N. J. Eq. 423; Henry *v.* Brown, 8 N. J. Eq. 245; Armstrong *v.* Ross, 20 N. J. Eq. 109; Ledos *v.* Cupfrian, 28 N. J. Eq. 162; Van Riper *v.* Claxton, 9 N. J. Eq. 302.

West Virginia.—Doonan *v.* Glynn, 26 W. Va. 225; Lamb *v.* Cecil, 25 W. Va. 288.

Illinois.—American Bible Soc. *v.* Price, 115 Ill. 623; Booth *v.* Wiley, 102 Ill. 84; Wise *v.* Twiss, 54 Ill. 301; Moshier *v.* Knox College, 32 Ill. 155; Hewitt *v.* Dement, 57 Ill. 500.

See also Hardin *v.* Boyd, 113 U. S. 756; The Tremolo Patent, 23 Wall. (U. S.) 518; Harrigan *v.* Bacon, 57 Vt. 644; Ogden *v.* Thornton, 30 N. J. Eq. 569; Doe *v.* Doe, 37 N. H. 268.

In Dodson *v.* McKelvey, 93 Mich. 263, the court allowed an amendment to a bill filed by a ward, against the executor of her deceased guardian to recover funds alleged to be in the executor's hands and to belong to the ward, so as to cover the case made by the proofs and to charge the estate for money lost to the ward by the neglect of the guardian to enforce its collection.

After Case Reserved.—Where a case was tried as if the allegations proposed by the amendment were contained in the original bill, the amendment should be allowed after hearing and case reserved for the full court. Byers *v.* Franklin Coal Co., 106 Mass. 131.

To Conform to Theory of Trial.—The assignee of a patent in an action against an alleged infringer may have leave to amend before the signing of an interlocutory decree so as to include assigned claims for damages and profits which were due to mesne assignors, the bill having been filed, answered, and tried upon the theory that a re-

defendant, but were not disclosed in the answer or discovered by covery upon the assigned claims was sought. New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co., 20 Fed. Rep. 505.

To Cure a Variance.—Under the *Mississippi* Code, providing that amendments shall be allowed in the pleadings and proceedings on liberal terms to prevent delay and injustice, it was held error to refuse leave to complainant to amend his bill after argument and final hearing to cure a variance between his allegations and proof, the variance being first disclosed by a deposition of a witness which was filed less than a week before the court convened. Jeffries *v.* Jeffries, 66 Miss. 216.

To Conform to Contract Proved.—A bill was directed to be amended after a final hearing so as to make the contract alleged agree with that proved in a bill for specific performance. Davison *v.* Davison, 13 N. J. Eq. 246. See also Lanning *v.* Heath, 25 N. J. Eq. 425.

Amendment of Verified Bill.—The fact that the bill is verified does not necessarily deprive the complainant of the benefit of an amendment, Marble *v.* Bonhotel, 35 Ill. 240; especially where the law did not require the bill to be verified, Gordon *v.* Reynolds, 114 Ill. 118.

Continuance.—No continuance is necessary unless the amendment essentially changes the case made by the bill. Martin *v.* Eversal, 36 Ill. 222.

To Meet Allegations in Answer.—Amendments to a bill to meet matters set up in the answer may be allowed at or even after a hearing on the pleadings and proofs. Munch *v.* Shabel, 37 Mich. 166; Delaware, etc., Canal, etc., R. Co. *v.* Raritan, etc., R. Co., 14 N. J. Eq. 445.

In Battle *v.* Mutual L. Ins. Co., 10 Blatchf. (U. S.) 417, it was held that although some testimony on the part of the plaintiff might be in conflict with the amendment yet, as the amendment harmonized with the allegations of the answer, and such testimony was not testimony sustaining those allegations, the point in the objection was immaterial.

Where the complainant in a foreclosure bill held subsequent mortgages not referred to in his bill, and the answer of a defendant, brought in as a subsequent incumbrancer, referred to such intervening mortgages, and based asserted equities upon their existence, it was held competent to permit the plaintiff to amend his bill at the hearing so as to make it allege the facts as to those mortgages. Slater *v.* Breese, 36 Mich. 77, where it was said that the allowance of amendments at the hearing is more a question of terms than of power, if the amendment is germane to the controversy.

Where Evidence is Defective.—Where the object of the bill does not commend it to the favorable consideration of the court, and the proof does not convince the court that the plaintiff is entitled to relief, the amendment will not be allowed. Midmer *v.* Midmer, 26 N. J. Eq. 299.

The amendment should not be allowed if after the amendment the case will be defective on the proofs. Church *v.* Holcomb, 45 Mich. 29; Curtis *v.* Goodenow, 24 Mich. 18.

Laches.—If the defendant's plea or answer has admonished the plaintiff of the necessity of amending his bill, he should apply promptly, and he will not be allowed to amend at the hearing. Hopkins *v.* Hopkins, 4 Strobh. Eq. (S. Car.) 207, 53 Am. Dec. 663; Wilbur *v.* Collier, Clarke Ch. (N. Y.) 315.

In Alabama.—The *Alabama* Code, § 3356, expressly authorizes amendments at any time before final decree, "to meet any state of the evidence which will authorize relief." Collins *v.* Stix, 96 Ala. 338; Lee *v.* Lee, 67 Ala. 406; Olds *v.* Marshall, 93 Ala. 138; Conner *v.* Smith, 74 Ala. 115; Prickett *v.* Sibert, 75 Ala. 315; Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488.

It is not error to refuse leave to amend where the relief claimed rests on the unsupported testimony of the plaintiff, whose testimony is based upon a paper title which he does not produce, and for the non-production of which he does not account. Alexander *v.* Taylor, 56 Ala. 60. See also Wright *v.* Dunklin, 83 Ala. 317.

It is sufficient if the evidence for the plaintiff makes out a *prima-facie* case. Gilmer *v.* Wallace, 75 Ala. 220.

It is permissible to change the averments of the bill as to the defendant's title to the property which the

the plaintiff until after the production of the evidence.[1] Such amendments are commonly made only after the testimony has been taken, and there is a decided objection to the allowance of amendments which vary the allegations according to the real or supposed exigency of the case while the taking of evidence is in progress.[2]

Making a New Case.—But the plaintiff cannot be permitted to amend at the hearing by making a new case totally inconsistent with that made by the bill as originally framed.[3]

(8) *After Decree.*—An amendment may be made even after a final decree where the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment.[4]

bill seeks to subject. Jones *v.* Reese, 65 Ala. 134.

The amendment will be allowed unless it makes an entirely new case. Pitts *v.* Powledge, 56 Ala. 147.

The right must be claimed before final decree. Winter *v.* Merrick, 69 Ala. 86; Smith *v.* Coleman, 59 Ala. 260, holding that the right to amend is confined to the evidence already taken. On which point see also Beatty *v.* Brown, 85 Ala. 209.

It is not error to pronounce a decree in vacation without granting leave to amend unless the decree is based on some amendable defect. Wright *v.* Dunklin, 83 Ala. 317.

1. Wilson *v.* Brown, 13 N. J. Eq. 280, where the plaintiff, under the circumstances stated, was permitted to amend without costs. Perea *v.* Gallegos, 4 N. Mex. 333; Howell *v.* Sebring, 14 N. J. Eq. 84; Morrison *v.* Mayer, 63 Mich. 238. See also Jeffries *v.* Jeffries, 66 Miss. 216; Briggs *v.* Briggs, 20 Mich. 34.

2. Seymour *v.* Long Dock Co., 17 N. J. Eq. 169. See also Andrews *v.* Halliday, 63 Ill. 263.

Whether an amendment of a bill at the hearing can be allowed when the amendment consists of facts that falsify material facts originally stated, *quære.* Thornton *v.* Ogden, 32 N. J. Eq. 723.

3. Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258; Platt *v.* Squire, 5 Cush. (Mass.) 551; Commerce Nat. Bank *v.* Smith (R. I., 1892), 24 Atl. Rep. 469; Livingston *v.* Hayes, 43 Mich. 129.

A bill was dismissed without prejudice where an amendment proposed after the hearing could not justly be allowed except upon terms equivalent to compelling the plaintiff to file a new bill. Whelan *v.* Sullivan, 102Mass. 204.

4. The Tremolo Patent, 23 Wall. (U. S.) 518. In that case the plaintiff filed a bill to restrain the infringement of a patent, and after final decree he was permitted to amend by setting up a reissue of the patent which had not been set out in the original bill, contrary, however, to the supposition of both parties through the whole progress of the trial. The court conceded that the case was anomalous, but declared that the amendment might "well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried." See Claflin *v.* Bennett, 51 Fed. Rep. 693.

Amendment and Decree on Same Day.—Under the *Alabama* Code authorizing an amendment at any time before final decree, if an amendment was filed and decree entered the same day, it does not appear that the amendment was filed before rendition of the decree, and its disallowance is not error. Beatty *v.* Brown, 85 Ala. 209.

Amendment Requiring New Proof.—After a final decree settling the equities, the court will refuse to allow an amendment which will authorize the introduction of proof or effect a different result. Munter *v.* Linn, 61 Ala. 492.

Clerical Error.—A mere clerical error in a bill may be amended after final decree. Donnelly *v.* Ewart, 3 Rich. Eq. (S. Car.) 18.

After Decree Nisi.—An amended bill may be filed after decree *nisi.* Lytel *v.* Breckinridge, 3 J. J. Marsh. (Ky.) 658, 667.

(9) *In Appellate Court.*—In appellate courts of last resort amendments are not usually allowed,[1] but the practice is to remand to the court below for that purpose if necessary.[2]

(10) *Remand with Leave to Amend.*—The appellate court, in reversing a decision overruling a demurrer, will remand for amendment unless the defect is incurable;[3] also where the court reverses a decree and it appears that additional allegations and proof, with the proof already taken, would entitle the complainant to relief upon the original cause of action.[4] And upon reversing a decree

1. Michigan Bank *v.* Niles, Walk. (Mich.) 398; Arendell *v.* Blackwell, 1 Dev. Eq. (N. Car.) 358; Williams *v.* Chambers, 1 Busb. Eq. (N. Car.) 75. See, however, Grant *v.* Ludlow, 8 Ohio St. 1; Thompson *v.* McCulloch, 18 Ga. 527.

In United States Supreme Court.—Amendments of pleadings will not be made in cases appealed to the *United States* Supreme Court except by consent of the parties. Kennedy *v.* Georgia State Bank, 8 How. (U. S.) 586; Johnson *v.* Christian, 125 U. S. 642; Pacific R. Co. *v.* Ketchum, 95 U. S. 1. See also Garland *v.* Davis, 4 How. (U. S.) 131.

In United States Circuit Court.—On appeal in equity from the District Court of the *United States* the Circuit Court can permit an amendment of substance. Warren *v.* Moody, 9 Fed. Rep. 673. See also Anonymous. Gall. (U. S.) 22.

Adding Parties.—In Hooper *v.* Royster, 1 Munf. (Va.) 119, on an appeal from an interlocutory decree, it was held that, if proper parties to the suit are wanting, the Court of Appeals will not leave it to the chancellor, but will itself direct such parties to be made.

Merely formal parties complainant, who might have been added on the hearing in the court below, may be considered as added in the Supreme Court where the decree is already so drawn as to give the added party all the relief he could have gained had he been a party from the beginning. Edinger *v.* Heiser, 62 Mich. 598.

In New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507, it was held that new parties cannot be brought in by amendment on appeal.

In *Pennsylvania* it seems that the bill may be amended in the Supreme Court. Darlington's Appeal, 86 Pa. St. 512.

2. See the next paragraph.

3. Wilburn *v.* McCalley, 63 Ala. 436; Smith *v.* Conner, 65 Ala. 371. See also Jones *v.* Latham, 70 Ala. 164.

Reversal of Decree upon Sustaining Demurrer.—Where, as the result of the application of the statute of limitations or the doctrine of laches, the lower court sustained a demurrer and dismissed the bill, and the appellate court reversed the decree, the cause was remanded with directions to allow complainant to amend, he having applied for leave before the appeal was taken. Riddle *v.* Whitehill, 135 U. S. 627.

4. Fenno *v.* Coulter, 14 Ark. 38; Lamb *v.* Laughlin, 25 W. Va. 300; Lane *v.* Lane, 87 Ga. 268; Barrett *v.* Sargeant, 18 Vt. 365; Lewis *v.* Darling, 16 How. (U. S.) 1; Eckford *v.* Halbert, 30 Miss. 273; Campion *v.* Kille, 15 N. J. Eq. 476. See also Church *v.* Holcomb, 45 Mich. 29.

Where the court affirms the decree it will not give the complainant leave to amend, unless the amendment would make a case for relief beyond all reasonable doubt: nor even then if there has been apparently needless delay in bringing the suit. Branch *v.* Knapp, 61 Ga. 616; Picquet *v.* Augusta, 64 Ga. 516.

Remanding without Judgment.—The appellate court may decline to render judgment of reversal in a meritorious case, but may remand for amendment, leaving the whole controversy open in the meantime. Trippe *v.* Winter, 83 Ga. 359.

Defects in Substance.—In Williams *v.* Chambers, 1 Busb. (N. Car.) 75, it was said that, when the bill is defective in substance, the appellate court will not, except under peculiar circumstances, remand the cause for the purpose of amendment in the court below. See also Bier *v.* Smith, 25 W. Va. 830.

Costs.—When the record is remanded with leave to amend, the complainant

for the complainant on account of want of proper parties, it is the common practice to remand with leave to amend.[1]

The case will not be remanded in order that a bill may be amended, when the amendment would make a different case from that stated in the bill.[2]

(11) *After Remand from Appellate Court.*—When a case is sent back to the court below reversed, it stands substantially as it did before trial, and the power of that court is as full and unrestricted as it was before the case was tried,[3] except that it is concluded by the legal principles announced by the appellate court.[4]

can be placed in no better position as to costs than if the bill had been dismissed without prejudice. Church *v.* Holcomb, 45 Mich. 29; Fenno *v.* Coulter, 14 Ark. 38.

1. Parberry *v.* Goram, 3 Bibb (Ky.) 107; Hoofman *v.* Marshall, 1 J. J. Marsh. (Ky.) 64; Sillings *v.* Bumgardner, 9 Gratt. (Va.) 273; Palmer *v.* Rich, 12 Mich. 414; Lewis *v.* Darling, 16 How. (U. S.) 1; Arendell *v.* Blackwell, 1 Dev. Eq. (N. Car.) 358. See *supra*, 2, *a*.

To Allow Plaintiff to Take Out Letters of Administration. — In Bradford *v.* Felder, 2 McCord Eq. (S. Car.) 168, the cause was remanded upon reversal so as to allow the plaintiff to take out administration and amend so as to sue as administrator.

2. Crabb *v.* Thomas, 25 Ala. 212; Williams *v.* Barnes, 28 Ala. 613; Squire *v.* Hewlett, 141 Mass. 597; Cook *v.* Bronaugh, 13 Ark. 183; Fenno *v.* Coulter, 14 Ark. 38.

Neglect to Apply in Lower Court.—Where a demurrer is sustained on account of the statute of limitations appearing to constitute a bar on the face of the bill, if the complainant does not ask for leave to amend by correcting a clerical error in the statement of a fact, the appellate court will not remand for the purpose of amendment. Arisley *v.* King, 35 Ala. 278. See also State Bank *v.* Ellis, 30 Ala. 478.

Excuse for Not Applying.—Where a decree dismissing a bill on demurrer is rendered in vacation without giving the plaintiff an opportunity to apply to amend, the appellate court will reverse with leave to amend. Kingsbury *v.* Milner, 69 Ala. 502.

3. Fenno *v.* Coulter, 14 Ark. 38; Chickering *v.* Failes, 29 Ill. 294; Hanserd *v.* Gray, 46 Miss. 75, allowing an amendment of the answer; Wailes *v.* Johnson, 25 Miss. 422.

Reversal for Mere Irregularity.—When a final decree is free from error, but the case is reversed and remanded because without the consent of the parties the chancellor affirmed the report of the register in vacation, the court below at a subsequent term has no authority to amend the decree on the merits, or to allow an amendment which seeks to accomplish such result. Smith *v.* Coleman, 59 Ala. 260.

Quære.—Whether the court below can allow an amendment after a judgment of reversal and remand, "that a decree may be rendered in conformity with" its opinion, was made a query in Lanier *v.* Hill, 30 Ala. 111.

After General Demurrer Sustained.—In King *v.* King, 45 Ga. 195, an amendment of the bill was allowed after a general demurrer for want of equity had been sustained and affirmed by the Supreme Court. But the imperative language of the *Georgia* statute allowed an amendment at any stage of the case, and the court with some reluctance followed prior decisions.

4. Fenno *v.* Coulter, 14 Ark. 38; Chickering *v.* Failes, 29 Ill. 294; Hannum *v.* Cameron, 12 Smed. & M. (Miss.) 509.

Questioning Right Already Adjudicated.—An amended answer which questions the right of a party as heir, when that right has been adjudicated and recognized in the appellate court, cannot be allowed. Hennings *v.* Conner, 4 Bibb (Ky.) 298.

Repeating Charges Decided Adversely.—To repeat by amendment a charge of fraud already adjudicated by a former ruling of the appellate court in the same case is "idle and unprofitable." Lowry *v.* Davenport, 80 Ga. 742.

Denying Recognized Facts. — The plaintiff should not be allowed to amend so as to dispute the facts upon

Furthermore, the allowance of amendments is discretionary as in the former proceeding.[1]

d. EFFECT OF AMENDMENT—(1) *Right of Defendant to Plead Anew.*—An amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer making an entirely new defense and contradicting his former answer.[2] And after an amendment of a bill in a material matter the defendant may plead,[3] answer,[4] or de-

which he obtained a decision favorable to his interests. Lombard *v.* Chicago Sinai Cong., 75 Ill. 271.

1. **Insufficient Amendment.**—If the amendment offered still fails to make a case, the lower court may refuse to allow it, and may dismiss the bill. Thurmond *v.* Clark, 47 Ga. 500.

Strong Showing Required.—In Adams County *v.* Burlington, etc., R. Co., 55 Iowa 94, 44 Iowa 335, it was said that the tendering of a new issue by amendment should be allowed only upon such a showing of accident, mistake, etc., as would entitle the party to a new trial in an action at law. See also Picquet *v.* Augusta, 64 Ga. 516.

Contradicting Admissions in Answer.—Where a party in his answer under oath admits a material allegation of the complaint, and a new trial is granted by the Supreme Court, the defendant should not be allowed on the return of the case to the court below to amend his answer by changing the admission into a denial. Spanagel *v.* Reay, 47 Cal. 608.

2. 1 Daniell Ch. Pr. (6th Am. ed.) 409; Burney *v.* Ball, 24 Ga. 505; Trust, etc., Ins. Co. *v.* Jenkins, 8 Paige (N. Y.) 589; Richardson *v.* Richardson, 5 Paige (N. Y.) 58; Dillon *v.* Davis, 3 Tenn. Ch. 386; Miller *v.* Whittaker, 33 Ill. 386; Furman *v.* North, 4 Baxt. (Tenn.) 296; Davis *v.* Davis, 62 Miss. 818.

As to the right to amend the answer where the bill is amended in compliance with an order made at the hearing that the cause stand over for the purpose of adding new parties, see Hutchinson *v.* Reed, Hoff. Ch. (N. Y.) 316, where the question received much consideration.

Evidence Previously Taken. — An amended bill as to defendants brought before the court for the first time is in effect an original bill, and no depositions previously taken will be permitted to be read against them at the hearing unless by consent. State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111.

3. Where the complainant amends his bill after a plea to the same has been disallowed, the defendant may put in a new plea to the amended bill. American Bible Soc. *v.* Hague, 10 Paige (N. Y.) 549.

4. **Amendment of Bill of Discovery.**—Where a bill for discovery is so amended as to make it a bill for discovery and relief, it entitles the defendant to amend his answer. Perkins *v.* Hendryx, 31 Fed. Rep. 522.

Objections to First Answer.—Objections to an answer to a bill as it stood before amendment cannot be made after amendment unless the defendant, after being duly called upon to file his answer to the bill as amended or voluntarily waiving such call, chooses to let it stand as an answer to the amended bill. Angel *v.* Pennsylvania R. Co., 37 N. J. Eq. 92; Trust, etc., Ins. Co. *v.* Jenkins, 8 Paige (N. Y.) 589.

Answer to Amendment.—Where a plea had been filed to an original bill, and the complainant amended his bill, and defendant answered only the amendment, it was held that the plea was superseded by the amended bill, and a motion to take it from the files for irregularity was denied, the proper motion being to take the amendment from the files. The defendant should have demurred or put in a plea or answer to the amended bill. Answer to the amendment alone would have been proper if he had previously answered the original bill. Peck *v.* Burgess, Walk. (Mich.) 485.

Amendment Making Parties. — An amended bill merely making proper parties does not give the defendant the right to file an answer to the amended bill, the amendment not affecting him. Oldham *v.* Rowan, 4 Bibb (Ky.) 544.

Answer Containing No Defense.—The court may in its discretion refuse leave

mur[1] to the same as if it were an original bill no matter what may have been the state of the pleadings before the amendment was made,[2] and he is entitled to a reasonable time for that purpose.[3]

An amendment of the bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which the original bill was open,[4] unless the nature of the case made by the bill has been changed by the amendment.[5]

(2) *Retroactive Effect*—**Original and Amendment One Record.**—The rule is general in a court of equity that an original and an amended bill are to be regarded as an entire bill, constituting in fact but one record.[6] So far as the equity of the bill is involved, the amended

to file an answer which contains no defense to the matter presented by the amendment. Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 289.

Federal Equity Rule.—*United States* Equity Rule 46 provides that, "In any case where an amendment shall be made after answer filed, the defendant shall put in a new answer or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the term is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer."

Matter in New Answer.—A new answer should not contain matter which was pleaded in the first answer. Gier *v.* Gregg, 4 McLean (U. S.) 202; Fisher *v.* Tribby, 5 Ill. App. 335.

1. **New Demurrer.**—To an amended bill the defendant has a right to interpose a new demurrer notwithstanding a previous demurrer to the original bill has been overruled. Bowes *v.* Hoeg, 15 Fla. 403.

Demurrer After Plea.—By amending the bill to which a plea has been filed the validity of the plea is admitted; but such amended bill stands in the place of a new one, and the plea is no answer to it, being superseded by the amended bill, to which the defendant has the same time to plead, answer, or demur as to the original bill. If the defendant chooses to demur to such amended bill, the case stands as if no plea had been field. Tompkins *v.* Hollister, 60 Mich. 470.

2. Davis *v.* Davis, 62 Miss. 818; Dillon *v.* Davis, 3 Tenn. Ch. 386; Christmas *v.* Mitchell, 3 Ired. Eq. (N. Car.) 535; Bancroft *v.* Wardour, 2 Bro. C. C. 66; Bosanquet *v.* Marsham, 4 Sim. 573; Cresy *v.* Bevan, 13 Sim. 354.

3. Davis *v.* Davis, 62 Miss. 818, holding that one hour and three-quarters is not a reasonable time.

Court May Prescribe Time.—Where no decree is prayed against a new party brought in by amendment, it is not requisite to extend to such party the time allowed to an original defendant for the purpose of filing an answer; and it is competent for the court to prescribe the time in which an original defendant shall answer an amendment. McDougald *v.* Dougherty, 14 Ga. 674. See Hoxey *v.* Carey, 12 Ga. 534.

After Time Has Expired.—When the time has expired for answering an amendment to a bill the case may be noticed for hearing. Munch *v.* Shabel, 37 Mich. 166.

Rule to Answer. — After the submission of a case for hearing upon the pleadings and proof, if the court allows amendments asking relief not before sought, it is error to proceed to a hearing against defendant's protest and enter a decree embracing the new matters without first laying a rule upon the defendant to answer. Gage *v.* Brown, 125 Ill. 522. *Compare* Gregg *v.* Brower, 67 Ill. 525.

4. 1 Daniell Ch. Pr. (6th Am. ed.) 409; Hardie *v.* Bulger, 66 Miss. 577.

5. 1 Daniell Ch. Pr. (6th Am. ed.) 409; Cresy *v.* Bevan, 13 Sim. 354.

6. Adams *v.* Phillips, 75 Ala. 461; Taunton *v.* McInnish, 46 Ala. 619; Morrow *v.* Fossick, 3 Lea (Tenn.) 131; Wilson *v.* Beadle, 2 Head (Tenn.) 510, 512; Browne *v.* Browne, 17 Fla. 607;

bill has relation to the commencement of the suit by the filing of the original bill.[1]

Statute of Limitations Suspended.—If the amendment does not introduce a new cause of action or entirely new parties, the statute of limitations will constitute no defense unless it would have been a defense to the original bill.[2]

Effect on Injunction.—Where a bill as amended states good ground for an injunction, the insufficiency of the original bill to sustain an injunction is immaterial.[3]

Discharging Contempt Proceedings.—As a general rule an amendment of a bill has the effect to destroy prior proceedings for a contempt.[4]

Carey *v.* Hillhouse, 5 Ga. 251; Mezeix *v.* McGraw, 44 Miss. 100; Barber *v.* Reynolds, 33 Cal. 497; Keyser *v.* Reuner, 87 Va. 249; Munch *v.* Shabel, 37 Mich. 166; Hammond *v.* Place, Harr. (Mich.) 438; Walsh *v.* Smyth, 3 Bland (Md.) 9.

Amendment of Footnote.—Where an original bill by its footnote waives oath as to all defendants, and another defendant is brought in by amendment, and, instead of a new footnote, the original footnote is amended by naming him as defendant, his oath is waived, for the reason that the footnote is a part of the bill (see *United States* Equity Rules 41, 42), and any amendment thereto relates back. Fisher *v.* Moog, 39 Fed. Rep. 665.

Amendment Covering Reissue of Expired Patent.—An amendment to cover the reissue of a patent was allowed although the patent alleged in the original bill to have been infringed had expired before the amendment. Reay *v.* Raynor, 19 Fed. Rep. 308.

Dismissal of Amended Bill.—A decree dismissing an amended bill is a final disposition of the whole case. Bradish *v.* Grant, 119 Ill. 606.

Dismissal of Original Bill.—A mandate from the appellate court directing the dismissal of a bill includes the dismissal of an amended bill on which the case was tried. Beach Mod. Eq. Pr. § 999, *citing* Campbell *v.* James, 31 Fed. Rep. 525.

1. Adams *v.* Phillips, 75 Ala. 461; Jones *v.* McPhillips, 82 Ala. 102; Cain *v.* Gimon, 36 Ala. 168; Lipscomb *v.* McClellan, 72 Ala. 151; Hurd *v.* Everett, 1 Paige (N. Y.) 129; Gaylord *v.* Ft. Wayne, etc., R. Co., 6 Biss. (U. S.) 286.

Offer to Pay on Bill to Redeem.—Thus in a suit to have an absolute conveyance declared a mortgage, and for an account and redemption, an amendment offering to pay the amount that shall be found due, and to bring the same into court, and to pay all legal costs, takes effect as of the filing of the original bill. Crews *v.* Threadgill, 35 Ala. 334.

Equities of Third Parties.—Where a demurrer to a bill to establish an equitable interest in land is sustained with leave to amend, and the bill is subsequently amended, the equities in the original bill are not subordinated to an attachment lien which was placed on the land after the bill was filed but before service of process upon the attaching creditor, although the latter obtained judgment under which the land was sold before the demurrer was sustained but after process was served upon him. Cotton *v.* Dacey, 61 Fed. Rep. 481. See also Lookout Bank *v.* Susong, 90 Tenn. 590; Bradley *v.* Dibbrell, 3 Heisk. (Tenn.) 522.

Where the Matter Occurred Pending Suit.—In *Alabama*, where it is permissible to set up by amendment matter which has occurred since the suit was brought, an amendment embracing such matter does not relate back. Jones *v.* McPhillips, 82 Ala. 102.

2. Allen *v.* Woodson, 50 Ga. 53; Wilhelm's Appeal, 79 Pa. St. 120. *Contra*, where a new cause is introduced, Henderson *v.* Kissam, 8 Tex. 46; or new and distinct parties, Miller *v.* M'Intyre, 6 Pet. (U. S.) 61; King *v.* Avery, 37 Ala. 169; Tompkins *v.* Holt (Ala., 1891), 8 So. Rep. 794.

3. Miller *v.* Cook, 135 Ill. 190. See also Barber *v.* Reynolds, 33 Cal. 497; Des Moines, etc., R. Co. *v.* Carpenter, 27 Iowa 487, 492; Sweatt *v.* Faville, 23 Iowa 321.

4. Symonds *v.* Duchess of Cumberland, 2 Cox 411; Gray *v.* Camp-

Designed to Promote Justice.—But the fiction of relation is never permitted to operate when it would destroy intervening rights,[1] or otherwise work injustice.[2]

(3) *Without Prejudice to Injunction.*—After injunction granted, the bill may be amended by leave without prejudice to the injunction;[3] and where a bill as amended states good ground for an injunction, the sufficiency of the bill as originally filed to sustain an injunction will not be considered on appeal, since the amendment relates back to the filing of the bill.[4]

(4) *Waiver of Default.*—When the complainant amends his bill after the defendant's default is taken, this virtually sets the default aside, and the defendant has the right to answer the bill without an order setting aside his default.[5]

bell, 1 R. & M. 323. See Davenport *v.* Bartlett, 9 Ala. 180.

1. Brinegar *v.* Allen, 2 Duv.(Ky.) 99.

Purchase Prior to Amendment.—If the equity in the amendment is contradictory of or different from that in the original bill, and the relief is of a different character, a purchaser who bought previous to the amendment will not be affected by it. Wortham *v.* Boyd, 66 Tex. 401.

2. McDougald *v.* Dougherty, 11 Ga. 570; Adams *v.* Phillips, 75 Ala. 461.

Adding New Parties. — When new parties defendant are added, they may set up the statute of limitations if it has attached at the date of the amendment. Miller *v.* M'Intyre, 6 Pet. (U.S.) 61.

So, if an entirely new plaintiff is added by amendment, the defendants have the same right to set up the statute of limitations against him, King *v.* Avery, 37 Ala. 169; or staleness of demand, Tompkins *v.* Holt (Ala., 1891), 8 So. Rep. 794.

Amendment Dispensing with Sworn Answer.—Where the original bill required an answer under oath, which was filed, and afterward the complainant filed an amended bill setting up new matter and dispensing with a sworn answer, it was held that such waiver would not affect the answer under oath already on file, and that it extended only to the new matter set up in the amended bill. Jefferson *v.* Kennard, 77 Ill. 246.

3. Johnson *v.* Vail, 14 N. J. Eq. 423; Barber *v.* Reynolds, 33 Cal. 497; Reed *v.* Consequa, 4 Wash. (U. S.) 174; Selden *v.* Vermilya, 4 Sandf. Ch. (N. Y.) 573; Mount Olivet Cemetery Co. *v.* Budeke, 2 Tenn. Ch. 480; Furness *v.* Brown, 8 How. Pr. (N. Y. Supreme Ct.) 159; Walker *v.* Walker, 3 Ga. 302; Warburton *v.* London, etc., R. Co., 2 Beav. 254; Pratt *v.* Archer, 1 Sim. & Stu. 433; Pickering *v.* Hanson, 2 Sim. 488; Davis *v.* Davis, 2 Sim. 515. See also Latham *v.* Wiswall, 2 Ired. Eq. (N. Car.) 294; Atty.-Gen. *v.* Marsh, 16 Sim. 572; Delaware, etc., Canal, etc., R. Co. *v.* Raritan, etc., R. Co., 14 N. J. Eq. 445.

"Where an injunction bill is amended on leave, the injunction continues in force although the order granting leave is silent on the subject." Beach Mod. Eq. Pr. § 154.

Where the bill as amended is upon its face sufficient, and there is no showing outside the bill why the injunction allowed in the suit should be dissolved, a motion to dissolve will be overruled. Lyster *v.* Stickney, 12 Fed. Rep. 609.

Inconsistent Amendment.—Where the amendment is directly in conflict with the relief sought in the original bill, an attachment and injunction sued out under the original bill will not inure to the benefit of the antagonistic right set up in the amendment. Bosley *v.* Phillips, 3 Tenn. Ch. 649.

Where Original Bill is Defective.—Where an injunction is granted on an original bill which is defective, but the bill is afterward cured of its defects by amendment, it is proper for the court to refuse to dismiss the original bill. Ward *v.* Whitfield, 64 Miss. 754.

4. Miller *v.* Cook, 135 Ill. 190. See Walsh *v.* Smyth, 3 Bland (Md.) 9.

5. Lyndon *v.* Lyndon, 69 Ill. 43; Gibson *v.* Rees, 50 Ill. 383; Scudder *v.* Voorhis, 1 Barb. (N. Y.) 55.

(5) *Obviating Multifariousness.*—Where an amendment abandons any claim which made the original bill multifarious, it obviates any objection on that ground.[1]

(6) *New Process upon Amendment.*—Upon an amendment of the bill, no new subpœna is necessary, except to bring in new defendants who are made parties by the amendment.[2]

3. Of Demurrers.—The court, upon overruling a demurrer because it was too broad, has sometimes given the defendant leave to put in a less extended demurrer, or to amend and narrow the demurrer already filed.[3] In the latter case, however, the application to amend ought to be made before the judgment upon the demurrer as it stands has been pronounced,[4] although even where that has been omitted, the court has, after the demurrer has been overruled, upon a proper case being shown, given the defendant leave to put in a less extended demurrer.[5] And leave to correct a clerical error in a demurrer has been granted, the time for demurring not having expired.[6]

Merely Formal Amendment. — An amendment necessary to show the jurisdiction of the court, but which neither alters the title of the complainant to the relief sought, nor the relief itself in substance or form, may be regarded as merely formal and not superseding a prior default. Clason *v.* Corley, 5 Sandf. (N. Y.) 454.

1. Alabama Warehouse Co. *v.* Jones, 62 Ala. 550; Harland *v.* Person, 93 Ala. 273; Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715.

2. Lawrence *v.* Bolton, 3 Paige (N. Y.) 294; Beekman *v.* Waters, 3 Johns. Ch. (N. Y.) 410; Equitable L. Assur. Soc. *v.* Laird, 24 N. J. Eq. 319; Longworth *v.* Taylor, 1 McLean (U. S.) 514; Jefferson *v.* Gaines, 7 Baxt. (Tenn.) 368; Abright *v.* Flowers, 52 Miss. 246; Angerstein *v.* Clark, 1 Ves. Jr. 250, Beach Mod. Eq. Pr. § 154. See Baltimore, etc., R. Co. *v.* Christie, 5 W. Va. 325.

Notice of Amendment.—A defendant in court or acknowledging due service of process may fairly be held to have constructive notice of all amendments made before he is defaulted. Fogg *v.* Merrill, 74 Me. 523.

But after his default he is entitled to notice of an amendment which increases the claim of the plaintiff. Fogg *v.* Merrill, 74 Me. 523.

In some states service of amendments is required. See Masterson *v.* Masterson, 32 Ala. 437; Alston *v.* Alston, 34 Ala. 13; Holly *v.* Bass, 63 Ala. 387; Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488; McRae *v.* Guion, 5 Jones Eq. (N. Car.) 129; Myers *v.* Morris (N. J., 1888), 11 Atl. Rep. 859; Reno *v.* Harper, 23 Miss. 154.

3. Kirkpatrick *v.* Corning, 39 N. J. Eq. 22; Vanderveer *v.* Stryker, 8 N. J. Eq. 186; Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164, where a demurrer for want of equity was overruled with leave to amend by specifying the grounds of demurrer. Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 39; Baker *v.* Mellish, 11 Ves. Jr. 68; Glegg *v.* Legh, 4 Madd. 104; Thorpe *v.* Macaulay, 5 Madd. 135.

In Kirkpatrick *v.* Corning, 39 N. J. Eq. 22, a decree of the chancellor sustaining a general demurrer was reversed by the Court of Appeals, but a part of the chancellor's decision, as expressed in his opinion, was approved. It was held that, after the decision of the Court of Appeals had been remitted to the Court of Chancery, the defendant could apply under the rule of court to have stricken out of the bill so much thereof as was held to be objectionable by that part of the decision sustained by the Court of Appeals, such proceeding being tantamount to an amendment of the original demurrer.

4. 1 Daniell Ch. Pr. (6th Am. ed.) 584.

5. 1 Daniell Ch. Pr. (6th Am. ed.) 584; Vanderveer *v.* Stryker, 8 N. J. Eq. 175; Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164; Baker *v.* Mellish, 11 Ves. Jr. 76.

6. Richardson *v.* Hastings, 7 Beav. 58.

United States Revised Sts. § 954,

4. Of Pleas.—The court will grant leave to amend a plea where an apparently good ground of defense is disclosed by the plea, but owing to some accident or mistake it has been informally pleaded.[1] Where a substantial ground of defense has been omitted, such permission will not be given.[2]

Where an amendment is allowed, a short time is generally limited within which it must be made.[3]

Although, where the error is very palpable, the court will give the defendant leave to amend at the argument of the plea, the most usual course is for the defendant to move subsequently for leave to amend his plea.[4]

5. Of Replications.—Any error in the replication except the omission of the names of any defendants may be corrected by amendment.[5]

6. Of Answers—*a.* IN GENERAL.—In matters of form,[6] or mis-

would authorize the amendment of a demurrer in matter of form. 1 Foster Fed. Pr. (2d ed.) § 166.

1. 1 Daniell Ch. Pr. (6th Am. ed.) 703, 704; Beach Mod. Eq. Pr. § 320; Green *v.* Harris, 11 R. I. 5, an instructive case on the amendment of pleas, holding that a plea may be amended though supported or accompanied by an answer. Meeker *v.* Marsh, 1 N. J. Eq. 198.

In Federal Courts.—*United States* Rev. Sts. § 954, would allow an amendment of a plea in matter of form.

Plea of Stated Account.—Where the defendant pleaded a stated account without alleging that it was just and true, and it was overruled for the defect, leave was given to amend. Driggs *v.* Garretson, 25 N. J. Eq. 178.

Plea of Release.—Where a bill charges that a release was procured by fraud, and the defendant pleads the release without denying the circumstances charged, he may be allowed to amend his plea. Allen *v.* Randolph, 4 Johns. Ch. 693; Bayley *v.* Adams, 6 Ves. 586.

Additional Facts.—A plea may be amended by the addition of a fact unknown to the defendant when the plea was filed and consistent with the defense then made, but it will not be allowed for the purpose of setting up a fact or state of facts inconsistent with the original defense. Freeman *v.* Michigan State Bank, Harr. (Mich.) 311, where the amendment was allowed.

Amendment of Verification.—The affidavit in support of a plea may be amended by leave of the court. Beach Mod. Eq. Pr. § 323; Cheatham *v.* Pearce, 89 Tenn. 668; Wrompelmeir *v.* Moses, 3 Baxt. (Tenn.) 471; Trabue *v.* Higden, 4 Coldw. (Tenn.) 624; Seifreid *v.* People's Bank, 2 Tenn. Ch. 19.

2. 1 Daniell Ch. Pr. (6th Am. ed.) 704.

Raising Several Issues.—An amendment of a plea so as to raise a multitude of issues will not generally be allowed, especially after long delay. Giant Powder Co. *v.* Safety Nitro Powder Co., 19 Fed. Rep. 509.

3. 1 Daniell Ch. Pr. (6th Am. ed.) 703; Beach Mod. Eq. Pr. § 320; Hoffman Ch. Pr. (2d ed.) 226.

4. 1 Daniell Ch. Pr. (6th Am. ed.) 704.

5. 1 Daniell Ch. Pr. (6th Am. ed.) 831.

In Goodyear *v.* McBurney, 3 Blatchf. (U. S.) 32, a plaintiff was permitted to file an amended replication to a plea, the amendment setting up matters of which he was ignorant when the plea and replication were filed, on payment of costs of opposing the motion to amend and of putting in a rejoinder to the replication.

Transposition of Parties. — After a cause was submitted to the jury, it being discovered that the replication which had been filed transposed the parties, the court permitted a formal and proper replication to be filed. Buckley *v.* Boutellier, 61 Ill. 293.

6. Amending Title.—Where there has been a mistake in the title of an answer, an amendment of it has been permitted. White *v.* Godbold, 1 Madd. 151; Peacock *v.* Duke of Bedford, 1 Ves. & B. 186; Thatcher *v.* Lambert, 5 Hare 228; Atty. Gen. *v.* Worcester, 2 Ph. 3.

takes in dates,[1] or verbal inaccuracies,[2] courts of equity are very indulgent in allowing amendments of answers.[3] But they are slow to allow amendments in material facts, or amendments which change essentially the grounds taken in the original answer.[4] Where the object is to let in facts and defenses de-

Formal Denial.—The defendant will be allowed to amend his answer by a formal denial of the averments of the bill. McBride *v.* Patton, 9 Phila. (Pa.) 271.

Making Answer Responsive.—Where an answer is not sufficiently explicit and responsive, an amended answer may be required. Feller *v.* Winchester, 3 Greene (Iowa) 244.

Amending Jurat.—An omission in the jurat to an answer may be amended. Arnold *v.* Kreissler, 22 Tex. 580.

Amending Verification. — Under the *Iowa* Code, the defendant may amend his answer and verification. Brink *v.* Morton, 2 Iowa 411.

Inserting Names of Parties. — The omission of the names of the parties from an unsworn answer by mistake of the solicitor was amended after replication and testimony in behalf of the parties for whom it was put in as a mere pleading. McMichael *v.* Brennan, 31 N. J. Eq. 496.

Federal Equity Rule.—*United States* Equity Rule 60 provides for the amendment of answers as of course in any matter of form, or by filling up a blank or correcting a date, or a reference to a document or other small matter at any time before a replication is put in or the cause set down for hearing upon bill and answer.

1. Smith *v.* Babcock, 3 Sumn. (U. S.) 583.

In Fulton *v.* Gilmour, 8 Beav. 154, 1 Phil. 522, after the cause was at issue and on the paper, leave was given to file a supplemental answer to correct an important date.

2. Smith *v.* Babcock, 3 Sumn. (U. S.) 583.

3. Smith *v.* Babcock, 3 Sumn. (U. S.) 583; Huffman *v.* Hummer, 17 N. J. Eq. 269.

Amending Supplemental Answer.—A supplemental answer asking for affirmative relief may be amended, like any other pleading, even after plaintiffs have taken a nonsuit, since they may remain in court as defendants to the portion of the answer demanding affirmative relief. Merchant *v.* Bowyer, 3 Tex Civ. App. 367.

Incorporating Demurrer in Answer.—Under the *Alabama* Code, § 3449, providing that amendments to answers must be allowed at any time before decree so as to set up any defense, the court is bound to permit, on motion, a demurrer filed before answer to be incorporated in the answer; but a refusal to do so will be error without prejudice where the demurrer was in fact ruled upon. Harland *v.* Person, 93 Ala. 273.

Amending Answer in Interpleader.—In a bill of interpleader, after the discharge of the complainant, and the testimony has been published by consent without prejudice, the court may in its discretion permit an amendment of one of the answers. Lanier *v.* Driver, 24 Ala. 149.

By Striking Out.—In Oliver *v.* Persons, 29 Ga. 568, a defendant was allowed to amend his answer by striking out part of it, the statute providing for amendments in form or substance as matter of right.

After Exceptions Sustained.—Where exceptions to the answer are sustained, the defendant should have leave to amend. Hollis *v.* Border, 10 Tex. 360.

Before Replication. — In *Kentucky*, under the acts of 1802 and 1811, the defendant could amend his answer as of right before replication. Hughes *v.* Phelps, 3 Bibb (Ky.) 198.

So in the federal courts under *United States* Equity Rule 60.

Converting Answer into Cross-bill.—In *Georgia*, where amendments in equity are a matter of right by statute, an amendment taking the form of a cross-bill may be made to the answer. Canant *v.* Mappin, 20 Ga. 730. See also Bowman *v.* Long, 27 Ga. 178.

4. Smith *v.* Babcock, 3 Sumn. (U. S.) 583; Graves *v.* Niles, Harr. (Mich.) 332; Huffman *v.* Hummer, 17 N. J. Eq. 269; Bell *v.* Hall, 5 N. J. Eq. 49; Vandevere *v.* Reading, 9 N. J. Eq. 446; Mechanics' Bank *v.* Burnett Mfg. Co., 32 N. J. Eq. 236; Campion *v.* Kille, 14 N. J. Eq. 229; Reynolds *v.* West, 32 Ark. 244; Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Tillinghast *v.* Champlin 4 R. I.

pending wholly upon parol evidence, the reluctance of the court to allow amendments is greatly increased.[1] But where the facts sought to be introduced are written papers or documents which have been omitted by accident or mistake, the court is much inclined to permit the amendment.[2]

The whole matter rests in the sound discretion of the court.[3] But the rule frequently declared is, that, before amendments to the answer are allowed, the court should be satisfied that the reasons assigned for the application are cogent; that the mistakes to be corrected or the facts to be added are made highly probable, if not certain;[4] that they are material to the merits of the case;[5]

128; Goodwin *v.* McGehee, 15 Ala. 232; Maher *v.* Bull, 39 Ill. 531; Maher *v.* Bull, 39 Ill. 538; Elder *v.* Harris, 76 Va. 187, holding that the provision of the Code allowing a defendant to file his answer at any time before final decree has no reference to an amended or supplemental answer; Cook *v.* Bee, 2 Tenn. Ch. 343; Martin *v.* Atkinson, 5 Ga. 390; Western Reserve Bank *v.* Stryker, 1 Clarke Ch. (N. Y.) 380.

Answer in Nature of Cross-bill.—Where an amended answer is filled in the nature of a cross-bill for affirmative relief, such amended answer should be confined to the matters contained in the original bill and answer, and should not interpose new and different matters not embraced therein. Radcliff *v.* Corrothers, 33 W. Va. 682.

1. Smith *v.* Babcock, 3 Sumn. (U. S.) 583; India Rubber Comb Co. *v.* Phelps, 8 Blatchf. (U. S.) 85.

2. Smith *v.* Babcock, 3 Sumn. (U. S.) 583.

3. Bowen *v.* Cross, 4 Johns. Ch. (N. Y.) 375; Huffman *v.* Hummer, 17 N. J. Eq. 269; Arnaud *v.* Grigg, 29 N. J. Eq. 1; Warren *v.* Twilley, 10 Md. 39; Ricketts' Appeal (Pa., 1888), 12 Atl. Rep. 60; Martin *v.* Atkinson, 5 Ga. 390.

Defendant in Contempt.—A defendant who offers to file an insufficient answer to purge a contempt cannot claim as a matter of right to amend the answer. The motion should be for leave to file a sufficient answer. Cowart *v.* Harrod, 12 Ala. 265.

Sufficient Showing.—When it is made to appear to the court upon oath that the defendant, when he first put in his answer, intended to swear as he desires by the amendment to be permitted to swear, the amendment will be allowed. Martin *v.* Atkinson, 5 Ga. 390.

Not so Liberal as at Law.—It has been said that courts of equity exhibit less facility in allowing amendments to answers than is exhibited by courts of law in allowing amendments to pleadings. Calloway *v.* Dobson, 1 Brock. (U. S.) 119.

Setting up Statutes of Frauds and of Limitations.—After issue joined and the cause set for hearing, the defendant may be permitted for good cause shown to amend his answer by pleading the statutes of frauds and limitations. Jackson *v.* Cutright, 5 Munf. (Va.) 308.

In White *v.* Turner, 2 Gratt. (Va.) 502, the defendant was allowed to amend by setting up the statute of limitations.

A motion to amend the answer by setting up the statute of frauds after the plaintiff had closed his testimony was allowed in Hann *v.* Barnegat, etc., Imp. Co. (N. J., 1887), 8 Atl. Rep. 531.

4. Smith *v.* Babcock, 3 Sumn. (U. S.) 583; Higgins *v.* Curtiss, 82 Ill. 28. See also Smallwood *v.* Lewin, 13 N. J. Eq. 123; Hart *v.* Sanderson, 18 Fla. 103.

Facts Admitted to be True.—An amendment will not be allowed which fails to state correctly facts which are admitted to be true. Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540.

Where Evidence Insufficient.—A motion to amend an answer, and for a commission to take testimony in a foreign country to prove who was the original inventor of a patent, will not be allowed when the affidavits filed show that there is no evidence to sustain the amendment. Hicks *v.* Otto, 17 Fed. Rep. 539.

5. Smith *v.* Babcock, 3 Sumn. (U. S.) 583.

Irrelevant Matter.—An amended answer presenting as new matter only matter immaterial and irrelevant

that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer was put in and sworn to,[1] and that the party has not been guilty of gross negligence.[2]

ought to be rejected. McKay *v.* McKay, 33 W. Va. 724.

Where a proposed amendment presents new matter which is not material to the defense, the court may refuse to permit it to be filed. Tracewell *v.* Boggs, 14 W. Va. 254.

1. Smith *v.* Babcock, 3 Sumn. (U. S.) 583; Martin *v.* Mitchell, 26 N. J. Eq. 497; Foutty *v.* Poar, 35 W. Va. 70; Matthews *v.* Dunbar, 3 W. Va. 138; Graham *v.* Skinner, 4 Jones (N. Car.) 94. See also Livesay *v.* Wilson, 1 Ves. & B. 149, note.

Previous Knowledge.—Leave to amend an answer in a foreclosure suit by the insertion of an additonal fact was refused where such fact was known to the defendant at the time the answer was filed. Cross *v.* Morgan, 6 Fed. Rep. 241.

In Wilson *v.* Wintermute, 27 N. J. Eq. 63, an application to amend a sworn answer, on the ground of mistake discovered at the time the answer was read to the party making it, was denied where the application was made more than two years after the discovery and the filing of the answer, and without excuse for the delay and upon feeble proof of the alleged mistake.

Mistake of Fact.—It was said, in Bowen *v.* Cross, 4 Johns. Ch. (N. Y.) 378, that amendments of answers to correct mistakes are allowed with great caution, and only where there is a mistake, properly speaking, as to a matter of fact, and not where the defendant has mistaken the nature of his defense. See also Reynolds *v.* West, 32 Ark. 244; Cock *v.* Evans, 9 Yerg. (Tenn.) 287; United R., etc. Co. *v.* Long Dock Co., 41 N. J. Eq. 407; Branch *v.* Dawson, 9 Ga. 592.

Mistake of Solicitor.—In Arnaud *v.* Grigg, 29 N. J. Eq. 1, after the evidence was closed and the cause set down for final hearing, the defendant was permitted to amend by setting up an instrument which had been omitted from the answer by mere oversight of his solicitor, the proposed amendment making no new defense, but making more effectual the defense already presented by the answer.

In Nail *v.* Punter, 4 Sim. 474, leave was given to a defendant to amend by stating facts which she had desired to state in her answer, but which she had been prevailed upon to omit by the mistaken advice of her solicitor. So, too, under like circumstances, in Burgin *v.* Giberson, 23 N. J. Eq. 403.

Limiting Admissions.—In Dagly *v.* Crump, Dick. 35, a defendant was allowed to amend his answer by limiting the admission of assets contained therein. The admission was most important, and was made by mistake and the carelessness of the solicitor who drew the answer. See also Hughes *v.* Bloomer, 9 Paige (N. Y.) 270; Curling *v.* Townshend, 19 Ves. Jr. 628; Swallow *v.* Day, Colly. 133.

Ambiguous Answer.—The discovery of a mistake in the answer, or that it is liable to be misunderstood, is a good ground for amendment. McWilliams *v.* Herndon, 3 Dana (Ky.) 568; Bowen *v.* Cross, 4 Johns. Ch. (N. Y.) 375. Especially so where the correction will not be prejudicial to the plaintiff. Mouncer *v.* Byars, 11 Ga. 180.

Contradicting Admissions.—The court may allow an amended answer contradicting admissions made in the original answer by mistake. Downing *v.* Bacon, 7 Bush (Ky.) 680; Taylor *v.* Dodd, 5 Ind. 246.

2. Smith *v.* Babcock, 3 Sumn. (U. S.) 583. Gouverneur *v.* Elmendorf, 4 Johns. Ch. (N. Y.) 357.

Illness and Hurry of Solicitor.—In Tillinghast *v.* Champlin, 4 R. I. 128, a substantial amendment of the answer was allowed after the cause had been set down for hearing on bill and answer, there being no gross negligence, and the illness and hurry of the solicitor being deemed a satisfactory excuse.

Ignorance and Laches.—In a suit for the infringement of a patent, the defendant, more than one year after the plaintiff's proofs were closed, moved to amend the sworn answer by averring, on information and belief, that the invention had been in public use for more than two years before the patent was applied for, and that it

b. FACTS OCCURRING SUBSEQUENT TO ANSWER.—Where a fact which may be of advantage to a defendant has happened subsequent to his answer, it cannot with propriety be put in issue by amending his answer.[1] But if it appears to the court on the hearing that it may thus be of advantage, the proper way seems to be to order the cause to stand over until a new bill can be filed in which the fact can be brought to a hearing with the original suit.[2]

c. MAKING A NEW DEFENSE.—Except under very special circumstances, leave will not be granted to the defendant to file an amended answer in which it is proposed to take entirely new ground, and change entirely the character of the defense.[3]

d. UNCONSCIONABLE DEFENSES.—Formerly the courts were inclined to discriminate against defenses denominated unconscionable,[4] such as usury, the statute of limitations, and the statute of

was described in a prior patent. The only excuse offered for not inserting the first defense in the original answer was that the counsel who prepared that answer was under the impression that the suit was subject to the law as it stood prior to the patent act of 1870; and as to the second defense, the excuse was that such counsel had no knowledge or information of any description of any patent prior to plaintiff's containing a certain device. The motion was denied. Webster Loom Co. *v.* Higgins, 13 Blatchf. (U. S.) 349.

See, for other cases of laches in applying for leave to amend, Goodwin *v.* McGehee, 15 Ala. 232; United R., etc., Co. *v.* Long Dock Co., 41 N. J. Eq. 407; Furman *v.* Edwards, 3 Tenn. Ch. 365; Wilson *v.* Wilson, 2 Lea (Tenn.) 17; India Rubber Comb. Co. *v.* Phelps, 8 Blatchf. (U. S.) 85.

Federal Equity Rule.—*United States* Equity Rule 80, providing that after replication or cause set down for hearing on bill and answer material amendments shall be made only upon special leave and cause shown by affidavit, is not complied with where it appears that the matter of the proposed amendment could with reasonable diligence have been earlier introduced into the answer. India Rubber Comb. Co. *v.* Phelps, 8 Blatchf. (U. S.) 85.

Laches without Prejudice.—Where defendant's delay in interposing a particular defence has not caused any material change in the plaintiff's situation, the amendment may be allowed. Arnold *v.* Chesebrough, 33 Fed. Rep. 571.

1. Story Eq. Pl. (10th ed.) § 903.

2. Story Eq. Pl. (10th ed.) § 903.

Subsequently Acquired Title.—But in Barnegat City Beach Assoc. *v.* Buzby (N. J., 1890), 20 Atl. Rep. 214, on a bill filed to determine title to land, the defendant was allowed to amend his answer so as to set up a title to the land in dispute which he had acquired since his answer was filed, the court declaring that conclusion to be "more in harmony with the liberality of judges at the present time in allowing amendments."

3. Campion *v.* Kille, 14 N. J. Eq. 229; Graves *v.* Niles, Harr. (Mich.) 332. See also Calloway *v.* Dobson, 1 Brock. (U. S.) 119; Freeman *v.* Michigan State Bank, Harr. (Mich.) 311; Reynolds *v.* West, 32 Ark. 244; Fielding *v.* Fitzgerald, 130 Ill. 437.

But in Graves *v.* Niles, Harr. (Mich.) 332, where it appeared that there was doubt in regard to the proper application of certain moneys admitted to have been received by the defendant, and the answer was obscure, and there was a possibility that great injustice might be done to the defendant, the court reluctantly granted an order permitting a separate supplemental answer to be filed as to the particular above mentioned, and explaining the ambiguity.

In Grace *v.* Newbre, 31 Wis. 19, where the original answer denied that there had been an account stated between the parties, an amendment which alleged, in substance, that if the transaction between them amounted to the stating of an account, then such account, by reason of certain mistakes, was stated at too large an amount against defendant, was held not inconsistent with the original denial.

4. **Setting up Ultra Vires.**—A defense to

frauds, and not to allow such defenses to be set up by amended or supplemental answer;[1] but this practice has been much shaken by recent authorities, which hold that it is the duty of the court to put statutory defenses upon the same footing with other legal defenses in this behalf.[2]

e. AT AND AFTER HEARING.—Upon the hearing of a cause, the same indulgence will be granted to a defendant as to a plaintiff,[3] and if it appears that the defendant has not put in issue facts which he ought to have put in issue, and which must necessarily be in issue to enable the court to determine the merits of the case, he will be allowed to amend his answer for the purpose of stating those facts.[4]

a bill for foreclosure, that the plaintiff corporation, in making the loan to secure which the mortgage was given, was acting *ultra vires*, is unconscionable, and cannot be set up in a supplemental answer by way of amendment. Third Ave. Sav. Bank *v.* Dimock, 24 N. J. Eq. 26.

1. See Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317, where the question is discussed.

Statute of Limitations.—See Stull *v.* Goode, 10 Heisk. (Tenn.) 58; Cock *v.* Evans, 9 Yerg. (Tenn.) 287; McRae *v.* David, 7 Rich. Eq. (S. Car.) 375; Percival *v.* Caney, 14 Jur. 473; and cases cited in Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317.

In Ricketts' Appeal (Pa., 1888), 12 Atl. Rep. 60, it was held not an abuse of discretion to refuse to allow the defendant to amend by setting up the statute of limitations after a hearing before a master, and while the case was before the Court of Common Pleas.

Statute of Frauds.—See Cook *v.* Bee, 2 Tenn. Ch. 343.

Usury.—See Hill *v.* Colie, 25 N. J. Eq. 469; Marsh *v.* Lasher, 13 N. J. Eq. 253; Hartson *v.* Davenport, 2 Barb. Ch. (N. Y.) 77.

2. Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317, where defendant amended by pleading the statute of limitations. McQueen *v.* Babcock, 3 Keyes (N. Y.) 428; White *v.* Turner, 2 Gratt (Va.) 502. See *infra*, III, 3, *g*.

Statute of Frauds.—Hann *v.* Barnegat, etc., Imp. Co. (N. J., 1887), 8 Atl. Rep. 531, where a motion to amend the defendant's answer by setting up the statute of frauds was allowed after the plaintiff had closed his testimony. "The time has been, perhaps," said Bird, N. C., "when such an amendment would not be allowed at any time, but happily, as I think, that time has passed." Scott *v.* Harris, 113 Ill. 447; Jackson *v.* Cutright, 5 Munf. (Va.) 308.

Usury. — When the plaintiff voluntarily confesses the taking of usury, and there is a variance between the contract alleged and that proved, the court, in order to give the defendant the benefit of facts admitted, will direct an amendment of the answer on the hearing. Cox *v.* Westcoat, 29 N. J. Eq. 551.

3. Story Eq. Pl. (10th ed.) § 902.

An *unsworn answer* may be amended on the hearing so as to admit proof of new facts in defense and to avoid a variance. Haskell *v.* Brown, 65 Ill. 29.

4. Story Eq. Pl. (10th ed.) § 982; Depue *v.* Sergent, 21 W. Va. 326. *Compare* Walden *v.* Bodley, 14 Pet. (U. S.) 156.

In Balen *v.* Mercier, 75 Mich. 42, the court allowed a substantial amendment to an unsworn answer.

Mistake of Fact.—In case of a plain mistake as to facts, though not discovered until after argument, an amendment of the answer will be allowed. Welsh *v.* Arnett (N. J., 1889), 17 Atl. Rep. 289.

To Obviate a Variance.—Where an objection to the relevancy or competency of the evidence is made specific for the first time in the closing argument for the plaintiff, the court will permit the defendant to so amend his answer as to obviate the objection, where the testimony is before the court showing a proper case therefor. Hamilton *v.* Southern Nevada Gold, etc., Min. Co., 33 Fed. Rep. 562; Powell *v.* Mayo, 26 N. J. Eq. 120.

After Hearing.—An answer may be

It is erroneous to permit an amended answer to be filed in the progress of the trial, and then to proceed without giving the plaintiff an opportunity to contest the matter of the answer.[1]

The instances are rare in which amendments to an answer have been allowed after the case has been heard and there has been any expression of opinion from the court.[2]

When the court is about to sign a final decree, it is too late to amend the answer by filing a plea in bar.[3]

On the rehearing of a decree, an answer cannot be amended except by consent of parties.[4]

7. Of Master's Report.—The court may in furtherance of justice send back a master's report for the correction of an inadvertent omission therein,[5] or an error of expression, so as to present the actual result at which he has arrived.[6]

8. Of Process.—Where a subpœna *ad respondendum* is dated before, but is not in fact issued until after the filing of the bill, the mistake may be corrected by amendment.[7] And where the

amended after the hearing where it may be done without interfering with the evidence. Flora *v.* Rogers, 4 Hayw. (Tenn.) 202. See also Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364.

Pleading Tender.—In Kiefer *v.* Rogers, 19 Minn. 14, the court refused to allow the defendant to amend his answer at the trial and plead a tender in bar of the action.

Substituting New Answer. — Where the defendant has filed an answer to the bill, which has been replied to, and the cause comes on for hearing, the defendant will not be permitted to withdraw his answer for the purpose of substituting another, on the ground that he had forgotten to present a material matter of the defense in his first answer; but he may be permitted to amend his answer, setting up such new matter, though in no wise to delay the hearing of the case. Tracewell *v.* Boggs, 14 W. Va. 524.

1. Dunn *v.* Dunn, 1 J. J. Marsh. (Ky.) 585, holding, however, that if the merits are not affected, it is error without prejudice.

2. Calloway *v.* Dobson, 1 Brock (U. S.) 119; Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Cocky *v.* Evans, 9 Yerg. (Tenn.) 287; Campion *v.* Kille, 14 N. J. Eq. 229.

Such amendment was allowed in Welch *v.* Arnett, (N. J., 1890), 20 Atl. Rep. 48.

3. Burnham *v.* Huffman, Walk. (Miss.) 381.

In Calloway *v.* Dobson, 1 Brock. (U. S.) 119, after hearing and interlocutory decree, the court refused to allow an amendment of the answer, introducing new and important matter which ought to have been known and originally inserted. See also India Rubber Comb Co. *v.* Phelps, 8 Blatchf. (U. S.) 85; Walden *v.* Bodley, 14 Pet. (U. S.) 156; Ruggles *v.* Eddy, 11 Blatchf. (U. S.) 524.

Remand with Directions to Amend.— Where an answer to a divorce bill is not verified as required by statute, the appellate court, upon directing a decree to be entered for the defendant, may direct that leave be granted to amend. Harrison *v.* Harrison, 94 Mich. 559.

4. Story Eq. Pl. (10th ed.) § 902.

5. Bryant *v.* Hendee, 40 Mich. 543, where the omission could be supplied by the exhibits attached to the report. Kanawha Valley Bank *v.* Wilson, 25 W. Va. 256.

6. Beach Mod. Eq. Pr. § 698; Heywood *v.* Miner, 102 Mass. 466.

If a decree has been founded on the report, the decree must first be vacated before the report can be amended. Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573.

7. Dinsmore *v.* Westcott, 25 N. J. Eq. 302, where it was also held that a defect in the affidavit of mailing a copy of the notice to an absent defendant, in not showing that the place to which it was directed was the defendant's post-office address, may be remedied by amendment.

subpœna was inadvertently made returnable on Sunday, it was amended so as to make it returnable on the Monday following.[1]

9. Leave to Amend—*a.* WHEN NECESSARY.—After any pleading or other matter has been filed, no alteration can be made in it without the sanction of a previous order.[2]

Before replication, an order for amending the bill is usually obtained as of course,[3] but an amendment of the bill at a subsequent stage,[4] or an amendment of the answer,[5] can be made only by special leave of the court upon application therefor.[6]

1. McEvoy *v.* School Trustees, 38 N. J. Eq. 420.

2. 1 Daniell Ch. Pr. (1st Am. ed.) 519; Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 170. See also Baldwin *v.* Love, 2 J. J. Marsh. (Ky.) 489; Young *v.* Bennett, 7 Bush (Ky.) 474; Baker *v.* Baldwin, 1 R. I. 489; Roberts *v.* Stigleman, 78 Ill. 120; Thebaut *v.* Canova, 11 Fla. 143. See also Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 69.

Objection on Appeal.—An objection to an amended bill, that it was not filed with leave of the court, as required by a rule, cannot be made for the first time in the appellate court. Clements *v.* Moore, 6 Wall. (U. S.) 299.

Waiver of Objection.—And the absence of an order allowing an amendment will not cause a reversal where the case was tried without objection on that ground. Bondurant *v.* Sibley, 37 Ala. 565; Swatts *v.* Spence, 68 Ga. 496. See also Farmers' L. & T. Co. *v.* Reid, 3 Edw. Ch. (N. Y.) 414.

Rescission of Order.—It is not error to allow the plaintiff to rescind an order for the amendment of his bill granted upon his application and before an amendment is actually made. Brooks *v.* Colby, 25 Ga. 634.

3. 1 Daniell Ch. Pr. (1st Am. ed.) 535; United States Equity Rules 28, 29; Buckley *v.* Corse, 1 N. J. Eq. 504. See also Holland *v.* Trotter, 22 Gratt. (Va.) 136.

4. Baker *v.* Baldwin, 1 R. I. 489; Hammond *v.* Place, Harr. (Mich.) 438; Walsh *v.* Smyth, 3 Bland (Md.) 9; Georgia R., etc., Co. *v.* Milnor, 8 Ga. 313; Molyneaux *v.* Collier, 13 Ga. 406; Terry *v.* McLure, 103 U. S. 442; Baldwin *v.* Love, 2 J. J. Marsh. (Ky.) 489.

Effect of Want of Leave.—A motion for an injunction based upon an amendment made without leave will be dismissed. Baker *v.* Baldwin, 1 R. I. 489.

5. Thomas *v.* Frederick County School Visitors, 7 Gill & J. (Md.) 369; Warren *v.* Twilley, 10 Md. 39; Huffman *v.* Hummer, 17 N. J. Eq. 269. See also Graves *v.* Niles, Harr. (Mich.) 332.

When Actual Filing Unnecessary.—Upon a petition that an amended answer attached be allowed, an order of the chancellor in vacation, directing that the amendment be filed as of the date of the order, is equivalent to an allowance of the amendment, and may be considered as part of the pleadings before it is actually filed with the register. Blanks *v.* Walker, 54 Ala. 117.

United States Equity Rule 60 provides that "after an answer is put in it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn at any time before a replication is put in or the cause set down for hearing upon bill and answer. But after replication or such setting down for hearing it shall not be amended in any material matters, as by adding new parties, facts, or defenses, or qualifying or altering the original statements, except by special leave of the court, or a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom."

6. **Order ex Mero Motu.**—No error can be predicated of the neglect of the court to order an amendment when no application was made therefor. State Bank *v.* Ellis, 30 Ala. 478; Beatty *v.* Brown, 85 Ala. 209; Hollis *v.* Border, 10 Tex. 360.

Implied Leave.—The refusal of the

b. APPLICATION.—An application for leave to amend should be made in writing, setting forth the proposed amendment,[1] and supported by affidavit of its materiality and the reasons why it was not inserted in the original pleading.[2] The affidavit required is that of the party himself, which cannot be dispensed with except under special circumstances,[3] although it may, if deemed necessary, be supplemented by that of his solicitor.[4] Where the former pleading was verified, oath must be made to the truth of the proposed amendment.[5]

court to strike out an amendment to a bill because it was filed without leave is tantamount to granting leave. Ward *v.* Whitfield, 64 Miss. 754.

Motion to Dismiss.—Where an amendment to a bill was filed and service acknowledged, with the express reservation of the right to demur thereto, but no order appeared allowing such amendment, it was not too late to move to dismiss at the hearing of the case. Hart *v.* Henderson, 66 Ga. 568.

1. Baker *v.* Baldwin, 1 R. I. 489; Freeman *v.* Michigan State Bank, Harr. (Mich.) 311; Hammond *v.* Place, Harr. (Mich.) 438; U. S. *v.* Atherton, 102 U. S. 375; Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567; Graham *v.* Skinner, 4 Jones Eq. (N. Car.) 94; Campbell *v.* Powers, 139 Ill. 128.

Counter-affidavits.—Affidavits denying the truth of matter proposed to be inserted in a bill by way of amendment are no sufficient objection to the application to amend. Coster *v.* Griswold, 4 Edw. Ch. (N. Y.) 364.

Objection Reserved.—Where the defendant objects to an application for leave to file an amended bill, and states that he will present his objection on motion to strike it out, the motion to strike out may be considered as if it were an application to file the amendment with objections thereto. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 38 Fed. Rep. 57.

Service of Copy.—The English practice of furnishing an office copy of a proposed amendment has not been adopted in *Pennsylvania*. Rose *v.* Rose, 1 Phila. (Pa.) 365.

Motion by Defendant to Amend Bill.—The plaintiff cannot on motion of the defendant be compelled to amend his bill so as to expose supposed defects in his case. Phelps *v.* Elliott, 23 Blatchf. (U. S.) 470, 26 Fed. Rep. 881.

2. Cook *v.* Bee, 2 Tenn. Ch. 344; Bowen *v.* Cross, 4 Johns. Ch. (N. Y.) 375; Graham *v.* Skinner, 4 Jones Eq. (N. Car.) 94; McKim *v.* Thompson, 1 Bland (Md.) 150; Thomas *v.* Doub, 1 Md. 252; Dougherty *v.* Murphy, 10 Phila. (Pa.) 509; Molyneaux *v.* Collier, 13 Ga. 406; Jones *v.* Kennicott, 83 Ill. 484; Robinson *v.* Woodson, 33 Ark. 307; Reynolds *v.* West, 32 Ark. 244; Taylor *v.* Dodd, 5 Ind. 246; Huffman *v.* Hummer, 17 N. J. Eq. 270; Bell *v.* Hall, 5 N, J. Eq. 49. See also Martin *v.* Atkinson, 5 Ga. 390.

When Affidavit Unnecessary.—There is no necessity of an affidavit for the allowance of an amendment to a bill after the hearing when the court is satisfied that the evidence before it will make a case for relief under a bill differently framed; and when such amendment is allowed without affidavit it will be presumed that the court was satisfied. Booth *v.* Wiley, 108 Ill. 84; Lewis *v.* Lamphere, 79 Ill. 187.

Amendment by Executors.—Executors may be allowed to amend a bill filed by their testator, although the amendment embraces statements which may never have been made by him, and although they offer no excuse for not having incorporated it in the original bill. Coster *v.* Griswold, 4 Edw. Ch. (N. Y.) 364.

Application to Amend Pleas.—Where application is made to amend a plea the court always requires to be told precisely what the amendment is to be, 1 Daniell Ch. Pr. (6th Am. ed.) 704; Beach Mod. Eq. Pr. § 320; Freeman *v.* Michigan State Bank, Harr. (Mich.) 311; and how the slip happened; and this must in general be presented by affidavit. 1 Daniell Ch. Pr. (6th Am. ed.) 704.

3. Cook *v.* Bee, 2 Tenn. Ch. 344; Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 56.

4. Cook *v.* Bee, 2 Tenn. Ch. 343; Taylor *v.* Dodd, 5 Ind. 246.

5. 1 Foster Fed. Pr. (2d ed.) § 168,

10. How Amendments are Made—*a.* OF BILLS—**Should be Designated.**—Whatever may be the nature of the amendment, it should be so perspicuously and distinctly introduced and placed upon the record as to afford the means of readily distinguishing the original bill from each one of the amendments to it.[1]

By Interlineations.—Short and apparently unimportant amendments, such as the mere correction of a verbal error, the alteration, striking out, or introduction of a name, or the making of a single allegation not materially changing the general structure of the bill, may be made by interlineations or by insertions in the margin.[2]

By Amended Bill.—But if there be much new matter to be introduced, it should be done by a separate amended bill.[3]

citing Rodgers *v.* Rodgers, 1 Paige (N. Y.) 424; to which may be added Rogers *v.* De Forest, 3 Edw. Ch. (N. Y.) 171; Jones *v.* Kennicott, 83 Ill. 484; Huffman *v* Hummer, 17 N. J. Eq. 270, where it was held that the admission by the complainant's solicitor of the truth of the proposed answer could not dispense with this requirement, unless, perhaps, where the admission was unequivocal and in writing.

Waiver of Objection.—When the proposed amendment to an answer was not verified, and was objected to on that ground, the appellate court will presume that had it been allowed it would have been verified at once. Grace *v.* Newbre, 31 Wis. 19.

1. Walsh *v.* Smyth, 3 Bland (Md.) 9, where it was also said that it should be so made as to show the day on which each of the amendments was put upon the record. Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 170.

Should be Actually Made.—"The bill when amended should either be re-engrossed or the amendments actually made by canceling and interlining or by substitution of sheets in the place of the canceled parts, containing the amendments to be inserted." Wilson *v.* King, 23 N. J. Eq. 150.

Stipulation for Amendment.—Neither an agreement between solicitors for an amendment nor an order giving leave to amend will avail on final hearing, if no amendment is actually made. Wilson *v.* King, 23 N. J. Eq. 150; Jones *v.* Davenport, 45 N. J. Eq. 78; Hudnit *v.* Tomson, 26 N. J. Eq. 239. *Compare* Arnaud *v.* Grigg, 29 N. J. Eq. 1.

Where a foreclosure bill contained no allegation as to taxes paid by the mortgagee, but it was stipulated of record before the hearing that the complainant had filed vouchers showing that he had paid the taxes on the premises for certain years, and the complainant asked the court in the stipulation to allow the amount in the decree when made, it was held that although it was decidedly irregular it amounted to an amendment so as to support a decree for the taxes upon the vouchers filed. Wright *v.* Langley, 36 Ill. 381.

Amendments How Designated.—"By annexing the engrossed amendments to the original bill, and by referring in that part of the bill where the amendments should have been inserted to the annexed amendments, and by referring at each amendment to the proper place for its insertion in the original bill, the record will be kept from being defaced, and all the requisite certainty and convenience will be obtained." Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 173.

2. 1 Beach Mod. Eq. Pr. § 153; Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 170; Ayres *v.* Valentine, 2 Edw. Ch. (N. Y.) 451; Walsh *v.* Smyth, 3 Bland (Md.) 9; Alabama Warehouse Co. *v.* Jones, 62 Ala. 550; Brooks *v.* Colby, 25 Ga. 635, where it was said that under the practice in *Georgia* the bill is seldom engrossed anew. See also Melton *v.* Withers, 2 S. Car. 561.

Interlineation with Different Ink.—An amendment by interlineation with different ink needs no footnote to explain it. Werborn *v.* Austin, 82 Ala. 498.

3. Walsh *v.* Smyth, 3 Bland (Md.) 9; Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 170; Peirce *v.* West, 3 Wash. (U. S.)

Form of Amended Bill.—The rule is that the amended bill should state no more of the original bill than may be necessary to introduce and make intelligible the new matter, which should alone constitute the chief subject of the bill.[1]

Verification.—Where the original bill is sworn to, an amendment which contains substantial matter, and is not a mere formal amendment, must be verified to the same extent as the original bill.[2]

Signature of Counsel.—The usual practice is for counsel to re-sign amendments where they are substantial.[3]

b. OF ANSWERS.—It was formerly the practice of the court, if it saw sufficient ground for so doing, to permit the defendant to amend his answer;[4] but this practice was superseded in part by an order of Lord Thurlow which forbade taking the answer off the file, yet permitted a supplemental answer to be filed, by that course leaving to the parties the effect of what had been sworn to with the explanation given by the supplemental answer.[5] This practice has been since adopted in all cases in which it is desired to correct a mistake in an answer as to a matter of fact.[6]

355; Fearey *v.* Hayes, 44 N. J. Eq. 425; Setzer *v.* Beale, 19 W. Va. 274.

Injunction Bill.—In Layton *v.* Evans, 2 N. J. Eq. 387, it was held in conformity with a rule of court that no alteration can be made in an injunction bill after injunction issued and served, but that an amended bill must be engrossed and annexed to the original. See also Lanning *v.* Heath, 25 N. J. Eq. 425.

1. Peirce *v.* West, 3 Wash. (U. S.) 355; Walsh *v.* Smyth, 3 Bland (Md.) 9; Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 170; Willis *v.* Evans, 2 B. & B. 225.

In amending, it is not correct to state in the amended bill, "and your orator by way of amendment, etc., showeth." Grim *v.* Wheeler, 3 Edw. Ch. (N. Y.) 448.

2. Walker *v.* Ayres, 1 Iowa 449; Gunn *v.* Blair, 1 Barb. (N. Y.) 539; Rodgers *v.* Rodgers, 1 Paige (N. Y.) 424; Whitmarsh *v.* Campbell, 2 Paige (N. Y.) 67; Renwick *v.* Wilson, 6 Johns. Ch. (N. Y.) 81; Parker *v.* Grant, 1 Johns. Ch. (N. Y.) 434; Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 46; Hill *v.* Hill, 53 Vt. 578; Semmes *v.* Boykin, 27 Ga. 47. But see Mount Olivet Cemetery Co. *v.* Budeke, 2 Tenn. Ch. 480.

Objection on Appeal.—In Briggs *v.* Briggs, 20 Mich. 34, though an amendment to a divorce bill was not sworn to, as required by the practice of the court, the objection, being first made on appeal, was disregarded.

When Verification Unnecessary. — A sworn bill may be amended in its prayer and by adding a new and proper party plaintiff without swearing to the amendment. Livingston *v.* Marshall, 82 Ga. 281, holding, also, that immaterial error in allowing trivial amendments without requiring them to be sworn to will not work a reversal.

So, where a bill for an account was sworn to for the purpose of obtaining an injunction, it was held that an amendment relating solely to the basis on which the account should be stated might be allowed without verification. Gregg *v.* Brower, 67 Ill. 525.

3. 1 Daniell Ch. Pr. (6th Am. ed.) 313.

4. 1 Daniell Ch. Pr. (1st Am. ed.) 339.

5. 1 Daniell Ch. Pr. (1st Am. ed.) 339.

6. 1 Daniell Ch. Pr. (1st Am. ed.) 339; Beach Mod. Eq. Pr. § 402; Huffman *v.* Hummer, 17 N. J. Eq. 271; Vandervere *v.* Reading, 9 N. J. Eq. 446; Graham *v.* Skinner, 4 Jones (N. Car.) 94; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338; Smith *v.* Babcock, 3 Sumn. (U. S.) 583. *Compare* Arnaud *v.* Grigg, 29 N. J. Eq. 1.

In Georgia.—Lord Thurlow's order, having been made since the revolution, was held not to be binding in *Georgia*. Oliver *v.* Persons, 29 Ga.

But the old course of taking the answer off the file and amending it is still pursued in cases of error or mistake in matters of form;[1] the court always making it a part of the order, however, that immediately upon the correction being made the answer shall be resworn.[2]

11. **Terms.**—The court has a discretionary power to prescribe the terms on which amendments of pleadings shall be allowed,[3] and the exercise of this discretion will not be reviewed upon appeal.[4] If, at the time the order for amendment is made, none

568. See Martin *v.* Atkinson, 5 Ga. 390.

1. 1 Daniell Ch. Pr. (1st Am. ed.) 342; Vandervere *v.* Reading, 9 N. J. Eq. 446; Bell *v.* Hall, 1 N. J. Eq. 49.

Striking out Name.—Where an answer purported to be the joint and several answer of three defendants, but was signed and sworn to by only two of them, the latter were permitted to take it from the files and erase the name of the other defendant and file it as their own. Bailey Washing Mach. Co. *v.* Young, 12 Blatchf. (U.S.) 199. See *United States* Equity Rule 60.

Unsworn Answer.—The defendant was permitted to amend an unsworn answer on file by retracting an admission made by mistake. Taylor *v.* Dodd, 5 Ind. 246.

But the defendant cannot have the benefit of an oath to an amended answer when the original was not sworn to, an oath not having been required to it. De France *v.* Howard, 4 Iowa, 524. But see White *v.* Hampton, 9 Iowa, 181.

Unnecessary Repetition.—An answer to an amended bill is impertinent if it repeats what was said in the answer to the original bill. Gier *v.* Gregg, 4 McLean (U. S.) 202.

Amendments by Affidavits.—Amendments in the form of affidavits, not referring to the answer on file, are irregular, and a motion to dissolve an injunction will not be heard upon them. Mason *v.* Detroit City Bank, Harr. (Mich.) 222.

2. 1 Daniell Ch. Pr. (1st Am. ed.) 343; Vandervere *v.* Reading, 9 N. J. Eq. 446.

3. Rives *v.* Walthall, 38 Ala. 329; Mahone *v.* Williams, 39 Ala. 202; Chambless *v.* Taber, 26 Ga. 167; Clark *v.* Keene's First Congregational Soc., 46 N. H. 272; Sheets *v.* Selden, 7 Wall. (U. S.) 416. See also Hancock *v.* Carlton, 6 Gray (Mass.) 39.

In Furtherance of Justice.—The terms must be such as not to amount to a negation of the right. Burney *v.* Ball, 24 Ga. 505; and not to injure others who are not in default. McDougald *v.* Dougherty, 11 Ga. 570.

After Master's Report.—Upon permitting an amendment of the bill after the report of a master, the allowance of costs is a mere matter of discretion. Camp *v.* Waring, 25 Conn. 520.

In Drew *v.* Beard, 107 Mass. 64, the plaintiff, upon amending his bill at that stage, was ordered to pay the defendant's costs, and, if he prevailed, to take no costs up to the time of the amendment. See also Nellis *v.* Pennock Mfg. Co., 38 Fed. Rep. 379.

Special Terms.—"Let the courts refuse to allow amendments except on such terms as shall prevent delay of the trial. Let them exact of the applicants for leave to amend, undertakings to go to trial at an early day; waivers of all formal objections of every kind; waivers of the proof of documents and of the production of books; waivers of the proof of all matters not really in issue, whenever it can be done consistently with a regard to what is reasonable and equitable." Thomas *v.* Horn, 21 Ga. 177.

That the court may impose special terms other than the payment of costs, see Clark *v.* Keene's First Congregational Soc., 46 N. H. 272; Hancock *v.* Carlton, 6 Gray (Mass.) 39.

Waiver by Acceptance.—The acceptance of the terms prescribed as a condition of amending the bill is a waiver of objection to the order. Mahone *v.* Williams, 39 Ala. 202.

4. McLane *v.* Riddle, 19 Ala. 180, where an amendment of the bill was allowed without terms. Sheets *v.* Selden, 7 Wall. (U. S.) 416; Mahone *v.* Williams, 39 Ala. 202; Thomas *v.* Horn, 21 Ga. 177.

of the defendants have appeared, the plaintiff may amend without payment of any costs.[1]

Amendment of the bill after answer,[2] or at the hearing, is usually made upon payment of costs;[3] but where the facts were known to the defendant, yet were not disclosed in his answer, and were not discovered by the plaintiff until the hearing, he was permitted to amend without costs.[4]

1. 1 Daniell Ch. Pr. (6th Am. ed.) 411.

In Smith Ch. Pr. 250, it is said: "A bill may be amended without costs, if the order to amend is obtained before the defendants have appeared; or if some of the defendants have appeared and others have not, it may be amended as to those who have not appeared, and as to those who have appeared, on the terms of amending their office copies."

2. Horn *v.* Clements (N. J., 1887), 8 Atl. Rep. 530; Fearey *v.* Hayes, 44 N. J. Eq. 425; Jennings *v.* Springs, Bailey Eq. (S. Car.) 181; Rogers *v.* Moor, 1 Root (Conn.) 472; Beekman *v.* Waters, 3 Johns. Ch. (N. Y.) 410.

Substituting New Plaintiff.—In Jennings *v.* Springs, Bailey Eq. (S. Car.) 181, where an amendment was made by substituting a new plaintiff, it was allowed upon payment of all the costs up to the time of the amendment, as well as the costs of the amendment itself.

Making a Different Case.—"Where a different case is made by the amendment, the plaintiff should be taxed with the costs, and the defendant made to pay no more than he would have been put to had the bill been brought right originally." McDougald *v.* Williford, 14 Ga. 665.

Party Suing In Forma Pauperis.—If a party suing *in forma pauperis* amends his bill after answer, it must be upon payment of costs as in ordinary suits; if he has a meritorious claim to amend without costs, he must apply to the court by special motion. Richardson *v.* Richardson, 5 Paige (N. Y.) 58.

Before and After Replication.—In Mt. Olivet Cemetery Co. *v.* Budeke, 2 Tenn. Ch. 480, it was said that, where an amendment of the bill is allowed after answer or other defense made, and the amendment merely serves to develop the case made by the bill, the only costs which ought to be charged upon the plaintiff are the costs of the amendment, if the court is satisfied that the amendment is not resorted to for delay; but that upon amendment of the bill after replication or setting the plea or demurrer for hearing, the complainant should be charged with the costs attending the filing of the plea, and setting it for hearing, and that the court might in a proper case order the payment of all costs. See French *v.* Shotwell, 4 Johns. Ch. (N. Y.) 505.

Abandoning Amendment.—Where the complainant obtains an order for leave to amend his bill upon payment of the costs of the defendant's answer and the costs of opposing the application, he is not compelled to pay the costs of the answer if he elects to proceed without making the proposed amendment; but in that case he must pay the costs of opposing the application to amend. Van Ness *v.* Cantine, 4 Paige (N. Y.) 55.

After Demurrer.—The terms upon which the plaintiff shall be allowed to amend after demurrer sustained are discretionary. Sheets *v.* Selden, 7 Wall. (U. S.) 416.

In Noyes *v.* Sawyer, 3 Vt. 160, upon the allowance of a demurrer for want of proper parties, the plaintiff was permitted to amend on payment of the defendant's costs of the term.

Where a demurrer was filed, and the court, without passing upon the demurrer, permitted the plaintiff to amend, the defendant was allowed his reasonable costs. Edison Electric Light Co. *v.* Mather Electric Co., 53 Fed. Rep. 244. See Cunningham *v.* Pell, 6 Paige (N. Y.) 655.

Upon overruling a demurrer, there being faults in pleading on both sides, each party was allowed to amend without paying costs to the other. Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 49.

In Young *v.* Bilderback, 3 N. J. Eq. 206, a demurrer was allowed with leave to amend on payment of costs.

3. Battle *v.* Mutual L. Ins. Co., 10 Blatchf. (U. S.) 417; Neale *v.* Neale, 9 Wall. (U. S.) 1; Booth *v.* Wiley, 102 Ill. 84.

4. Wilson *v.* Brown, 13 N. J. Eq.

When the cause is remanded from an appellate court with leave to amend the bill without prejudice to any proceedings, the plaintiff can be placed in no better position as to costs than if the bill had been dismissed without prejudice, and must pay all costs to the time a decree is entered on the mandate.[1]

Amendment of the answer may be allowed upon payment of taxable costs to the time of the amendment.[2]

III. Of Pleadings and Proceedings at Common Law and under Codes and Statutes—1. Power to Amend—*a.* Inherent.—The power of amendment is incidental to the exercise of all judicial power.[3] Justices of the peace may allow an amendment of the pleadings in cases pending before them.[4]

280. See also Harrigan *v.* Bacon, 57 Vt. 644.

Effect of Laches.—But where an amendment is based upon knowledge obtained from the defendant, the plaintiff will be required to pay the costs accruing after the time when the motion to amend could and should have been made. Hoyt *v.* Smith, 27 Conn. 468.

1. Church *v.* Holcomb, 45 Mich. 29. See also Arendell *v.* Blackwell, 1 Dev. Eq. (N. Car.) 358; Fenno *v.* Coulter, 14 Ark. 38.

2. Arnold *v.* Chesebrough, 33 Fed. Rep. 571.

3. Tilton *v.* Cofield, 93 U. S. 166; Augusta *v.* Moulton, 75 Me. 551; Adams *v.* Main, 3 Ind. App. 232. See also Fitch *v.* Stevens, 2 Met. (Mass.) 505; Gilchrist *v.* Kitchen, 86 N. Car. 20; Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; Smith *v.* Rathbun, 75 N. Y. 122; Ellison *v.* Georgia R. Co., 87 Ga. 691; Bailey *v.* Jones, 14 Ga. 384: Mandel *v.* Peet, 18 Ark. 247.

"Every court, whether of general or limited jurisdiction, has the power to permit such amendments to be made in the pleadings while the cause is *in fieri* as will enable it to fulfil the end of its creation—the administration of justice." Murry *v.* Harper, 3 Ala. 745.

Validating Acts.—The legislature has not the power to legalize existing pleadings which are substantially defective without first requiring them to be amended. People *v.* Mariposa County, 31 Cal. 196.

Substitution for Lost Pleading.—Where an original pleading has been lost or mislaid it is proper for the court to allow another one to be filed as a substitute. Turner *v.* Lambeth, 2 Tex. 365, Wilkerson *v.* Branham, 5 Ala. 608. See also Ætna Ins. Co. *v.* Sparks, 62 Ga. 187; Newman *v.* Dodson, 61 Tex. 91.

4. Hanlin *v.* Baxter, 20 Kan. 134; Snyder *v.* Winsor, 44 Mich. 140; Linhart *v.* Buiff, 11 Cal. 280; Butler *v.* King, 10 Cal. 342. *Compare* Wilson *v.* Bayley, 42 N. J. L. 132. But not after the cause is submitted and taken under advisement. Webster *v.* Williams, 69 Mich. 135.

In New York a justice of the peace has ample power at any time before the trial or during the trial, to amend the pleadings if substantial justice will be promoted thereby. New York Code, § 2944. And it has been held that § 723 of the Code, authorizing "the court" to allow amendments, applies to justices of the peace. Lapham *v.* Rice, 55 N. Y. 472; Ackley *v.* Tarbox, 31 N. Y. 564; Lowe *v.* Rommell, 5 Daly (N. Y.) 17.

A justice may allow an amendment to conform to the proof. Schork *v.* Moritz (Super. Ct.), 24 N. Y. St. Rep. 898; Doughty *v.* Crozier, 9 Abb. Pr. (N. Y. C. Pl.) 411. He may allow an amendment changing the action from tort to contract. Bigelow *v.* Dunn, 36 How. Pr. (N. Y. Supreme Ct.) 120; DeWitt *v.* Greener, 11 Civ. Pro. Rep. (N. Y. Co. Ct.) 327. But he cannot allow an amendment at the trial so as to introduce a new cause of action. Dows *v.* Morrison (C. Pl.), 20 N. Y. Supp. 860.

In a proper case it is the imperative duty of the justice to allow an amendment, and reversible error to refuse. Smith *v.* Mitten, 13 How. Pr. (N. Y. Supreme Ct.) 325; Wood *v.* Shultis, 4 Hun (N. Y.) 309; Hilliard *v.* Austin, 17 Barb. (N. Y.) 141; Leonard *v.* Foster, 7 Hun (N. Y.) 464; Walsh *v.* Cornett, 17 Hun (N. Y.) 27; Ryan *v.*

So far as the mere power to amend is concerned, the statutes of amendment are only declaratory of the common law.[1] At common law amendments can be made in all cases in furtherance of justice at any time before final judgment is entered and the term passed,[2] and there is no distinction in this respect between penal and other actions.[3]

Lex Fori Governs.—The practice of the *lex fori* in respect of amendments will control regardless of the practice in the state where the cause of action arose.[4]

b. SOMETHING TO AMEND OR AMEND BY.—At common law the general rule was that there must be something in the record to amend by.[5] But under the statutes of amendment the power

Lewis, 3 Hun (N. Y.) 429; Turck *v.* Richmond, 13 Barb. (N. Y.) 533; Vaughn *v.* Lego (Supreme Ct.), 17 N. Y. St. Rep. 279. See further, as to the power and duty of justices in respect of amendments, Jaycox *v.* Pinney, 62 Barb. (N. Y.) 344; Gilmore *v.* Barnett, 20 Hun (N. Y.) 514; Birdsall *v.* Fuller, 11 Hun (N. Y.) 204; Agreda *v.* Faulberg, 3 E. D. Smith (N. Y.) 178; Loyd *v.* Fox, 1 E. D. Smith (N. Y.) 101; Fulton *v.* Heaton, 1 Barb. (N. Y.) 552; Stern *v.* Drinker, 2 E. D. Smith (N. Y.) 401; White *v.* Stevenson, 4 Denio 193; Glasse *v.* Keulsen, 3 Abb. Pr. (N. Y.) 100; Waldheim *v.* Sichel, 1 Hilt. (N. Y.) 45; Woolley *v.* Wilber, 4 Denio (N. Y.) 570; Bull *v.* Colton, 32 Barb. (N. Y.) 94; Colvin *v.* Corwin, 15 Wend. (N. Y.) 557; Monteith *v.* Cash, 1 E. D. Smith (N. Y.) 412; Andrews *v.* Thorp, 1 E. D. Smith (N. Y.) 615; Hinds *v.* Page, 6 Abb. Pr. N. S. (N. Y. Co. Ct.) 58; Price *v.* Peters, 15 Abb. Pr. (N. Y. C. Pl.) 197; Hall *v.* Olney, 62 Barb. (N. Y.) 27.

1. Christal *v.* Kelly, 88 N. Y. 285; Lane *v.* Beam, 19 Barb. (N. Y.) 52; Smith *v.* Rathbun, 75 N. Y. 122; Prindle *v.* Aldrich, 13 How. Pr. (N. Y. Supreme Ct.) 466; Chouteau *v.* Hewitt, 10 Mo. 131; Knott *v.* Taylor, 96 N. Car. 553; Coombs *v.* Low, R. M. Charlt. (Ga.) 395.

Contra.—In Irwin *v.* Paulett, 1 Kan. 418, it was held that the authority to allow amendments is derived solely from the provisions in the Code.

2. Chouteau *v.* Hewitt, 10 Mo. 131; Coombs *v.* Low, R. M. Charlt. (Ga.) 395.

3. Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336; Barber *v.* McHenry, 6 Wend. (N. Y.) 516; Merriam *v.* Langdon, 10 Conn. 460; Beates *v.* Retallick, 23 Pa. St. 288; Griffith *v.* Eshelman, 4 Watts (Pa.) 55; Megargell *v.* Hazleton Coal Co., 8 W. & S. (Pa.) 342; Davis *v.* Saunders, 7 Mass. 62; Mitchell *v.* Tibbetts, 17 Pick. (Mass.) 298; Hamilton *v.* Boiden, 1 Mass. 50; Thornton *v.* Townsend, 39 Me. 181; Canal St. Gravel Road Co. *v.* Paas, 95 Mich. 372; Jones *v.* Ross, 2 Dall. (U. S.) 143; Childress *v.* Nashville, 3 Sneed (Tenn.) 347; Washington *v.* Frank, 1 Jones (N. Car.) 436. *Compare* U. S. *v.* Batchelder, 9 Int. Rev. Rec. 98.

Leave to amend may be refused where it would not be in furtherance of justice. Palmer *v.* York Bank, 18 Me. 166.

Real Actions. — Amendments may be allowed in real actions. Bird *v.* Decker, 64 Me. 550; Parker *v.* Murch, 64 Me. 54; Howard *v.* Houghton, 64 Me. 445; Howe *v.* Wilds, 34 Me. 566; Rowell *v.* Small, 30 Me. 30; Holmes *v.* Holmes, 2 Pick. (Mass.) 23; Means *v.* Welles, 12 Met. (Mass.) 356.

In Rand *v.* Dodge, 12 N. H. 67, it was held that a writ of entry could not be amended by striking out one of the demandants.

4. South Car. R. Co. *v.* Nix, 68 Ga. 572.

5. Johnson *v.* Mayrant, 1 McCord (S. Car.) 484; Nelson *v.* Barker, 3 McLean (U. S.) 379; Lake *v.* Morse, 11 Ill. 587. See also Bailey *v.* Palmer, 5 Ark. 208.

"Notwithstanding this general rule Tidd says and quotes the cases in support of his statement that the courts have, in particular instances, permitted the plaintiff to amend his declaration after issue joined in cases where there was nothing to amend by. Tidd's Pr. 713." Daly, C. J., in Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494.

of the court is not now considered to be thus limited.[1] Nevertheless, there must be something to amend, and a declaration or complaint which wholly fails to state any cause of action whatever cannot be amended, at least in those states where an amendment introducing a new cause of action is not allowed.[2]

Where, however, the defect in the declaration or complaint consists merely in a faulty statement of the facts constituting the cause of action, it may be cured by amendment.[3]

c. RELATION BETWEEN FEDERAL AND STATE PRACTICE.—A federal statute provides for the amendment of defects in pleadings and proceedings in civil actions.[4] And another provision

1. Gregg *v.* Gier, 4 McLean (U. S.) 208.

2. Lilly *v.* Charlotte, etc., R. Co., 32 S. Car. 142; Bleckeley *v.* Branyan, 28 S. Car. 449; Kennerty *v.* Etiwan Phosphate Co., 21 S. Car. 226; Phinney *v.* Phinney, 17 How. Pr. (N. Y. Supreme Ct.) 197 (query); State *v.* Rottaken, 34 Ark. 144; Mexican Mill *v.* Yellow Jacket Silver Min. Co., 4 Nev. 40; Smith, Petitioner, 15 Pick. (Mass.) 446; Guilford *v.* Adams, 19 Pick. (Mass.) 376; Bangor, etc., R. Co. *v.* Smith, 49 Me. 9; Simpson *v.* Memphis, etc., R. Co., 66 Ala. 85; Grasser *v.* Eckart, 1 Binny (Pa.) 575; Brashears *v.* Strock, 46 Mo. 221; Boren *v.* Billington, 82 Tex. 137. See also Woodruff *v.* Dickie, 5 Robt. (N. Y.) 620; Keenan *v.* Knight, 9 Allen (Mass.) 257; Bachus *v.* Mickle, 45 Ala. 445.

A count for balance of account or for the amount due is amendable by adding a bill of particulars. Harrington *v.* Tuttle, 64 Me. 474.

The *Georgia* statute expressly requires "enough to amend by." The question received much consideration in Ellison *v.* Georgia R. Co., 87 Ga. 691, where, however, the amendment was allowed.

In Selma, etc., R. Co. *v.* Lacy, 49 Ga. 106, and Smith *v.* East & West R. Co., 84 Ga. 183, the amendment was denied.

Objection How Raised.—The question should be raised by motion to strike the amendment from the files, not by a motion to dismiss the declaration as amended. O'Shields *v.* Georgia Pac. R. Co., 83 Ga. 621.

Waiver of Objection.—If the objection to the amendment is not made in the court below it is not available in the appellate court. Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633.

3. Harvey *v.* Hackney, 35 S. Car. 361; Miller *v.* Stark, 29 S. Car. 325; Skinner *v.* Grant, 12 Vt. 456; Wilson *v.* Pearson, 102 N. Car. 290; Pullen *v.* Hutchinson, 25 Me. 249; Davenport *v.* Holland, 2 Cush. (Mass.) 13, where the court discussed at some length the question as to how defective a declaration must be in order to be beyond the reach of amendment. Wingate *v.* Com., 5 Cush. (Mass.) 446; Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673; Ellison *v.* Georgia R. Co., 87 Ga. 691, now the leading case in Georgia; Schmidt *v.* Block, 76 Ga. 823; Mitchell *v.* Long, 74 Ga. 94; Merritt *v.* Bagwell, 70 Ga. 578; Central R., etc., Co. *v.* Denson, 83 Ga. 266; Snook *v.* Raglan, 89 Ga. 251; Tatum *v.* Allison, 31 Ga. 337; Ware *v.* Macon City Bank, 59 Ga. 840; Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659; Cartter *v.* Cotter, 88 Ga. 286; Southwestern R. Co. *v.* Bryant, 67 Ga. 212; Hardee *v.* Lovett, 83 Ga. 203; Verdery *v.* Barrett, 89 Ga. 349; Dill *v.* Jones, 3 Ga. 79; Strawn *v.* Kersey, 22 Ga. 586.

4. "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any court of the United States shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof: and such court shall amend every such defect and want of form, other than those which the party demurred so expresses: and may at any

declares in substance that the practice at law in the federal courts shall conform to the practice of the state in which the court is held.[1] Where the state statute allows amendments at any stage of the case as a matter of right, the federal court will not exercise a discretion to deny the amendment.[2]

In allowing amendments to conform to the proof, the federal court will follow the state statute defining a material variance.[3]

The state practice in respect of the allowance of amendments introducing a new cause of action will govern the federal court.[4]

The mode of amending the complaint as of course, under the state practice,[5] and the state practice in allowing amendments after verdict by increasing the amount of damages claimed, will be followed.[6]

d. AMENDMENT OF JURISDICTIONAL AVERMENTS.—A court without jurisdiction has no authority to allow an amendment to pleadings in the suit.[7]

Where the court has jurisdiction of the subject-matter, and the defendant has appeared in court to contest the merits, the declaration or complaint may be amended by inserting averments necessary to perfect the jurisdiction of the court upon the record.[8]

time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall, in its discretion and by its rules, prescribe." U. S. Rev. St. § 954.

1. "The practice, pleadings, and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." United States Rev. St. § 914.

"'As near as may be' allows only necessary variations from the state methods growing out of the different organization of the courts, and other similar matters." Lewis *v.* Gould, 13 Blatchf. (U. S.) 216.

2. Nussbaum *v.* Northern Ins. Co. (District of Georgia), 40 Fed. Rep. 337.

3. Liverpool, etc., Ins. Co. *v.* Gunther (District of New York), 116 U. S. 113.

4. Chamberlain *v.* Mensing (District of South Carolina), 51 Fed. Rep. 511.

The state decisions as to what does or does not constitute a new cause of action will be followed. West *v.* Smith (District of Connecticut), 101 U. S. 263.

5. Rosenbach *v.* Dreyfuss (District of New York), 1 Fed. Rep. 391.

6. Elting *v.* Campbell (District of New York), 5 Blatchf. (U. S.) 183, where it was said that "the practice of the state courts, if settled and uniform, should, unless there are very strong reasons in opposition, be followed." *Compare* Tobey *v.* Claflin, 3 Sumn. (U. S.) 379.

Other Instances.—The state practice was followed in Clark *v.* Sohier, 1 Woodb. & M. (U. S.) 368; Whitaker *v.* Pope (District of Georgia), 2 Woods (U. S.) 463; Henderson *v.* Louisville, etc., R. Co. (District of Louisiana), 123 U. S. 61, where a usee was substituted for a nominal plaintiff. Fitzpatrick *v.* Flannagan (District of Mississippi), 106 U. S. 648, where an affidavit in attachment was amended by adding a new ground for attachment under the authority of the Mississippi Code, § 1134. See also *infra*, IV, 1, *b*.

7. Goff *v.* Robinson, 60 Vt. 633.

A petition to the court of common pleas for a highway, which shows upon its face that the court has no jurisdiction of the application, cannot after a reference to the road commissioners and a report made by them be amended so as to give the court jurisdiction. Dinsmore *v.* Auburn, 26 N. H. 356.

8. Chafee *v.* Postal Tel. Co., 35 S. Car. 372. See also Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106.

Defective averments as to the residence of the parties are amendable;[1] and under authority to amend "by inserting other allegations material to the case," it has been held that a plaintiff may be allowed to amend his complaint by inserting allegations proper to obviate an objection that the court has no jurisdiction of the cause of action.[2]

Striking Out.—The court may undoubtedly allow an amendment by striking out a count of which it has no jurisdiction.[3]

In the Federal Courts, the want of an averment of diverse citizenship of the parties may be supplied by amendment,[4] and the plaintiff may amend his declaration to show that he was an alien when the action was brought instead of a citizen as alleged.[5]

Limitation of the Power.—In Brown *v.* Pond, 5 Fed. Rep. 41, Judge Choate says that the power of amendment can only be exercised in cases where the court has acquired jurisdiction over the defendant or where he has submitted himself to the jurisdiction.

Averment Merely Defective.—In a special proceeding under *North Carolina* Laws, 1887, c. 276, to sell land in partition, a complaint which fails to allege that the plaintiff is in possession is defective merely, and the court is not without jurisdiction to grant an amendment. Godwin *v.* Early (N. Car., 1894), 18 S. E. Rep. 973.

Averment of Value of Property.—Where judgment was arrested for want of jurisdiction, the declaration not alleging the value of the property in controversy, the plaintiff was permitted to amend by adding the averment. Lanning *v.* Dolph, 4 Wash. (U. S.) 629; Romero *v.* Luna (N. Mex., 1892), 30 Pac. Rep. 855.

Petition in Drainage Proceedings.—In Coolman *v.* Fleming, 82 Ind. 117, it was held that a petition in a drainage case might be amended even as to a jurisdictional matter.

In Justice Court.—A justice of the peace has the right to allow the complaint to be amended in the statement of a jurisdictional fact. Linhart *v.* Buiff, 11 Cal. 280.

1. The omission to allege in the declaration that the defendant resides in the county where suit is brought is amendable. Raney *v.* McRae, 14 Ga. 589; Hall *v.* Mobley, 13 Ga. 318.

In Chaffe *v.* Thornton, 28 La. Ann. 837, where the petition alleged that the plaintiff resided in the City of New Orleans, without averring that it was within the state of *Louisiana*, an amendment was allowed instanter.

Where it appears from the petition that the defendant does not reside in the county where suit is brought, and there are no allegations which bring the case within some of the exceptions to the general rule which requires inhabitants of the state to be sued in the county of their domicil, the defect may be cured by amendment. Evans *v.* Mills, 16 Tex. 196.

2. Frizzell *v.* Duffer, 58 Ark. 612.

In Charlotte Planing Mills *v.* McNinch, 99 N. Car. 517, such an amendment was allowed with the consent of the defendant.

After Motion to Dismiss.—The *Colorado* Code expressly provides for amendments after demurrer sustained for want of jurisdiction of the subject-matter. A motion to dismiss is equivalent to a demurrer, and upon being overruled the plaintiff may be allowed to amend. Southwestern Land Co. *v.* Hickory Jackson Ditch Co., 18 Colo. 439.

Amendment in Agreed Case.—A submission of an action upon a case stated by the parties without limiting the plaintiff's right to recover to the particular form in which the action is brought, authorizes the writ to be amended in the court where it is brought into another form of which that court has original jurisdiction, although it has no jurisdiction of the action in its present form. Merrill *v.* Bullock, 105 Mass. 486.

3. Pollard *v.* Barnes, 2 Cush. (Mass.) 191.

4. Morgan *v.* Gay, 19 Wall. (U. S.) 81; Kelsey *v.* Pennsylvania R. Co., 14 Blatchf. (U. S.) 89; Hillard *v.* Brevoort, 4 McLean (U. S.) 24.

5. Betzoldt *v.* American Ins. Co., 47 Fed. Rep. 705. See also Michaelson *v.* Denison, 3 Day (Conn.) 294, a case

Such amendments have been allowed after a demurrer sustained,[1] pending a motion in arrest of judgment on account of the defect,[2] and have been sanctioned by the Supreme Court even where the judgment below has been reversed because the record lacked the proper jurisdictional averments.[3]

2. Amendments by Referee—*a.* POWER WHOLLY STATUTORY. —Referees have no power to allow an amendment of the pleadings in cases submitted to them unless the power is expressly conferred by statute.[4]

b. CODE PROVISIONS.—Some of the codes provide that upon the trial before a referee the latter shall have the same power as the court to allow amendments to the summons or to the pleadings, which he may exercise in like manner and upon like terms as the same powers are exercised by the court upon a trial.[5]

decided in the United States Circuit Court.

1. Fisher *v.* Rutherford, 1 Baldw. (U. S.) 188.

2. Maddox *v.* Thorn, 60 Fed. Rep. 217.

3. Betzoldt *v.* American Ins. Co., 47 Fed. Rep. 705; Parker *v.* Ormsby, 141 U. S. 81; Everhart *v.* Huntsville College, 120 U. S. 223; King Bridge Co. *v.* Otoe County, 120 U. S. 225; Metcalf *v.* Watertown, 128 U. S. 590; Menard *v.* Goggan, 121 U. S. 253; Conolly *v.* Taylor, 2 Pet. (U. S.) 556; Morgan *v.* Gay, 19 Wall. (U. S.) 81; Continental Ins. Co. *v.* Rhoads, 119 U. S. 237; Halsted *v.* Buster, 119 U. S. 341; Denny *v.* Pironi, 141 U. S. 124.

4. De La Riva *v.* Berreyesa, 2 Cal. 196; Eldred *v.* Eames, 115 N Y. 401 (*reversing* 48 Hun (N. Y.) 253), where it was said that in New York the power of amendment was first conferred upon referees by § 272 of the Code in 1857. See also the dissenting opinion of Follet, J., in the same case at general term, 48 Hun (N. Y.) 257.

Referees in Special Proceedings. — It was held in Eldred *v.* Eames, 115 N. Y. 401, *reversing* 48 Hun (N. Y.) 253, that the general language of the Code provision conferring power upon referees in special proceedings did not obliterate the distinction between statutory references and those made in actions which are inherent in the nature of the proceeding, and that upon a reference of a claim against the estate of a decedent the referee has no power of amendment, as an amendment would vary the matter referred.

In *In re* Muzor's Estate, 25 N. Y. Supp. 818, 4 Misc. Rep. 818, a proceeding before a referee to state an administrator's account, the court said that "there can be no question as to the power of a referee to grant such an amendment as the surrogate himself might grant upon a trial," *citing* §§ 2538 2546 of the Code, and Billington *v.* Cahill (Supreme Ct.) 4 N. Y. Supp. 633.

5. New York Code, § 1018; South Carolina Code, § 296.

Extent of Power.—That the referee has the same power as the court in this behalf, see Knapp *v.* Fowler, 26 Hun (N. Y.) 200; Van Ness *v.* Bush, 22 How. Pr. (N. Y. Supreme Ct.) 481; Bennett *v.* Lake, 47 N. Y. 93; Hoyt *v.* Hoyt, 8 Bosw. (N. Y) 511; and upon the same terms with like effect, Oregon Steamship Co. *v.* Otis, 59 How. Pr (N. Y. Supreme Ct.) 254; Woodruff *v.* Dickie, 5 Robt. (N. Y.) 619; Smith *v.* Rathbun, 75 N. Y. 122.

His power extends only to such amendments as the court may order on a trial. Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557; Secor *v.* Law (N.Y.), 3 Trans. App. 328.

His power to allow amendments is not co-extensive with that of the court at special term; it is restricted to that of the court at circuit. Chittenango Cotton Co. *v.* Stewart, 67 Barb. (N. Y.) 423.

An answer to an amended complaint may be amended on terms pending a trial before a referee. Skinner *v.* White, 63 Hun (N. Y.) 628, 17 N. Y. Supp. 657.

New Bill of Particulars.—He may permit a new bill of particulars to be substituted for that annexed to the complaint. Melvin *v.* Wood, 4 Abb. Pr.

c. THE POWER CONCURRENT.—The power with which the referee is thus invested is concurrent with that of the court, and pending a reference, if a party desires to amend and the referee adjourns his case, a motion may be made to the court.[1]

d. NEW CAUSE OF ACTION.—A referee cannot permit such an amendment of the complaint as would constitute a new cause of action.[2]

e. NEW DEFENSE.—Nor can he permit the defendant to amend his answer on the trial by setting up a new defense.[3]

N. S. (N. Y. Ct. of App.) 438, 3 Keyes (N. Y.) 533. See Patchin *v.* Peck, 38 N. Y. 39.

In Respect of Parties.—A referee has power to amend the summons and complaint by adding a party defendant. Magovern *v.* Robertson (Supreme Ct.), 37 N. Y. St. Rep. 441, 14 N. Y. Supp. 114. But see Newman *v.* Marvin, 12 Hun (N. Y.) 236; Knapp *v.* Hungerford, 7 Hun (N. Y.) 588. He cannot strike out the name of a party. Billings *v.* Baker, 6 Abb. Pr. (N. Y. Supreme Ct.) 213.

Amendment Allowed in Findings.—Where the plaintiff on the trial moves to amend so as to include interest in the demand, and the referee without objection reserves his decision, an allowance of the amendment, made in the findings, is in time. Bean *v.* Edge, 46 N. Y. Super. Ct. 455.

1. Bullock *v.* Bemis, 40 Hun (N. Y.) 623, 2 N. Y. St. Rep. 189.

May Require Application to Court.—A referee is not obliged, upon the trial, to permit an amendment of the complaint which is necessary to make it state a cause of action against certain of the defendants; he may require the parties to apply to the court, where terms may be imposed which will protect the rights of such defendants. Barnes *v.* Seligman, 55 Hun (N. Y.) 339, 29 N. Y. St. Rep. 68, 8 N. Y. Supp. 834.

2. National Steamship Co. *v.* Sheahan, 122 N. Y, 461, *aff'g* 13 N. Y. St. Rep. 429; Zoller *v.* Kellogg, 66 Hun (N. Y.) 194, 21 N. Y. Supp. 226; Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388; Dougherty *v.* Valloton, 38 N.Y. Super. Ct. 455; Union Bank *v.* Mott, 10 Abb. Pr. (N. Y. Supreme Ct.) 372; Sinclair *v.* Neill, 1 Hun (N. Y.) 80; Bockes *v.* Lansing, 74 N. Y. 437, *aff'g* 13 Hun (N. Y.) 38; Quimby *v.* Claflin, 13 N. Y. Wkly Dig. 203. But see Secor *v.* Law, 9 Bosw. (N. Y.) 163; Dunnigan *v.* Crummey, 44 Barb. (N. Y.) 528.

A referee has power to permit an amendment of a complaint which changes the case from one for damages for breach of contract to one upon a *quantam meruit.* Flynn *v.* Westmayer, 14 Civ. Pro. (N. Y. Super. Ct.) 130, 4 N. Y. Supp. 188. Or which changes an allegation that an assignment was in writing and for a certain sum, so as to allege that it was by parol and as security for a certain sum. Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511.

For other amendments held not to introduce a new cause of action, see Bennett *v.* Agricultural Ins. Co., 106 N. Y. 243; Snow *v.* Cable, 19 Hun (N. Y.) 280.

3. Case *v.* Phœnix Bridge Co., 34 N. Y. St. Rep. 581, 19 Civ. Pro. Rep. (N. Y. Super. Ct.) 373, 11 N. Y. Supp. 723; Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557; Dougherty *v.* Valloton, 38 N. Y. Super. Ct. 455. See also Smith *v.* Bodine, 74 N. Y. 30; Brett *v.* First Universalist Soc., 63 Barb. (N. Y.) 610, *aff'd* 64 N. Y. 651; Livermore *v.* Bainbridge, 44 How. Pr. (N. Y. Supreme Ct.) 357, *aff'd* 47 How. Pr. (N. Y.) 350.

Payment Amended to General Denial.—The referee may allow an amendment of the answer which contained an averment of payment to plaintiff's agent, by setting up a general denial. Wilcox *v.* Onondaga County Sav. Bank, 40 Hun (N. Y.) 297.

Making General Denial Special.—Or to set up by amendment of an answer which was a general denial, that one of the defendants sued as a partner was not a partner, and that the claim sued on has been paid in part. Frazer *v.* Hunt, 18 N. Y. Wkly Dig. 390.

Reply to Counterclaim — After the final submission of the cause and a decision by the referee the plaintiff will not be permitted to amend his reply to a counterclaim by setting up a further defense thereto. Brady *v.* Nally, 26

f. TO CONFORM TO PROOF.—Referees have power after a cause of action has been duly made out by the proofs to direct an amendment of the pleadings so as to make them conform thereto.[1]

g. POWER TO IMPOSE TERMS.—The power of a referee with respect to the terms upon which an amendment shall be allowed is commensurate with that of the court.[2]

h. REVIEW OF REFEREE'S RULING.—The allowance or rejection of amendments rests in the sound discretion of the referee, and his decision will not be reviewed except for want of power, or in a clear case of abuse.[3]

3. In Furtherance of Justice—*a.* PRINCIPLE PERVADES ALL AMENDMENTS.—In civil proceedings all amendments, if no statute or rule of court interposes to prevent, are in the discretion of the court, and are allowed or refused as the court may deem most conducive to the furtherance of justice.[4]

Abb. N. Cas. (N. Y. Super. Ct.) 367, 14 N. Y. Supp. 480.

Setting up Limitation.—A referee cannot allow a party on the trial to add the plea of the statute of limitations; it is a new defense. Riley *v.* Corwin, 17 Hun. (N. Y.) 597. *Contra*, Mason *v.* Johnson, 13 S. Car. 20.

1. Hough *v.* Blower, 1 Alb. L. J. 124; Chapin *v.* Dobson, 78 N. Y. 74; Oregon Steamship Co. *v.* Otis, 59 How. Pr. (N. Y. Supreme Ct.) 254, 27 Hun (N. Y.) 452, 100 N. Y. 448; Flynn *v.* Westmayer (Super. Ct.), 4 N. Y. Supp. 188; Nichols *v.* Scranton Steel Co. (Ct. of App.), 51 N. Y. St. Rep. 277, 137 N. Y. 471, *aff'g* 46 N. Y. St. Rep. 58; Merriam *v.* Wolcott, 61 How. Pr. (N. Y. Supreme Ct.) 377; Crismon *v.* Deck, 84 Iowa 344; Gilbank *v.* Stephenson, 31 Wis. 592; South Car. R. Co. *v.* Barrett, 12 S. Car. 174.

Failure of Proof. — In Button *v.* Schuyler's Steam Towboat Line, 40 Hun (N. Y.) 422, an amendment was properly denied on account of failure of proof.

2. Smith *v.* Rathbun, 75 N. Y. 122, *reversing* 13 Hun (N. Y.) 47, and holding that where the referee allows the plaintiff to amend by adding allegations which do not substantially change the cause of action, he may impose as a condition that a defendant who has answered may interpose a demurrer or answer.

Waiver of Objection.—A referee may allow an amendment of the complaint upon the trial on payment of costs; at all events the opposite party by accepting the costs is precluded from raising the objection. Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281.

3. Haight *v.* Littlefield, 71 Hun (N. Y.) 289; Coates *v.* Donnell, 48 N. Y. Super. Ct. 46; Price *v.* Brown, 98 N. Y. 388; Melvin *v.* Wood, 3 Keyes (N. Y.) 533; Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557; Rocker *v.* Wildfoerster (Supreme Ct.), 20 N. Y. Supp. 9. See also Brett *v.* First Universalist Soc., 63 Barb. (N. Y.) 610, *aff'd* 64 N. Y. 651.

Grounds for Ruling.—Doubtless, if a referee denies leave to amend on the ground of a supposed want of power, his decision is reviewable for error. See *infra*, 4, *a*, (2). But if the order denying leave states no ground for his decision, it will be presumed that it was simply an exercise of discretion. Haight *v.* Littlefield, 71 Hun (N. Y.) 289.

Method of Review.—In New York the special term has no power to review the ruling of the referee. It can be reviewed only on appeal. Knapp *v.* Fowler, 26 Hun (N. Y.) 200. See Macpherson *v.* Ronner, 40 N. Y. Super. Ct. 448.

4. Jackson *v.* Warren, 32 Ill. 331; Thompson *v.* Mosely, 29 Mo. 477; Chouteau *v.* Hewitt, 10 Mo. 131; Goddard *v.* Williamson, 72 Mo. 131; Greer *v.* Covington (Ky., 1885), 2 S. W. Rep. 323; Bussey *v.* Rothschild, 27 La. Ann. 316; Penny *v.* Parham, 1 La. Ann. 274; McMullen *v.* Jewell, 3 La. Ann. 139; Meyer *v.* Farmer, 36 La. Ann. 785; Tucker *v.* Liles, 3 La. 297; Debuys *v.* Mollers, 2 Martin N. S. (La.) 625; Brockman *v.* Berryhill, 16 Iowa 183; Wilson *v.* Johnson, 1 Greene (Iowa)

Amendments are not ordinarily allowed in order to give one of the parties a purely technical advantage over the other.[1] Obviously, however, the term "furtherance of justice" is not susceptible of accurate definition, and the application of the principle is to be determined by the varying circumstances of each particular case, for which reference must be had to specific heads of this article.[2]

A few general considerations touching the subject are discussed in the following subsections.

b. AMENDMENTS FAVORED.—Although the granting or refusal of leave to amend rests within the sound discretion of the court,[3]

147; Daguerre *v.* Orser, 3 Abb. Pr. (N. Y. C. Pl.) 88; Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Wampler *v.* Shissler, 1 W. & S. (Pa.) 365; State *v.* Vandever, 3 Harr. (Del.) 29; State *v.* Collins, 1 Harr. (Del.) 216; Townsend *v.* Townsend, 2 Harr. (Del.) 277; Hendricksen *v.* Huey, 2 Harr. (Del.) 301; Ten Eyck *v.* Delaware, etc., Canal Co., 19 N. J. L. 5; Bartley *v.* Smith, 43 N. J. L. 321; Archibald *v.* Thompson, 2 Colo. 391; Fuller *v.* Wing, 19 Me. 222.

Extraordinary Liberality in California.—In Bradley *v.* Parker (Cal., 1893), 34 Pac. Rep. 236, it was said that the courts of *California* "have gone further, perhaps, in permitting amendments than those of any other jurisdiction in the Union."

Good Faith Recognized.—As a general rule courts will not refuse a party leave to amend a pleading so long as they are satisfied that he is in good faith attempting to remedy such defects as are made to appear by the rulings upon questions presented in the course of settling the pleadings. Balch *v.* Smith, 4 Wash. St. 504.

Oversights of Counsel.—"From oversights of counsel committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality." Kirstein *v.* Madden, 38 Cal. 158. See also Penny *v.* Van Cleef, 1 Hall (N. Y.) 165.

Mistake of Law.—The court may allow an answer to be amended so as to correct a mistake of law made by the defendant's attorney. Gould *v.* Stafford, 101 Cal. 32.

Third Parties Protected.—A mistake in the name of a party cannot be corrected by amendment where the rights of third parties will be prejudiced. Fullerton *v.* Campbell, 25 Pa. St. 345.

Diligence Rewarded.—The court will not refuse to allow an amendment of the pleadings in an action to set aside as fraudulent a general assignment because the effect of allowing such an amendment may be to enable one diligent creditor to collect his claims before the claims of other creditors. Smith *v.* Parkhurst (Supreme Ct.), 2 N. Y. St. Rep. 212.

Inconsistent Defenses. — An amendment of the answer by setting up several inconsistent defenses should not be allowed. Marx *v.* Gross, 58 N. Y. Super. Ct. 221.

Pleading Judgment in Bar.—Where judgment is directed on demurrer of one of two joint debtors and the action served and directed to proceed as to the other, it is not in furtherance of justice to allow an amendment of the answer of the remaining defendant by setting up the judgment in bar. Schmohl *v.* Fusco (City Ct.), 37 N. Y. St. Rep. 687.

Withdrawal of Pleading.—A party may in the discretion of the court be allowed to withdraw any pleading filed by him where it works no injury to his adversary. Humphrey *v.* Hughes, 79 Ky. 487.

1. Hexter *v.* Schneider, 14 Oregon 184, affirming the ruling of the lower court in refusing to allow an amendment by pleading in abatement during the progress of the trial.

2. The leading features in modern practice are that amendments are allowed with great liberality (see the following paragraph), that their allowance or refusal is discretionary with the court (*infra*, 4, *a*, 1), and that the exercise of such discretion will not be reviewed except in a clear case of abuse (*infra*, 4, *a*, 1).

3. See *infra*, 4, *a*, 1.

a multitude of authorities declare the salutary rule that statutes of amendment are remedial and must be construed and applied liberally in favor of the privilege of amending. Upon this proposition there are no dissenting authorities.[1]

1. *Missouri.*—Reyburn *v.* Mitchell, 106 Mo. 365; Chauvin *v.* Lownes, 23 Mo. 223; Clarkson *v.* Morrison, 24 Mo. 134; Caldwell *v.* McKee, 8 Mo. 334; Dallam *v.* Bowman, 16 Mo. 225; House *v.* Duncan, 50 Mo. 453.

Iowa.—Logan *v.* Tibbott, 4 Greene (Iowa) 389; Tiffany *v.* Henderson, 57 Iowa 490, where it was said that "to allow amendments is the rule; to refuse, the exception;" Miller *v.* Perry, 38 Iowa 301; O'Connell *v.* Cotter, 44 Iowa 50; Hays *v.* Turner, 23 Iowa 217; Pride *v.* Wormwood, 27 Iowa 257; Seevers *v.* Hamilton, 11 Iowa 66.

Massachusetts.—Davenport *v.* Holland, 2 Cush. (Mass.) 12; Barker *v.* Burgess, 3 Met. (Mass.) 273; Goddard *v.* Pratt, 16 Pick. (Mass.) 412.

California.—Link *v.* Jarvis (Cal., 1893), 33 Pac. Rep. 206; Pierson *v.* McCahill, 22 Cal. 127; Burns *v.* Scooffy, 98 Cal. 271; Smith *v.* Yreka Water Co., 14 Cal. 201; Ward *v.* Clay, 82 Cal. 502; Lestrade *v.* Barth, 17 Cal. 285, affirming the decision of the trial court in granting a new trial for its own erroneous exercise of discretion in denying defendant leave to amend; Cooke *v.* Spears, 2 Cal. 409; Butler *v.* King, 10 Cal. 342; Kirstein *v.* Madden, 38 Cal. 158; McMillan *v.* Dana, 18 Cal. 339; Linhart *v.* Buiff, 11 Cal. 280.

New York.—Campbell *v.* Campbell, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 187; Strong *v.* Dwight, 11 Abb. Pr. N. S. (N. Y. Supreme Ct.) 319; Reeder *v.* Sayre, 70 N. Y. 180; Bragg *v.* Bickford, 4 How. Pr. (N. Y. Supreme Ct.) 21; Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317; Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Richmond *v.* Second Avenue R. Co. (Super. Ct.), 29 N. Y. Supp. 588.

Tennessee.—Stovall *v.* Bowers, 10 Humph. (Tenn.) 560.

Nebraska.—Berrer *v.* Moorhead, 22 Neb. 687.

Alabama.—Watts *v.* Womack, 44 Ala. 605; Beavers *v.* Hardie, 59 Ala. 570, Nelson *v.* Webb, 54 Ala. 436; Boardman *v.* Parrish, 56 Ala. 54; Webster *v.* Wyser, 1 Stew. (Ala.) 184, holding that a plea *puis darrein* continuance may be amended; Sanders *v.* Knox, 57 Ala. 80; Robinson *v.* Darden, 50 Ala. 71.

North Carolina.—Alamance County *v.* Blair, 76 N. Car. 136; Deal *v.* Palmer, 68 N. Car. 215; Robinson *v.* Willoughby, 67 N. Car. 84; Kron *v.* Smith, 96 N. Car. 389.

Pennsylvania.—Trego *v.* Lewis, 58 Pa. St. 463; Miller *v.* Pollock, 99 Pa. St. 202; Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169; Fidler *v.* Hershey, 90 Pa. St. 363; Getty *v.* Shearer, 20 Pa. St. 12; Tiernan *v.* Blackstone, 1 Phila. (Pa.) 27; Beates *v.* Rotallick, 23 Pa. St. 290; Steffy *v.* Carpenter, 37 Pa. St. 41.

Wisconsin.—Gregory *v.* Hart, 7 Wis. 532; Treadway *v.* Wilder, 8 Wis. 91; Brown *v.* Bosworth, 62 Wis. 542.

Oregon.—Baldock *v.* Atwood, 21 Oregon 79; Swift *v.* Mulkey, 14 Oregon 59.

Connecticut.—Bennett *v.* Collins, 52 Conn. 1; Phelps *v.* Enz, 19 Conn. 58.

New Hampshire.—Stebbins *v.* Lancashire Ins. Co., 59 N. H. 149.

Michigan.—Beecher *v.* Wayne Circuit Judges, 70 Mich. 363; Snyder *v.* Winsor, 44 Mich. 140.

Ohio.—Milins *v.* Marsh, 1 Disney (Ohio), 512; Beresford *v.* Ward, 1 Disney (Ohio), 171; Loving *v.* Fairchild (District of Ohio), 1 McLean (U. S.) 333.

South Carolina.—Tarrant *v.* Gittelson, 16 S. Car. 234; State Bank *v.* Simpson, 2 Spears (S. Car.) 41; Hester *v.* Hagood, 3 Hill (S. Car.) 195.

Illinois.—Thompson *v.* Sornberger, 78 Ill. 353; Drake *v.* Drake, 83 Ill. 526.

Kansas.—Harper *v.* Hendricks, 49 Kan. 724; School Dist. No. 2 *v.* Boyer, 46 Kan. 54; Culp *v.* Steere, 47 Kan. 746.

Georgia.—Woodson *v.* Law, 7 Ga. 105.

Mississippi.—Cooper *v.* Granberry, 33 Miss. 117; Bloom *v.* Price, 44 Miss. 73.

Texas.—Reed *v.* Harris, 37 Tex. 167.

Louisiana.—Jelks *v.* Smith, 5 La. Ann. 674; Carter *v.* Farrell, 39 La. Ann. 102.

Colorado.—Lebanon Min. Co. *v.* Consolidated, etc., Min. Co., 6 Colo. 371.

Maine.—Solon *v.* Perry, 54 Me. 493.

c. THE DEFENDANT FAVORED.—Courts have expressly declared that greater liberality will be exercised in allowing a defendant to amend his answer than in permitting the plaintiff to amend his complaint,[1] especially when the defendant will necessarily lose all benefit of the defense unless it be allowed in the pending suit.[2]

Municipal Corporations.—And more indulgence will be granted in this behalf to a municipal corporation defendant than to individuals.[3]

d. AMENDMENTS BARRED BY LIMITATION.—Where a proposed amendment consists of new matter relating to the subject of the action as set forth in the complaint, and is not a new and

Liberal Construction of Statutes.—The *Connecticut* Practice Act provides for amendments on appeals from justices of the peace, during the first term of the appellate court, by the introduction of equitable causes of action or defenses. This was construed to give the court a discretionary power to allow such amendments after the lapse of the first term, the right to amend being absolute during the first term. Bennett *v.* Collins, 52 Conn. 1.

And where the statute allowed the names of partners to be inserted during the first three days of the term, it was held that the court had a discretion to allow the amendment at a later stage of the case. Phelps *v.* Enz, 19 Conn. 58.

The *Massachusetts* statute of 1833, c. 144, provided that "at any time before issue joined on a plea of nonjoinder of a party defendant in an action founded on debt or contract, the plaintiff may on motion be allowed to amend his writ and declaration by inserting therein the name of any other person as defendant"; and it was held that such amendment might be made although no plea of nonjoinder had been filed. Goddard *v.* Pratt, 16 Pick. (Mass.) 412.

In *Pennsylvania*, although by the strict construction of the Act of 1806 it might be held to apply only to amendments of declarations or pleas, the court, looking to the spirit and intention of the act, held that it applied to subsequent pleadings in the cause, and allowed an amendment of a replication. Tiernan *v.* Blackstone, 1 Phila. (Pa.) 27.

1. Garrison *v.* Goodale, 23 Oregon 307; Thorn *v.* Smith, 71 Wis. 24; Brown *v.* Bosworth, 62 Wis. 542; Garvin *v.* Dawson, 13 S. & R. (Pa.) 246, 248. See also Nys *v.* Biemeret, 44 Wis. 104.

The Reason, as stated in the case first cited, is that the plaintiff may suffer a nonsuit and commence another suit, whereas if the defendant were denied the privilege, he might be without remedy.

"The practice is undoubtedly more liberal in allowing a change of plea after a demurrer overruled than in allowing amendments to declarations which have been held to be insufficient." McAlister *v.* Clark, 33 Conn. 253.

In Williams *v.* Cooper, 1 Hill (N. Y.) 637, a defendant in an action of slander pleaded the general issue, under the impression that he had no evidence in justification, but afterwards discovering such evidence, he obtained leave to amend by adding a plea of justification.

In Peters *v.* Foss, 16 Cal. 357, the trial court granted a new trial for its own abuse of discretion in refusing defendant leave to amend his answer, and the appellate court affirmed the decision.

See also for other cases where a liberal discretion was exercised in favor of a defendant. Young *v.* Gay, 41 La. Ann. 758; Wright *v.* Williams, 5 Cow. (N. Y.) 501; Bowman *v.* De Peyster, 2 Daly (N. Y.) 203; Cayce *v.* Ragsdale, 17 Mo. 32.

2. Thorn *v.* Smith, 71 Wis. 18; Garrison *v.* Goodale, 23 Oregon 307.

3. Seaver *v.* New York, 7 Hun (N. Y.) 331. See also Capron *v.* Adams County, 43 Wis. 613; Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137.

independent cause of action,[1] the fact that the statute of limitations has attached to it pending the suit is a strong reason for allowing the amendment instead of refusing it.[2]

e. FURTHER AMENDMENTS.—Where a party finds, after amending his pleading, that it is still insufficient for his purpose, it is not an abuse of discretion to permit further amendments;[3] but as an application under such circumstances savors of laches, it is often denied.[4]

f. AMENDMENT OF PLEA IN ABATEMENT.—It is not deemed to be in furtherance of justice to allow a plea in abatement to be amended.[5] Where matters in abatement were pleaded at the

1. The introduction of an entirely new cause of action by amendment after it has become barred by the statute of limitations is not usually deemed to be in furtherance of justice. Stevens *v.* Brooks, 23 Wis. 196; Drake *v.* Watson, 4 Day (Conn.) 37. See also Eggleston *v.* Beach, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 288.

2. Sanger *v.* Newton, 134 Mass. 308; Davis *v.* Saunders, 7 Mass. 62, a *qui tam* action; People *v.* Cook, 62 Hun (N. Y.) 304; Elting *v.* Dayton, 67 Hun (N. Y.) 425, 22 N. Y. Supp. 154, where this consideration in favor of the amendment prevailed although the plaintiff was not free from laches; Risley *v.* Phœnix Bank, 2 Hun (N. Y.) 349; Wilson *v.* Smith (Super. Ct.), 39 N. Y. St. Rep. 156; Miller *v.* Watson, 6 Wend. (N. Y.) 506; Dana *v.* McClure, 39 Vt. 197; Lottman *v.* Barnett, 62 Mo. 159; Wood *v.* Lane, 84 Mich. 521; Shieffelin *v.* Whipple, 10 Wis. 81, where the trial court was reversed for refusing to allow the amendment on the trial; Tucker *v.* Virginia City, 4 Nev. 20; Kansas Pac. R. Co. *v.* Runkel, 17 Kan. 145; Verdery *v.* Barrett, 89 Ga. 349; Rand *v.* Webber, 64 Me. 191; Dana *v.* McClure, 39 Vt. 197.

Counterclaim Barred by Limitation.—If a proposed amendment of an answer by setting up a counterclaim shows that the latter is barred by the statute of limitations, it should nevertheless be allowed, for the plaintiff may not choose to plead the statute. Dudley *v.* Stiles, 32 Wis. 371.

3. Cleveland *v.* Cohrs, 13 S. Car. 397; Detroit Third Nat. Bank *v.* Reilly, 81 Mich. 438; Riverside Land, etc., Co. *v.* Jensen, 73 Cal. 550; Wilbur *v.* Abbot, 6 Fed. Rep. 817, where a refusal would have cut off a part of the plaintiff's remedy. See also Franklin *v.* Mackey, 16 S. & R. (Pa.) 117; Perry *v.* Herbert, 8 Tex. 1.

4. Nethercott *v.* Kelly (Super. Ct.), 5 N. Y. Supp. 259; Bitzer *v.* Campbell, 47 Minn. 221; Bean *v.* Moore, 2 Chand. (Wis.) 44; Jenn *v.* Spencer, 32 Tex. 657; Trammell *v.* Swan, 25 Tex. 473; Fogarty *v.* Harrigan, 28 Wis. 142.

In Billings *v.* Sanderson, 8 Mont. 201, the defendant, having previously filed two amended answers, was denied leave to amend again.

In Sanders *v.* Wakefield, 41 Kan. 11, he was denied leave to amend a fourth time.

In Balch *v.* Smith, 4 Wash. 497, the court refused to allow plaintiff to amend a third time.

5. Trinder *v.* Durant, 5 Wend. (N. Y.) 72; Brown *v.* Nourse, 55 Me. 230; Getchell *v.* Boyd, 44 Me. 482; Esdaile *v.* Lund, 12 M. & W. 606, where Parke, B., said that in case of a dilatory plea "the court cannot show it any favor, and will not give the defendant leave to amend." See also Hexter *v.* Schneider, 14 Oregon 184; Davis *v.* Campbell, 35 Tex. 779; Eschbach *v.* Bayley, 28 Md. 492; Livengood *v.* Shaw, 10 Mo. 273.

Whether a defective jurat to a plea in abatement can be amended, *quære.* Jones *v.* Eaton, 51 Me. 386.

Allowance Discretionary.—It was held in Helm *v.* Rodgers, 5 Humph. (Tenn.) 105, that the allowance of an amendment of a plea in abatement in matter of form does not exceed the power of the court, and is therefore not a subject of error.

Where Not a Plea in Abatement.—A plea showing that a defendant has been sued out of the county on process sent to his county is not a plea in abatement, but a meritorious one to secure a substantial right, and if defective in form is amendable. Safford

same time with a defense in bar, leave to amend as to the matters in abatement was denied.[1]

g. UNCONSCIONABLE DEFENSES—USURY AND LIMITATION.—Formerly the rule was rigorously enforced that a plea setting up what was denominated an unconscionable defense, such as usury or the statute of limitations, would not be allowed as a matter of favor by way of amendment after the period of pleading it as a matter of right had elapsed.[2] But this doctrine has been wholly abandoned in some of the courts where it was once upheld,[3] and

v. Sangamo Ins. Co., 88 Ill. 296, practically identical with Drake *v.* Drake, 83 Ill. 526.

1. Oregon Cent. R. Co. *v.* Scoggin, 3 Oregon 161.

2. **Usury.**—Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Lovett *v.* Cowman, 6 Hill (N. Y.) 223; Utica Ins. Co. *v.* Scott, 6 Cow. (N. Y.) 606; Bates *v.* Voorhies, 7 How. Pr. (N. Y. Supreme Ct.) 234. See also Smalley *v.* Doughty, 6 Bosw. (N. Y.) 66.

But a plea of usury may be amended. Makepeace *v.* Boyd, 2 Mass. 430.

Statute of Limitations.—Coit *v.* Skinner, 7 Cow. (N. Y.) 401; Hallagan *v.* Golden, 1 Wend. (N. Y.) 302; Jackson *v.* Varick, 2 Wend. (N. Y.) 294; Lovett *v.* Cowman, 6 Hill (N. Y.) 223; Wolcott *v.* McFarlan, 6 Hill (N. Y.) 227; Sagory *v.* New York, etc., R. Co., 21 How. Pr. (N. Y. Supreme Ct.) 455; Osgood *v.* Whittelsey, 20 How. Pr. (N. Y. Supreme Ct.) 72; Clinton *v.* Eddy, 37 How. Pr. (N. Y. Supreme Ct.) 23; McQueen *v.* Babcock, 22 How. Pr. (N. Y. Supreme Ct.) 229, 3 Keyes (N. Y.) 428, holding, however, that it may be set up in an amendment which is filed as of course; Sheets *v.* Baldwin, 12 Ohio 120; Burton *v.* Waples, 3 Harr. (Del.) 75; Waples *v.* McGee, 2 Harr. (Del.) 444. See also Stuart *v.* Lander, 16 Cal. 372; Cooke *v.* Spears, 2 Cal. 409; Plumer *v.* Clarke, 59 Wis. 646.

In Marx *v.* Hilsendegen, 46 Mich. 336, a refusal to allow the defendant to interpose the statute of limitations on the trial was sustained, the court declaring that a contrary course would have been gross injustice.

After Amendment of Declaration.—But if the plaintiff amends his declaration, the defendant may plead the statute of limitations. State *v.* Green, 4 Gill & J. (Md.) 381; Harriott *v.* Wells, 9 Bosw. (N. Y.) 631.

Where Defendant was Misled.—Where the plaintiff declared in slander for words spoken within the period of the statute of limitations, but produced evidence of words spoken on a more remote date and barred by the statute, it was held reversible error not to allow the defendant to file a plea of the statute. Brickett *v.* Davis, 21 Pick. (Mass.) 404.

Amendment of Plea of Statute.—In Wall *v.* Wall, 2 Har. & G. (Md.) 79, it was declared to be the universal practice not to allow a plea of the statute of limitations to be amended. And leave was denied in Lamott *v.* McLaughlin, 3 Har. & M. (Md.) 324; Griffin *v.* Moore, 43 Md. 246. See also Kunkel *v.* Spooner, 9 Md. 473; Nelson *v.* Bond, 1 Gill (Md.) 218.

3. In *New York* it is now settled, contrary to the earlier decisions cited in the preceding note, that in respect of the allowance of amendments all legal defenses stand upon an equal footing, and no discrimination will be made against those formerly denominated unconscionable, such as usury and the statute of limitations. Amendments setting up usury were allowed in Grant *v.* McCaughin, 4 How. Pr. (N. Y. Supreme Ct.) 216; Brown *v.* Mitchell, 12 How. Pr. (N. Y. Supreme Ct.) 408; Barnett *v.* Meyer, 10 Hun (N. Y.) 109; Catlin *v.* Gunter, 11 N. Y. 368. See also Bank of Kinderhook *v.* Gifford, 40 Barb. (N. Y.) 659; Union Nat. Bank *v.* Bassett, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 359.

Amendments setting up the statute of limitations were allowed in Sheldon *v.* Adams, 41 Barb. (N. Y.) 54; Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317; Cunliff *v.* Delaware, etc., Canal Co. (Supreme Ct.), 4 N. Y. St. Rep. 775. *Compare In re* Bear (District of New York), 8 Fed. Rep. 428, where the court appears not to have been advised of the change in the *New York* decisions.

at least ameliorated in other jurisdictions.[1]

1. **South Carolina.**—In Mason *v.* Johnson, 13 S. Car. 20, the court referred with approval to the rule now established in *New York*, and held that the allowance of an amendment on the trial setting up the statute of limitations is proper.

In Garlington *v.* Copeland, 32 S. Car. 57, it was held not to be an abuse of discretion for the court to refuse to permit an amendment of the answer by pleading the statute of limitations after the case had been heard at length on the merits.

In Seegers *v.* McCreery (S. Car., 1894), 19 S. E. Rep. 686, the trial court refused to allow a motion to amend the answer by adding the defense of the statute of limitations after the plaintiff's evidence had been closed, and the Supreme Court held that it was a matter of discretion which was properly exercised.

Wisconsin.—In Smith *v.* Dragert, 61 Wis. 222, the trial court refused to allow the defendant to amend by setting up the statute of limitations, reciting in its order that the refusal was based upon a supposed want of power. The appellate court decided that this was error, and remanded the cause with directions to the court below to exercise its discretion as it should see fit.

The doctrine in *Wisconsin* was there summarized as follows: "The allowance or disallowance of an amendment to a pleading setting up a statute of limitations or a plea of usury rests in the sound discretion of the trial court, under all the circumstances of the case. In accordance with that principle the court has frequently sustained orders of the trial court refusing to grant such amendment. Fogarty *v.* Horrigan, 2 Wis. 142; Eldred *v.* Oconto Co., 30 Wis. 206; Meade *v.* Lane, 32 Wis. 261; Dehuel *v.* Komrow, 37 Wis. 336; Plumer *v.* Clarke, 59 Wis. 646. It has also sanctioned the right of the trial court in the exercise of such discretion to grant such amendment. Newman *v.* Kershaw, 10 Wis. 340; Jones *v.* Walker, 22 Wis. 220; Orton *v.* Noonan, 25 Wis. 676; Baker *v.* Columbia County, 39 Wis. 444; Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137." See also Morgan *v.* Bishop, 61 Wis. 407.

Where a county is defendant it is reversible error to refuse to allow an amendment of its answer by setting up the statute of limitations. Capron *v.* Adams County, 43 Wis. 613. See also Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137; Baker *v.* Columbia County, 39 Wis. 444.

In Dole *v.* Northorp, 19 Wis. 249, it was held that an amendment should not be allowed by setting up the defense of usury to defeat a recovery of the principal and legal interest, if under the original answer the court can do equity between the parties by rendering judgment for the principal and legal interest, less the amount paid as usurious interest.

California.—In Cooke *v.* Spears, 2 Cal. 409, a refusal to allow an amendment setting up the statute of limitations was held not an abuse of discretion, but the court said that it should be allowed at any time when justice would be promoted thereby.

Iowa.—In McNider *v.* Sirrine, 84 Iowa 58, it was held that the statute of limitations cannot be set up by amendment to an answer after judgment, unless made to conform to the proof; if not so made it would be changing the defense, which is not permitted at that stage.

In Phœnix Ins. Co. *v.* Dankwardt, 47 Iowa 432, it was held that the allowance of an amendment to the answer by setting up the statute of limitations would not be reviewed except for an abuse of discretion.

Other States.—In Burton *v.* Rodney, 1 Houst. (Del.) 442, it was held that, upon a general leave to amend without qualification after the cause was at issue, the court would not on motion strike out a plea of the statute of limitations filed under the leave.

In People *v.* Barton (Colo. App., 1894), 36 Pac. Rep. 299, it was held reversible error to allow a defendant without any showing by affidavit to amend a demurrer to the complaint by adding an additional ground of demurrer based on the statute of limitations.

After a case has gone to the supreme court on a plea of *res adjudicata* the lower court may properly refuse to allow the defendant to plead the statute of limitations. Donnelly *v.* Pepper, 91 Ky. 363.

In Mitchell *v.* Cotten, 3 Fla. 134, the defendant was allowed to amend be-

Infancy is not an unconscionable defense, and may be set up by amendment.[1]

h. LACHES OF APPLICANT.—A party who has notice of a defect in his pleadings should move to amend without unreasonable delay, otherwise the court will be justified in denying him leave to amend on the ground of laches.[2]

When a party has procrastinated until an advanced stage of the proceedings, and the amendment will produce much inconvenience or delay, his application is regarded with extreme disfavor.[3]

fore trial by setting up the statute of limitations.

Williams *v.* Little, 11 N. H. 576, shows that the rule in *New Hampshire* is the same as that now established in *New York.* See the preceding note.

In Clark *v.* Thomas, 4 Heisk (Tenn.) 419, the refusal to allow a plea of the statute of limitations to be filed after the trial had commenced, upon affidavit accounting for the failure to file the plea earlier, but not verifying the plea, was held not to be an abuse of discretion.

1. Rogers *v.* Wright, 21 Wis. 681.

2. *California.*—Emeric *v.* Alvarado, 90 Cal. 484.

New York.—Eggleston *v.* Beach (Supreme Ct.), 33 N. Y. St. Rep. 835; Cocks *v.* Radford, 13 Abb. Pr. (N. Y. Supreme Ct.) 267; Johnson *v.* American Writing Mach. Co. (Super. Ct.), 4 N. Y. Supp. 391; Hurlbut *v.* Interior Conduit, etc., Co. (Super. Ct.), 28 N. Y. Supp. 1007; Archer *v.* Douglass, 1 How. Pr. (N. Y.) 93; Johnson *v.* Atlantic Ave. R. Co. (Supreme Ct.), 27 N. Y. Supp. 584; Sackett *v.* Thompson, 2 Johns. (N. Y.) 206; McLean *v.* St. Paul, etc., Ry. Co., 18 Abb. N. Cas. (N. Y. C. Pl.) 423; Eggleston *v.* Beach, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 288; Wooster *v.* Bateman (Super. Ct.), 25 N. Y. Supp. 806; Sleeman *v.* Hotchkiss (Supreme Ct.), 36 N. Y. St. Rep. 540; Sheldon *v.* Adams, 41 Barb. (N. Y.) 54; Butler *v.* Farley (Supreme Ct.), 17 N. Y. St. Rep. 109.

Pennsylvania.—Perdue *v.* Taylor, 146 Pa. St. 163; Gardiner *v.* Wilson, 2 Yeates (Pa.) 186; Bricker *v.* Dull, 82 Pa. St. 328; Campbell *v.* Gratz, 6 Binn. (Pa.) 114.

Kentucky.—Cavanaugh *v.* Britt, 90 Ky. 273; Mudd *v.* Mudd (Ky., 1890), 14 S. W. Rep. 355; Persifull *v.* Boreing (Ky., 1893), 22 S. W. Rep. 440; Newton *v.* Terry (Ky., 1892), 22 S. W. Rep. 159.

Kansas.—Butcher *v.* Brownsville Bank, 2 Kan. 70; Baughman *v.* Hale, 45 Kan. 453; Kansas, etc., Fire Ins. Co. *v.* Amick (Kan.), 20 Pac. Rep. 518.

Other States.—Kelly *v.* Kershaw, 5 Utah, 295; Johnson *v.* Swayze, 35 Neb. 117; Billings *v.* Sanderson, 8 Mont. 201; Penny *v.* Parham, 1 La. Ann. 274.

Knowledge of the defendant is knowledge of his counsel. Heyler *v.* New York News Pub. Co. (Supreme Ct.), 24 N. Y. Supp. 499.

In Archer *v.* Merchants', etc., Ins. Co., 43 Mo. 434, the court said that despite the laches of the applicant it will generally conduce to substantial justice to allow the amendment upon adequate terms. See also Pomeroy *v.* Brown, 19 Mo. 302.

3. Dorster *v.* Arnold, 8 Ga. 209; Sharpe *v.* Dillman, 77 Ind. 281, where the application was made after trial and while the court was announcing his finding; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Johnson *v.* American Writing Mach. Co. (Super. Ct.), 4 N. Y. Supp. 391; Brusie *v.* Peck (Supreme Ct.), 6 N. Y. St. Rep. 709; Saltus *v.* Genin, 3 Bosw. (N. Y.) 639, where the plaintiff, who was apprised of the necessity of amendment on the trial, waited more than two years thereafter, and nearly a year after a decision against him on appeal; Emeric *v.* Alvarado, 90 Cal. 484; Hancock *v.* Hubbell, 71 Cal. 537; Page *v.* Williams, 54 Cal. 562, where defendant pleaded payment, and more than two years after issue joined moved to amend by alleging want of consideration; Fisher *v.* Greene, 95 Ill. 94, where the defendant's application came nearly two years after the issues were made up; Dow *v.* Blake, 148 Ill. 76, an application to file additional pleas seventeen months after issue joined and only three days before trial; Cotten *v.* Fidelity Casualty

Where the Facts Were Known.—It is not an abuse of discretion to reject an amendment tendering a new issue after the pleadings have been made up, or upon the trial, where it appears that the facts contained in the amendment were known to the party when he filed the original pleading.[1]

i. IMMATERIAL, UNNECESSARY, OR UNAVAILING AMENDMENTS.—The court may properly refuse to allow an amendment which is immaterial,[2] unnecessary,[3] or indefinite,[4] or which will not accomplish the purpose for which it is intended.[5] Thus, it

Co., 41 Fed. Rep. 506, an application to amend a plea on the trial after the evidence was closed; Baughman *v.* Hale, 45 Kan. 453, an application by plaintiff on the trial to amend so as to change the issues; Buno *v.* Gomer, 3 Colo. App. 456, where the plaintiff, after a report of a referee, proposed to strike out certain admissions in his complaint, the court declaring that application should have been made the instant the error was discovered; Bitterling *v.* Deshler, 160 Pa. St. 1, an application to amend by changing the form of action six years after judgment of nonsuit.

1. Cavanaugh *v.* Britt, 90 Ky. 273, where the plaintiff sought to amend.

In the following cases amendments to answers were refused on the ground stated. Cotten *v.* Fidelity Casualty Co., 41 Fed. Rep. 506; Cocks *v.* Radford, 13 Abb. Pr. (N. Y. Supreme Ct.) 207; Johnson *v.* Atlantic Ave. R. Co. (Supreme Ct.), 27 N. Y. Supp. 587; Smith *v.* Equitable Mortg. Co. (Supreme Ct.), 26 N. Y. Supp. 180; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Phenix Ins. Co. *v.* Stocks, 149 Ill. 319; Newton *v.* Terry (Ky., 1892), 22 S. W. Rep. 159; Lucas Market Sav. Bank *v.* Goldsoll, 8 Mo. App. 596; Lewin *v.* Houston, 8 Tex. 94; Buddee *v.* Spangler, 12 Colo. 216; Holladay *v.* Elliott, 3 Oregon 340; Sayers *v.* First Nat. Bank, 89 Ind. 230.

Contra.—In *California* the fact that new matter set up by amendment of an answer was well known to the defendant when he filed his original answer is no good reason for denying him leave to amend. Pierson *v.* McCahill, 22 Cal. 127; Farmers' Nat. Gold Bank *v.* Stover, 60 Cal. 387; Sharon *v.* Sharon, 77 Cal. 102.

2. Levinson *v.* Schwartz, 22 Cal. 229, where the proposed amendment stated only a conclusion of law. Bridgeport Sav. Bank *v.* Randall, 15 Wis. 541; Baxter *v.* State, 15 Wis. 488; Shepard *v.* McNeil, 38 Cal. 73; Carey *v.* Brown, 62 Cal. 373. Kirsch *v.* Smith, 64 Cal. 13, and Aultman *v.* McLean, 27 Iowa 129, where the proposed amendment of an answer alleged facts which constituted no defense. Toledo Sav. Bank *v.* Rothman, 78 Iowa 288; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Steinhauser *v.* Spraul, 114 Mo. 551; Rio *v.* Gordon, 14 La. 418. See also Rehfuss *v.* Gross, 108 Pa. St. 521.

3. Mansfield *v.* Wilkerson, 26 Iowa 482; Commercial Nat. Bank *v.* Gibson, 37 Neb. 750. Edgar *v.* Stevenson, 70 Cal. 286, and Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, where the proof that might have been offered under the amendment was admissible under the original pleading.

Ineffective Amendment.—It is not error to refuse to allow an amendment of a demurrer where the amendment in legal effect adds nothing to the original. Hainer *v.* Iowa Legion of Honor, 78 Iowa 245.

4. Hawley *v.* Harran, 79 Wis. 379; Shipman *v.* State, 43 Wis. 381; Clarkson *v.* Hoyt (Cal., 1894), 36 Pac. Rep. 382, a proposed amendment of an answer setting up fraud in general terms. Harney *v.* Corcoran, 60 Cal. 314.

5. Peck *v.* Rees, 7 Utah 467; Beavers *v.* Hardie, 59 Ala. 570; Blakemore *v.* Wood, 3 Sneed (Tenn.) 470; State *v.* Keokuk, 18 Iowa 390; Whalley *v.* Small, 29 Iowa 288; Sleeman *v.* Hotchkiss (Supreme Ct.), 37 N. Y. St. Rep. 648; Work *v.* Rexford (Supreme Ct.), 33 N. Y. St. Rep. 1001, 11 N. Y. Supp. 616; Carpenter *v.* Knapp (Supreme Ct.),26 N. Y. Supp. 436; Musselman *v.* Musselman, 44 Ind. 113; Midland Pac. R. Co. *v.* McDermid, 91 Ill. 172. See also Wehle *v.* Koch (Super. Ct.), 19 N. Y. Supp. 189; Hardy *v.* Nelson, 27 Me. 525.

is not error to refuse leave to file an amendment to which a demurrer would be sustained,[1] or to set up matter which has already been presented by a sufficient pleading.[2]

4. Amendments Discretionary—*a.* REVIEW OF DISCRETION—(1) *On What Grounds.*—**At Common Law** the amendment of pleadings was regarded as a matter so exclusively addressed to the discretion of the trial court that its allowance or refusal could not be reviewed upon error.[3]

In Many of the States and in the federal Supreme Court this rule still obtains, the appellate tribunal declining to review the decision of the lower court except where it was based solely upon a mistaken view as to its *power* to allow the amendment.[4]

Amendment Contradicting Facts. — Where the affidavit in support of an application to amend shows that the amendment would not accord with the facts, the motion will be denied. People *v.* Sackett, 14 Mich. 320.

But where affidavits in opposition to a motion suggest the falsity of the proposed amendment, the court will not refuse leave unless the pleading is so clearly sham that it would be stricken out on motion. Hughes *v.* Heath, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 275.

1. Beavers *v.* Hardie, 59 Ala. 570; Blakemore *v.* Wood, 3 Sneed (Tenn.) 470.

Insufficient Amendment.—In no case should a party be permitted to file an insufficient plea. Pennington *v.* Ware, 16 Ark. 120. But it was said in Campbell *v.* Campbell, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 187, that the court will not, as a general rule, undertake to determine, upon an application for leave to amend, whether the proposed amendment sets forth a cause of action or defense which can be finally maintained, unless it can be made to appear conclusively that the amendment, if granted, could be of no possible avail to the party making it.

Making Original Pleading Defective.—An amendment to a declaration will not be allowed when it would leave the declaration defective on its face. Gilman *v.* Meredith School Dist., 18 N. H. 215.

2. Commercial Nat. Bank *v.* Gibson, 37 Neb. 750; Dorn *v.* Baker, 96 Cal. 206; Heilbron *v.* Kings River, etc., Canal Co., 76 Cal. 11; Hurlbut *v.* Interior Conduit, etc., Co. (Super. Ct.), 28 N. Y. Supp. 1007; Mayer *v.* Woodbury, 14 Iowa 57; Harvey *v.* Spaulding, 7 Iowa 423; Robinson *v.* Erickson, 25 Iowa 85; Brown *v.* Ellis, 26 Iowa 85; Smith *v.* Fellows, 58 Ala. 467; Rawle *v.* Skipwith, 8 Martin N. S. (La.) 407. See also Jones *v.* Ritter, 56 Ala. 270.

3. Burk *v.* Huber, 2 Watts (Pa.) 306; Davis *v.* Church, 1 W. & S. (Pa.) 240; Clymer *v.* Thomas, 7 S. & R. (Pa.) 178; Smith *v.* Kessler, 44 Pa. St. 142; Ordroneaux *v.* Prady, 6 S. & R. (Pa.) 510; Caldwell *v.* Remington, 2 Whart. (Pa.) 132; Tryon *v.* Miller, 1 Whart. (Pa.) 11; Sweigart *v.* Lowmarter, 14 S. & R. (Pa.) 200; Bowman *v.* De Peyster, 2 Daly (N. Y.) 205, *citing* Hart *v.* Seixas, 21 Wend. (N. Y.) 51; Cooper *v.* Bissell, 15 Johns. (N. Y.) 319; Travis *v.* Waters, 12 Johns. (N. Y.) 506; Clason *v.* Shotwell, 12 Johns. (N. Y.) 31; Chichester *v.* Cande, 3 Cow. (N. Y.) 44, note; Mandeville *v.* Wilson, 5 Cranch (U. S.), 15; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280; Mellish *v.* Richardson, 9 Bing. 125. See also Price *v.* New Jersey R., etc., Co., 31 N. J. L. 236; Syme *v.* Jude, 3 Call (Va.) 522; Helm *v.* Rodgers, 5 Humph. (Tenn.) 105; Neal *v.* Spooner, 20 Fla. 38; Planters' & Merchants' Bank *v.* Willis, 5 Ala. 770; Holloway *v.* Lowe, 1 Ala. 246; Watkins *v.* Canterberry, 4 Port. (Ala.) 415; and the early *Illinois* cases cited in the next note but one.

The English statute 3 & 4 Will. IV. c. 42, § 23, authorizing amendments to avoid a variance, expressly permits an application for a new trial in case the amendment is allowed. But if the amendment is denied, it has been held that the decision is not subject to review. Doe *v.* Errington, 1 Ad. & El. 750, 28 E. C. L. 199. See Wilkin *v.* Reed, 15 C. B. 192.

4. *United States.*—Chapman *v.* Barney, 129 U. S. 677; Marine Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280;

In Other States, especially where the Code system has been

U. S. *v.* Buford, 3 Pet. (U. S.) 12; McGlinchy *v.* United States, 4 Cliff. (U. S.) 312; Walden *v.* Craig, 9 Wheat. (U. S.) 576; Smith *v.* Vaughan, 10 Pet. (U. S.) 366. *Compare* the remarks of Chief Justice Marshall in Mandeville *v.* Wilson, 5 Cranch (U. S.) 15, and of McCormick, C. J., in Maddox *v.* Thorn, 60 Fed. Rep. 220. See also Watts *v.* Weston, 62 Fed. Rep. 136.

Connecticut.—Merriam *v.* Langdon, 10 Conn. 460; Taylor *v.* Keeler, 51 Conn. 397; McAllister *v.* Clark, 33 Conn. 253.

Delaware.—Thompson *v.* Thompson, 6 Houst. (Del.) 225; Vandergrift *v.* Hollis, 6 Houst. (Del.) 90.

Maine.—Gilman *v.* Emery, 54 Me. 460; Moor *v.* Shaw, 47 Me. 88; Wight *v.* Stiles, 29 Me. 164; Wyman *v.* Door, 3 Me. 183; Clapp *v.* Blach, 3 Me. 216; Foster *v.* Haines, 13 Me. 307; Simpson *v.* Norton, 45 Me. 281; Ayer *v.* Gleason, 60 Me. 207; Cameron *v.* Tyler, 71 Me. 27; Solon *v.* Perry, 54 Me. 493; Rowell *v.* Small, 30 Me. 30.

Maryland.—Scarlett *v.* Academy of Music, 43 Md. 203; Calvert *v.* Carter, 18 Md. 108; Warren *v.* Twilley, 10 Md. 46; Thomas *v.* Doub, 1 Md. 324; Ellicott *v.* Eustace, 6 Md. 506; Staley *v.* Thomas, 68 Md. 439. See Gordon *v.* Downey, 1 Gill (Md.) 41; Dyson *v.* West, 1 Har. & J. (Md.) 567.

Massachusetts.—The later cases declare the rule to be that if it is within the power of the court to allow an amendment it is within its discretion to deny, and that no exception lies to the exercise of discretion. Barlow *v.* Nelson, 157 Mass. 395; Church *v.* Phillips, 157 Mass. 566; Terry *v.* Brightman, 133 Mass. 536; Ford *v.* Ford, 104 Mass. 198; George *v.* Reed, 101 Mass. 378; Sheldon *v.* Smith, 97 Mass. 36; Hutchinson *v.* Tucker, 124 Mass. 240; Richmond Iron Works *v.* Woodruff, 8 Gray (Mass.) 447; Augur Steel Axle, etc., Co. *v.* Whittier, 117 Mass. 451; Looney *v.* Looney, 116 Mass. 283; Payson *v.* Macomber, 3 Allen (Mass.) 69; Gwynn *v.* Globe Locomotive Works, 5 Allen (Mass.) 317; Lang *v.* Bunker, 6 Allen (Mass.) 61; Ham *v.* Kerwin, 146 Mass. 378; Wood *v.* West Boston, etc., Bridges, 122 Mass. 394. *Compare* the following earlier cases: Slater *v.* Nason, 15 Pick. (Mass.) 345; Brickett *v.* Davis, 21 Pick. (Mass.) 404; Dodge *v.* Tileston, 12 Pick. (Mass.) 328; Kincaid *v.* Howe, 10 Mass. 203; Perkins *v.* Burbank, 2 Mass. 81.

New Hampshire.—Gagnon *v.* Connor, 64 N. H. 276; Morse *v.* Whitcher, 64 N. H. 591; Sawyer *v.* Keene, 47 N. H. 173. See also Perley *v.* Brown, 12 N. H. 493.

New Jersey.—U. S. Watch Co. *v.* Learned, 36 N. J. L. 429, where the amendment was allowed. See Hoboken *v.* Gear, 27 N. J. L. 265; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229; Crawford *v.* New Jersey R. Co., 28 N. J. L. 479; Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141; Bruch *v.* Carter, 32 N. J. L. 554.

New York.—In Davis *v.* New York, etc., R. Co., 110 N. Y. 646, 14 N. Y. St. Rep. 1, the court said: "As the court had power in the exercise of its discretion to allow this amendment, we have no jurisdiction to review its discretion." See also, to the same effect, Reed *v.* New York, 97 N. Y. 620; Holyoke *v.* Adams, 50 N. Y. 233; Thompson *v.* Kessel, 30 N. Y. 383; Classon *v.* Cooley, 8 N. Y. 426; Freeman *v.* Grant, 132 N. Y. 22; Coffin *v.* Grand Rapids Hydraulic Co., 136 N. Y. 655; Richtmyer *v.* Remsen, 38 N. Y. 206; Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; Quimby *v.* Claflin, 77 N. Y. 270; Riggs *v.* Waydell, 78 N. Y. 586; Hatch *v.* Central Nat. Bank, 78 N. Y. 487; Fisher *v.* Gould, 81 N. Y. 228; Price *v.* Brown, 98 N. Y. 388; White *v.* Stevenson, 4 Den. (N. Y.) 193; Robbins *v.* Richardson, 2 Bosw. (N. Y.) 248.

In the inferior or intermediate courts of *New York* possessing appellate jurisdiction the exercise of discretion is a subject of review. Ansonia Brass, etc., Co. *v.* Gerlach (C. Pl.), 28 N. Y. Supp. 540; Brady *v.* Cassidy (C. Pl.), 37 N. Y. St. Rep. 501; Miner *v.* Baron (Supreme Ct.), 39 N. Y. St. Rep. 893; Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454; Baldwin *v.* New York, etc., Nav. Co., 4 Daly (N. Y.) 314; Seaver *v.* New York, 7 Hun (N. Y.) 331; Burnap *v.* Halloran, 1 Code Rep. (N. Y.) 51; Heyler *v.* New York News Pub. Co. (Supreme Ct.), 24 N. Y. Supp. 499; Smith *v.* Equitable Mort. Co. (Supreme Ct.), 26 N. Y. Supp. 180; Newerf *v.* Jebb (Supreme Ct.), 6 N. Y. Supp. 581; Elting *v.* Dayton, 67 Hun (N. Y.) 425; Buck *v.* Barker (Super. Ct.), 5 N. Y.

adopted, decisions granting or refusing leave to amend are sub-

St. Rep. 826; Powers *v.* Fox (City Ct.), 11 N. Y. St. Rep. 651; Benson *v.* McNamee (Supreme Ct.), 12 N. Y. St. Rep. 503; Pracht *v.* Ritter, 48 N. Y. Super. Ct. 509; Coates *v.* Donnell, 48 N. Y. Super. Ct. 46; Tovey *v.* Culver, 54 N. Y. Super. Ct. 404; Sheldon *v.* Adams, 41 Barb. (N. Y.) 54; Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Bailey *v.* Kay, 50 Barb. (N. Y.) 110; New *v.* Aland, 62 How. Pr. (N. Y. Supreme Ct.) 185; Johnson *v.* American Writing Mach. Co. (Super. Ct.), 4 N. Y. Supp. 391; Page *v.* Voorhies (City Ct.), 16 N. Y. Supp. 101; Bradley *v.* Shafer (Supreme Ct.), 19 N. Y. Supp. 640; Wilson *v.* Spafford (Supreme Ct.), 32 N. Y. St. Rep. 532; Work *v.* Rexford (Supreme Ct.), 33 N. Y. St. Rep. 1001; Sleeman *v.* Hotchkiss (Supreme Ct.), 36 N. Y. St. Rep. 540. *Compare* Tighe *v.* Pope, 16 Hun (N. Y.) 180; Rosenwald *v.* Hammerstein, 12 Daly (N. Y.) 377; Phincle *v.* Vaughan, 12 Barb. (N. Y.) 215; Nethercott *v.* Kelly (Super. Ct.), 5 N. Y. Supp. 259; McElwain *v.* Corning, 12 Abb. Pr. (N. Y. Super. Ct.) 16; Bowman *v.* De Peyster, 2 Daly (N. Y.) 203; Johnson *v.* Brown, 57 Barb. (N. Y.) 118; Richmond *v.* Second Ave. R. Co. (Super. Ct.), 29 N. Y. Supp. 588.

Pennsylvania. — Under the act of 1806 certain amendments were a matter of right, and refusal to allow them was a subject of error. Sweigart *v.* Lowmarter, 14 S. & R. (Pa.) 200; Mechanics', etc., Ins. Co. *v.* Spang, 5 Pa. St. 113; Young *v.* Com., 6 Binn. (Pa.) 88; Com. *v.* Mecklin, 2 Watts (Pa.) 130; Yost *v.* Eby, 23 Pa. St. 327; Megargell *v.* Hazleton Coal Co., 8 W. & S. (Pa.) 342; Newlin *v.* Palmer, 11 S. & R. (Pa.) 98; Rahäuser *v.* Schwergerbarth, 3 Watts (Pa.) 28; Mans *v.* Montgomery, 10 S. & R. (Pa.) 192; Stewart *v.* Kelly, 16 Pa. St. 160; Sharp *v.* Sharp, 13 S. & R. (Pa.) 444; Johns *v.* Bolton, 12 Pa. St. 339; Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466; Smith *v.* Kessler, 44 Pa. St. 142. *Compare* Fox *v.* Foster, 4 Pa. St. 119; Waggoner *v.* Line, 3 Binn. (Pa.) 589.

But amendments not provided for by that act were subject to the common-law rule. The cases are cited in the preceding note.

By the acts of April 16, 1846; May 4, 1852, and April 12, 1858, it is the absolute right of parties to strike the names of either plaintiffs or defendants where there is an allegation of mistake either in fact or law. Cochran *v.* Arnold, 58 Pa. St. 399; Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169.

In other respects, amendments are now regarded as discretionary and subject to review in case of abuse. Battles *v.* Sliney, 126 Pa. St. 460; Herman *v.* Rinker, 106 Pa. St. 121; Bricker *v.* Dull, 82 Pa. St. 328; Robeson *v.* Whiteside, 16 S. & R. (Pa.) 320; Kellog *v.* Gilfillan (Pa., 1887), 10 Atl. Rep. 888; Perdue *v.* Taylor, 146 Pa. St. 163; Leeds *v.* Lockwood, 84 Pa. St. 70; Heller *v.* Royal Ins. Co., 151 Pa. St. 101; Melvin *v.* Melvin, 130 Pa. St. 6; Magill's Appeal, 59 Pa. St. 430; Scott *v.* Kittanning Coal Co., 89 Pa. St. 231; Young *v.* Young, 88 Pa. St. 422.

Vermont. — Callender *v.* Sweat, 14 Vt. 160; Montgomery *v.* Maynard, 33 Vt. 450; Waterman *v.* Hall, 17 Vt. 128; Harris *v.* Belden, 48 Vt. 478; Bates *v.* Cilley, 47 Vt. 1; Lippett *v.* Helley, 46 Vt. 516.

Florida. — In Florida the act of Jan. 7, 1853, makes any order refusing to allow an amendment reviewable by the Supreme Court. Robinson *v.* Hartridge, 13 Fla. 501. But where an amendment is allowed, the court leans toward the English rule, which precludes any review. Neal *v.* Spooner, 20 Fla. 38.

North Carolina. — In North Carolina the exercise of discretion is not reviewed unless a substantial right is impaired, which usually occurs only when there is an absence of power, Murphy *v.* Gibbs (N. Car., 1890), 12 S. E. Rep. 272; State *v.* Roseman, 72 N. Car. 427; Alamance Co. *v.* Blair, 76 N. Car. 136; Bushee *v.* Surles, 79 N. Car. 51; Henry *v.* Cannon, 86 N. Car. 24; Gilchrist *v.* Kitchen, 86 N. Car. 20; Wiggins *v.* McCoy, 87 N. Car. 499; Loftin *v.* Rouse, 94 N. Car. 508; Jarrett *v.* Gibbs, 107 N. Car. 303; Sinclair *v.* Western N. Car. R. Co., 111 N. Car. 507; Hunt *v.* Crowell, 2 Murph. (N. Car.) 424; Biggs *v.* Williams, 66 N. Car. 427; Quiett *v.* Boon, 5 Ired. (N. Car.) 9; Anders *v.* Merredith, 4 Dev. & B. (N. Car.) 199; Gill *v.* Young, 88 N. Car. 58; Austin *v.* Clark, 70 N. Car. 458; Henderson *v.* Graham, 84 N. Car. 496; Warden *v.* McKinnon, 99 N. Car. 251.

ject to review, but will be sustained unless there appears to have been a palpable abuse of discretion under all the circumstances.[1]

According to the earlier cases the review was certainly confined to question of power. Pendleton *v.* Pendleton, 2 Jones (N. Car.) L. 135; Ingram *v.* McMorris, 2 Jones (N. Car.) L. 450.

South Carolina.—In South Carolina the rule seems to be the same as in North Carolina, *supra*. Zimmerman *v.* Amaker, 10 S. Car. 98; Suber *v.* Chandler, 28 S. Car. 382; Garlington *v.* Copeland, 32 S. Car. 601; Richardson *v.* Wallace, 39 S. Car. 216; Seegers *v.* McCreery (S. Car., 1894), 19 S. E. Rep. 696; Sibley *v.* Young, 26 S. Car. 415; McKnight *v.* Cooper, 27 S. Car. 92; Trumbo *v.* Finley, 18 S. Car. 305; McCaslan *v.* Latimer, 17 S. Car. 123; Mason *v.* Johnson, 13 S. Car. 20; Chichester *v.* Hastie, 9 S. Car. 330. See Mobley *v.* Mobley, 7 Rich. (S. Car.) 431; Lilly *v.* Charlotte, etc., R. Co., 32 S. Car. 142; Munroe *v.* Williams, 35 S. Car. 572.

1. *Arkansas.*—Mohr *v.* Sherman, 25 Ark. 7; King *v.* Caldwell, 26 Ark. 405; McMurray *v.* Boyd, 58 Ark. 504; Atkinson *v.* Cox, 54 Ark. 444; McFadden *v.* Stark, 58 Ark. 7; Ford *v.* Ward, 26 Ark. 360.

California.—Wixon *v.* Devine, 91 Cal. 477; Fitzgerald *v.* Neustadt, 91 Cal. 600; Jackson *v.* Jackson, 94 Cal. 446; Sharon *v.* Sharon, 77 Cal. 102; Coubrough *v.* Adams, 70 Cal. 374; Stringer *v.* Davis, 30 Cal. 322; Lattimer *v.* Ryan, 20 Cal. 628; Irwin *v.* McDowell (Cal., 1893), 34 Pac. Rep. 708; Farmers' Nat. Gold Bank *v.* Stover, 60 Cal. 387; Sweeney *v.* Stanford, 60 Cal. 362; Gillan *v.* Hutchinson, 16 Cal. 154; Dorn *v.* Baker, 96 Cal. 206; Robinson *v.* Smith, 14 Cal. 254; Canfield *v.* Bates, 13 Cal. 606; Arrington *v.* Tupper, 10 Cal. 464; Butler *v.* King, 10 Cal. 342; Heilboon *v.* Kings River, etc., Canal Co., 76 Cal. 11; Swain *v.* Burnett, 76 Cal. 299; Riverside Land, etc., Co. *v.* Jensen, 73 Cal. 550; Harney *v.* Corcoran, 60 Cal. 314; Lower Kings River Water Ditch Co. *v.* Kings River, etc., Canal Co., 67 Cal. 577; Carey *v.* Brown, 62 Cal. 373; Martin *v.* Thompson, 62 Cal. 618; Kirsch *v.* Smith, 64 Cal. 13; Shepard *v.* McNeil, 38 Cal. 73; Edgar *v.* Stevenson, 70 Cal. 286; Bradley *v.* Parker (Cal., 1893), 34 Pac. Rep. 234; Drew *v.* Hicks (Cal., 1894), 35 Pac. Rep. 563; Duff *v.* Duff, 101 Cal. 1; Clarkson *v.* Hoyt (Cal. 1894), 36 Pac. Rep. 382; Smith *v.* Yreka Water Co., 14 Cal. 201; Lestrade *v.* Barth, 17 Cal. 285; Peters *v.* Foss, 16 Cal. 357; Pierson *v.* McCahill, 22 Cal. 127; Levinson *v.* Schwartz, 22 Cal. 229; Cooke *v.* Spears, 2 Cal. 409; Nevada County, etc., Canal Co. *v.* Kidd, 37 Cal. 282; Stearns *v.* Martin, 4 Cal. 227; Jessup *v.* King, 4 Cal. 331; Smith *v.* Dorn, 96 Cal. 73; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69; Bulwer Consolidated Min. Co. *v.* Standard Consolidated Min. Co., 83 Cal. 613; Chatfield *v.* Williams, 85 Cal. 518; McPherson *v.* Weston, 85 Cal. 90; Beronio *v.* Southern Pac. R. Co., 86 Cal. 415; Buckley *v.* Howe, 86 Cal. 596; Shadburne *v.* Daly, 76 Cal. 355; Cain *v.* Cody (Cal., 1892), 29 Pac. Rep. 778; Cheney *v.* O'Brien, 69 Cal. 199; Schilling *v.* Holmes, 23 Cal. 232; Gluckauf *v.* Bliven, 23 Cal. 314; *In re* Hidden's Estate, 23 Cal. 362; Gavitt *v.* Doub, 23 Cal. 79; Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416.

Colorado.—Cooper *v.* Wood, 1 Colo. App. 101; Sylvester *v.* Jerome (Colo., 1893), 34 Pac. Rep. 760; Patrick *v.* Crowe, 15 Colo. 543; Buddee *v.* Spangler, 12 Colo. 216; Weese *v.* Barker, 7 Colo. 178; Brown *v.* Nachtrieb, 6 Colo. 517; Dyer *v.* McPhee, 6 Colo. 174; Cooper *v.* McKeen, 11 Colo. 41; Sears *v.* Collins, 5 Colo. 492; Tribune Pub. Co. *v.* Hamill, 2 Colo. App. 237; Barton *v.* Laws (Colo. App., 1894), 35 Pac. Rep. 284; Buno *v.* Gomer, 3 Colo. App. 456.

Illinois.—Phenix Ins. Co. *v.* Stocks, 149 Ill. 319; Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445; Chandler *v.* Frost, 88 Ill. 559; Dow *v.* Blake, 148 Ill. 76. See also Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 219. The earlier cases held that the exercise of discretion could not be reviewed. Lansing *v.* Birge, 3 Ill. 375; Warren *v.* McHatton, 3 Ill. 32; Phillips *v.* Dana, 2 Ill. 498; Ballance *v.* Curtenius, 8 Ill. 449.

Idaho.—Palmer *v.* Utah, etc., R. Co., 2 Idaho 350.

Indiana.—Lindley *v.* Sullivan, 133 Ind. 588; Peigh *v.* Huffman, 6 Ind. App. 658; Bever *v.* North, 107 Ind. 544; Dewey *v.* State, 91 Ind. 173; Levy *v.* Chittenden, 120 Ind. 37; Hay *v.* State, 58 Ind. 337; Judd *v.* Small, 107 Ind. 398; McKeen *v.*

Construction of Statute.—A statute authorizing amendments by either party of course, at any time before the pleading is answered,

Porter, 134 Ind. 483; Stanton *v.* Kewrick (Ind., 1893), 35 N. E. Rep. 19; Grand Rapids, etc., R. Co. *v.* Ellison (Ind., 1888), 18 N. E. Rep. 507; Burns *v.* Fox, 113 Ind. 205; Nysewander *v.* Lowman, 124 Ind. 584; Hoffman *v.* Rothenberger, 82 Ind. 474; Martinsville *v.* Shirley, 84 Ind. 546; Shropshire *v.* Kennedy, 84 Ind. 111; Lewark *v.* Carter, 117 Ind. 206; Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193; Meyer *v.* State, 125 Ind. 335; Child *v.* Swain, 69 Ind. 230; Wayne County Turnpike Co. *v.* Berry, 5 Ind. 286; Gaff *v.* Hutchinson, 38 Ind. 341; Koons *v.* Price, 40 Ind. 164; Shaw *v.* Binkard, 10 Ind. 227; Voltz *v.* Newbert, 17 Ind. 187; Burns *v.* Simmons, 101 Ind. 557; Maxwell *v.* Day, 45 Ind. 509; Burr *v.* Mendenhall, 49 Ind. 496; Chicago, etc., R. Co. *v.* Jones, 103 Ind. 386; Rettig *v.* Newman, 99 Ind. 424; Daggett *v.* Flanagan, 78 Ind. 253; Duncan *v.* Cravens, 55 Ind. 525; Spath *v.* Hankins, 55 Ind. 155; City of Aurora *v.* Cobb, 21 Ind. 492; Adams *v.* Main, 3 Ind. App. 232; Sandford Tool, etc., Co. *v.* Muller, 1 Ind. App. 204; Shelby County *v.* Castetter, 7 Ind. App. 309.

Iowa.—Harkins *v.* Edwards, 1 Iowa 296; Logan *v.* Tibbott, 4 Greene (Iowa) 389; Wilson *v.* Johnson, 1 Greene (Iowa) 147; Wyland *v.* Mendel, 78 Iowa 739; Marling *v.* Burlington, etc., R. Co., 67 Iowa 331; Harrington *v.* Christie, 47 Iowa 319; Phillips *v.* Van Schaick, 37 Iowa 229; Packard *v.* Snell, 35 Iowa 80; Smith *v.* Howard, 28 Iowa 51; Bates *v.* Bates, 27 Iowa 110; Brockman *v.* Berryhill, 16 Iowa 183; Hall *v.* Doran, 6 Iowa 433; Fulmer *v.* Fulmer, 22 Iowa 230; Mansfield *v.* Wilkerson, 26 Iowa 482; Aultman *v.* McLean, 27 Iowa 129; Pride *v.* Wormwood, 27 Iowa 257; Mayer *v.* Woodbury, 14 Iowa 57; Dunton *v.* Thorington, 15 Iowa 217; Brockman *v.* Berryhill, 16 Iowa 183; Hatfield *v.* Gano, 15 Iowa 177; State *v.* Keokuk, 18 Iowa, 390; Hainer *v.* Iowa Legion of Honor, 78 Iowa 245; Harvey *v.* Spaulding, 7 Iowa 423; Chlein *v.* Kabat, 72 Iowa 291; Deere *v.* Nelson, 73 Iowa 186; Wankon *v.* Strouse, 74 Iowa 547; Tiffany *v.* Henderson, 57 Iowa 490; Gray *v.* Regan, 37 Iowa 688; Davis *v.* Chicago, etc., R. Co., 83 Iowa 744; Maish *v.* Crangle, 80 Iowa 650; Nelson *v.* Hays, 75 Iowa 671; George *v.* Swafford, 75 Iowa 491; Eslich *v.* Mason City, etc., R. Co., 75 Iowa 443; Crismon *v.* Deck, 84 Iowa 344; Schoenhofen Brewing Co. *v.* Armstrong (Iowa, 1894), 57 N. W. Rep. 436; Bunyan *v.* Loftus (Iowa, 1894), 57 N. W. Rep. 685; Aultman *v.* Shelton (Iowa, 1894), 57 N. W. Rep. 857.

Kansas.—Taylor *v.* Clendening, 4 Kan. 524; Kansas Pac. R. Co. *v.* Kunkel, 17 Kan. 145; Wright *v.* Bacheller, 16 Kan. 259; Kansas Farmers' Mut. F. Ins. Co. *v.* Amick, 37 Kan. 73; Smith *v.* Smith, 22 Kan. 699; Missouri Pac. R. Co. *v.* McCally, 41 Kan. 639; Harper *v.* Hendricks, 49 Kan. 718; Stith *v.* Fullinwider, 40 Kan. 73; Byington *v.* Saline County, 37 Kan. 654; Leroy, etc. R. Co. *v.* Small, 46 Kan. 300; Baughman *v.* Hale, 45 Kan. 453; Gaylord *v.* Stebbins, 4 Kan. 42; Hanlin *v.* Baxter, 20 Kan. 134; Rogers *v.* Hodgson, 46 Kan. 276; Davis *v.* Wilson, 11 Kan. 74; Wilson *v.* Phillips, 8 Kan. 211; Hodges *v.* Farnham, 49 Kan. 777; Brenner *v.* Luth, 28 Kan. 581; Perry *v.* Jones, 18 Kan. 552; Hobson *v.* Ogden, 16 Kan. 388; Kunz *v.* Grund, 12 Kan. 547; Prater *v.* Snead, 12 Kan. 447.

Kentucky. — Donnelly *v.* Pepper, 91 Ky. 363; Downing *v.* Bacon, 7 Bush (Ky.) 680; Hubble *v.* Murphy, 1 Duv. (Ky.) 278; Kearney *v.* Covington, 1 Metc. (Ky.) 339; Thomas *v.* See, 8 B. Mon. (Ky.) 5; Lane *v.* Traders' Deposit Bank (Ky., 1893), 21 S. W. Rep. 750; Cavanaugh *v.* Britt, 90 Ky. 273; Mudd *v.* Mudd (Ky., 1890), 14 S. W. Rep. 355; Greer *v.* Covington (Ky., 1885), 2 S. W. Rep. 323; Palmer *v.* Hamilton (Ky., 1894), 24 S. W. Rep. 613; Greer *v.* Louisville, etc., R. Co. (Ky., 1893), 21 S. W. Rep. 649; Stone *v.* Mattingly (Ky., 1892), 19 S. W. Rep. 402; Louisville Underwriters *v.* Pence (Ky., 1892), 19 S. W. Rep. 10; Persifull *v.* Boreing (Ky., 1893), 22 S. W. Rep. 440; Owensboro, etc., R. Co. *v.* Harrison (Ky., 1893), 22 S. W. Rep. 545; Newton *v.* Terry (Ky., 1892), 22 S. W. Rep. 159.

Louisiana.—Lampton *v.* State Nat. Bank, 41 La. Ann. 719; McCubbin *v.* Hastings, 27 La. Ann. 713, *limited* in Hart *v.* Bowie, 34 La. Ann. 323; Hickman *v.* Boggins, 14 La. Ann. 618; West *v.* Hickman, 14 La. Ann. 620;

and providing that "all other amendments shall be by leave of the court," does not confer unlimited power and discretion, and

Tucker *v.* Liles, 3 La. 297; Carter *v.* Farrell, 39 La. Ann. 102; Boagni *v.* Anderson, 32 La. Ann. 920; Mouton *v.* Cameau, 5 La. Ann. 566; Adle *v.* Metoyer, 1 La. Ann. 254; Holmes *v.* Steamer Chieftain, 1 La. Ann. 136; Thomas *v.* Baillo, 7 La. 410; Mitreaud *v.* Delassize, 13 La. 416; Rio *v.* Gordon, 14 La. 418; Succession of Rouzan, 7 Rob. (La.) 436.

Michigan.—Pangborn *v.* Continental Ins. Co., 67 Mich. 683; Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236; Foley *v.* Riverside Storage, etc., Co., 85 Mich. 7; Ludeman *v.* Hirth, 96 Mich. 17; Wolscheid *v.* Thorne, 76 Mich. 265; Mead *v.* Glidden, 79 Mich. 209; People *v.* Wayne Circuit Judge, 41 Mich. 727; Sick *v.* Michigan Aid Assoc., 49 Mich. 50; Browne *v* Moore, 32 Mich. 254; Polhemus *v.* Ann Arbor Sav. Bank, 27 Mich. 45; Beecher *v.* Wayne Circuit Judges, 70 Mich. 363; Randall *v.* Baird, 66 Mich. 312; Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238; Hollywood *v.* Reed, 57 Mich. 234; Kennedy *v.* Brown, 50 Mich. 336; Borden *v.* Clark, 26 Mich. 410; Wood *v.* Metropolitan L. Ins. Co., 96 Mich. 437; Wood *v.* Lane, 84 Mich. 521; Beneway *v.* Thorp, 77 Mich. 181.

Minnesota.—Brazil *v.* Moran, 8 Minn. 236; Dougan *v.* Turner, 51 Minn. 330; Iverson *v.* Dubay, 39 Minn. 325; Iltis *v.* Chicago, etc., R. Co., 40 Minn. 273; Osborne *v.* Williams, 37 Minn. 507; McEvoy *v.* Bock, 37 Minn. 402; North *v.* Webster, 36 Minn. 99; Winona *v.* Minnesota R. Const. Co., 29 Minn. 68; Carli *v.* Union Depot, etc., Co., 32 Minn. 101; Guerin *v.* St. Paul F. & M. Ins. Co., 44 Minn. 20; Burke *v.* Baldwin, 54 Minn. 514; Bitzer *v.* Campbell, 47 Minn. 221; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Fowler *v.* Atkinson, 5 Minn. 505; Bruns *v.* Schreiber, 48 Minn. 366; Morrison *v.* Lovejoy, 6 Minn. 319.

Mississippi.—The Gen. Stat., § 1581, provides that the allowance or refusal of amendments may be assigned for error. But the abuse of discretion must be clear to warrant a reversal. Barker *v.* Justice, 41 Miss. 240; Bloom *v.* Price, 44 Miss. 73; Currie *v.* Natchez, etc., R. Co., 61 Miss. 725. Under the Act of 1840 (Sheet Acts, p. 133) the allowance of amendments when offered at the proper time was mandatory. Shields *v.* Taylor, 13 Smed. & M. (Miss.) 127; Stephens *v.* Commercial, etc., Bank, 31 Miss. 438; Dent *v.* Coleman, 10 Smed. & M. (Miss.) 83; Wharton *v.* Porter, 10 Smed. & M. (Miss.) 305. See also Cooper *v.* Granberry, 33 Miss. 117.

Prior to the statute the allowance of amendments seems to have been reviewable only for want of power. Vicksburg W. & B. Co. *v.* Washington, 1 Smed. & M. (Miss.) 536; Henderson *v.* Hainer, 5 How. (Miss.) 525; Green *v.* Robinson, 3 How. (Miss.) 105.

Missouri.—Allen *v.* Ranson, 44 Mo. 263; Davis *v.* Ritchie, 85 Mo. 501; Goddard *v.* Williamson, 72 Mo. 131; State *v.* Sandusky, 46 Mo. 377; Thompson *v.* Mosely, 29 Mo. 477; Chauvin *v.* Lownes, 23 Mo. 223; Long *v.* Overton, 7 Mo. 567; Glasscock *v.* Glasscock, 8 Mo. 577; Dozier *v.* Jerman, 30 Mo. 216; Ferguson *v.* Hannibal, etc., R. Co., 35 Mo. 452; Greene *v.* Gallagher, 35 Mo. 226; Dallam *v.* Bowman, 16 Mo. 225; Cayce *v.* Ragsdale, 17 Mo. 32; Pomeroy *v.* Brown, 19 Mo. 302; Cullum *v.* Cundiff, 20 Mo. 522; Riggin *v.* Collier, 6 Mo. 568; Caldwell *v.* McKee, 8 Mo. 334; Renfro *v.* Prior, 22 Mo. App. 403; Waverly Timber, etc., Co. *v.* St. Louis Cooperage Co., 112 Mo. 383; Collins *v.* Glass, 46 Mo. App. 297; Turner *v.* Thomas, 10 Mo. App. 338; Robertson *v.* Springfield, etc., R. Co., 21 Mo App. 633; Corby *v.* Wright, 4 Mo. App. 443; Steinhauser *v.* Spraul, 114 Mo. 551.

Montana.—Billings *v.* Sanderson, 8 Mont. 201; Wormall *v.* Reins, 1 Mont. 630.

Nebraska.—Mills *v.* Miller, 3 Neb. 87; Ward *v.* Parlin, 30 Neb. 376; Union Pacific R. Co. *v.* Broderick, 35 Neb. 739; Brown *v.* Rogers, 20 Neb. 547; Klosterman *v.* Olcott, 25 Neb. 382; Healy *v.* Aultman, 6 Neb. 349; Singer Mfg. Co. *v.* Doggett, 16 Neb. 609; Hedges *v.* Roach, 16 Neb. 673; Bush *v.* Bank of Commerce, 38 Neb. 403; Omaha, etc., R. Co. *v.* Moshel, 38 Neb. 281; Commercial Nat. Bank *v.* Gibson 37 Neb. 750; Omaha, etc., R. Co. *v.* Brown, 29 Neb. 492; Johnson *v.* Swayze, 35 Neb. 117.

Nevada.—Dorn *v.* O'Neale, 6 Nev. 155; Carlyon *v.* Lannan, 4 Nev. 156;

the appellate court may revise, reverse, or affirm when the discretion is improperly and illegally or unreasonably exercised.[1]

Absolute Right.—Occasionally the allowance of amendments is made peremptory by statute.[2]

Beck *v.* Thompson (Nev., 1894) 36 Pac. Rep. 562.

New Mexico.—Beall *v.* Territory, 1 N. Mex. 507.

New York.—See the New York cases cited in the preceding note.

Ohio.—Brock *v.* Bateman, 25 Ohio St. 609; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345; Schneider *v.* Hosier, 21 Ohio St. 109; Clark *v.* Clark, 20 Ohio St. 128.

Oregon.—Cook *v.* Croisan (Oregon, 1894), 36 Pac. Rep. 532; Garrison *v.* Goodale, 23 Oregon, 307; Hexter *v.* Schneider, 14 Oregon 184; Wild *v.* Oregon Short Line, etc., R. Co., 21 Oregon 159; Henderson *v.* Morris, 5 Oregon 24; Brauns *v.* Stearns, 1 Oregon 367; Wallace *v.* Baisley, 22 Oregon 572; Bowles *v.* Doble, 11 Oregon 474; Blanchard *v.* Bennett, 1 Oregon 328.

Pennsylvania.—See the Pennsylvania cases cited in the preceding note.

South Dakota.—Jenkinson *v.* Vermillion (S. Dak., 1892), 52 N. W. Rep. 1066; Yetzer *v.* Young (S. Dak., 1892), 52 N. W. Rep. 1054.

Tennessee.—Tennessee Bank *v.* Skillern, 2 Sneed (Tenn.) 698; Blakemore *v.* Wood, 3 Sneed (Tenn.) 470; Helm *v.* Rodgers, 5 Humph. (Tenn.) 105; Dockery *v.* Miller, 9 Humph. (Tenn.) 731; Cheek *v.* Merchants' Nat. Bank, 9 Heisk. (Tenn.) 489; Clark *v.* Thomas, 4 Heisk. (Tenn.) 419.

Texas.—Smith *v.* Anderson, 39 Tex. 496; Boren *v.* Billington, 82 Tex. 137; Austin *v.* Jordan, 5 Tex. 130; Richie *v.* Levy, 69 Tex. 133; Teas *v.* McDonald, 13 Tex. 349; Guim *v.* O'Daniel, 5 Tex. Civ. App. 112; Johnson *v.* Borden (Tex. Civ. App., 1894), 25 S. W. Rep. 1131; Obert *v.* Landa, 59 Tex. 475; Phillips *v.* Patillo, 18 Tex. 518; Ann Berta Lodge *v.* Leverton, 42 Tex. 18; Hatchett *v.* Conner, 30 Tex. 104; Reid *v.* Allen, 18 Tex. 241; Matossy *v.* Frosh, 9 Tex. 610.

Utah.—Kelly *v.* Kershaw, 5 Utah 295; McCord, etc., Mercantile Co. *v.* Glen, 6 Utah 139.

Washington.—Skagit R., etc., Co. *v.* Cole, 2 Wash. 57.

West Virginia.—Ralston *v.* Meyer, 34 W. Va. 737.

Wisconsin.—Gillett *v.* Robbins, 12 Wis. 319; Capron *v.* Adams County, 43 Wis. 613; Chandros *v.* Edwards, 86 Wis. 493; Continental Ins. Co. *v.* Phillips, 83 Wis. 354; Hibbard *v.* Peek, 75 Wis. 619; Charnley *v.* Honig, 74 Wis. 163; Thorn *v.* Smith, 71 Wis. 18; Ball *v.* McGeoch, 78 Wis. 355; Patten Paper Co. *v.* Kaukauna Water-power Co., 79 Wis. 331; Hawley *v.* Harran, 79 Wis. 379; Brown *v.* Bosworth, 62 Wis. 542; Phillips *v.* Jarvis, 19 Wis. 204; State *v.* Horney, 44 Wis. 615; Kirch *v.* Davies, 55 Wis. 287; Vliet *v.* Sherwood, 38 Wis. 159; Nys *v.* Biemeret, 44 Wis. 104; Kretser *v.* Cary, 52 Wis. 374; Thomas *v.* Hatch, 53 Wis. 296; Ault *v.* Wheeler, etc., Mfg. Co., 54 Wis. 300; Plumer *v.* Clarke, 59 Wis. 646; Bean *v.* Moore, 2 Chand. (Wis.) 44; Bridgeport Sav. Bank *v.* Randall, 15 Wis. 541; Monaghan *v.* School Dist. No. 1, 38 Wis. 100; Fox River Valley R. Co. *v.* Shoyer, 7 Wis. 365; Shieffelin *v.* Whipple, 10 Wis. 81; Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388; Baxter *v.* State, 15 Wis. 488; Hitchcock *v.* Merrick, 15 Wis. 522; Rublee *v.* Tibbetts, 26 Wis. 399; Moll *v.* Semler, 28 Wis. 589; Dudley *v.* Stiles, 32 Wis. 371; Jones *v.* Walker, 22 Wis. 220; McWhinne *v.* Martin, 77 Wis. 182.

Prior to the Code there was no review except upon the question of power. Fowler *v.* Colton, 1 Pin. (Wis.) 331; May *v.* Crook, 1 Pin. (Wis). 546. See Bean *v.* Moore, 2 Pin. (Wis.) 392.

1. Koons *v.* Price, 40 Ind. 164.

2. **Alabama.**—Section 2833 of the Code provides that the court "must, while the cause is in progress," amend imperfections and defects of form, "unless injustice will thereby be done to the opposite party," and "must permit the amendment of the complaint by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant, upon such terms and conditions as the justice of the case may require."

The only limitation on amendments before the jury have retired is that the form of action must not be changed and there must not be an entire change of parties or a new cause of action.

(2) *For Want of Power.*—If an amendment is allowed [1] or refused [2] contrary to law, or if leave to amend is denied expressly and solely upon the erroneous ground of want of power,[3] the dis-

Mahan *v.* Smitherman, 71 Ala. 563. With these exceptions the allowance of amendments to a complaint is usually regarded as peremptory. Robinson *v.* Darden, 50 Ala. 71; Lansburg *v.* Cohen, 52 Ala. 180; Southern L. Ins. Co. *v.* Roberts, 60 Ala. 431; Griel *v.* Solomon, 82 Ala. 85; Ricketts *v.* Weeden, 64 Ala. 548. See Watkins *v.* Canterberry, 4 Port. (Ala.) 415; Ashley *v.* Robinson, 29 Ala. 112; Goldsmith *v.* Picard, 27 Ala. 142; Jones *v.* Ritter, 56 Ala. 270. But to warrant a reversal for refusal to allow an amendment a party must show that he was prejudiced thereby. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644; Beavers *v.* Hardie, 59 Ala. 570.

As to the remedy by mandamus in case of improper refusal of leave, see *Ex parte* South, etc., R. Co., 65 Ala. 599.

Georgia.—Georgia Code, § 3479, provides that plaintiffs or defendants may amend "as matter of right."

The trial court was reversed for refusing to allow amendments in Savannah, etc., R. Co. *v.* Watson, 86 Ga. 795; Strawn *v.* Kersey, 22 Ga. 586; Smith *v.* Georgia R., etc., Co., 87 Ga. 764; Fielder *v.* Collier, 13 Ga. 496; Bright *v.* Central City St. R. Co., 88 Ga. 535; Colley *v.* Gate City Coffin Co. (Ga., 1893), 18 S. E. Rep. 817; Worrill *v.* Taylor, 27 Ga. 398. See also Barrett *v.* Pascoe (Ga., 1893), 17 S. E. Rep. 117; and before the Code, Martin *v.* Philips, 4 Ga. 203; Christian *v.* Penn, 5 Ga. 482; Myrick *v.* Myrick, 67 Ga. 771.

It seems that refusal of leave will not work a reversal if there was no prejudice. Hadden *v.* Larned, 87 Ga. 634; Byrd *v.* Campbell Printing Press, etc., Co. (Ga.), 16 S. E. Rep. 267; Mitchell *v.* Fullington, 83 Ga. 301; White Star Line Steamboat Co. *v.* Gordon County, 81 Ga. 47; Gay *v.* Peacock, 41 Ga. 84.

Or if the application was not properly made. Perry *v.* Watts, 67 Ga. 602.

But if the court allows a new cause of action to be introduced, its ruling will be reviewed. McWilliams *v.* Anderson, 68 Ga. 772; Milburn *v.* Davis (Ga., 1893), 17 S. E. Rep. 286; Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655; Singer Mfg. Co. *v.* Armstrong, 91 Ga. 745; Pearson *v.* Reid, 10 Ga. 580; Fokes *v.* De Vaughn, 66 Ga. 735; Lamar *v.* Russel, 77 Ga. 307; Chattanooga, etc., R. Co. *v.* East Rome Town Co., 89 Ga. 732.

1. Peck *v.* Smith, 3 Vt. 265; Callender *v.* Sweat, 14 Vt. 160; Greeley *v.* Winsor (S. Dak., 1891), 50 N. W. Rep. 630; Dyson *v.* West, 1 Har. & J. (Md.) 567; New York, etc., Milk Pan Assoc. *v.* Pennington Agricultural Works, 89 N. Y. 22, *reversing* 25 Hun (N. Y.) 475; Coulter *v.* American, etc., Express Co., 5 Lans. (N. Y.) 67; Ayer *v.* Gleason, 60 Me. 207; Herrick *v.* Osborne, 39 Me. 231; Harris *v.* Mercer, 22 Ind. 329; Hart *v.* Bowie, 34 La. Ann. 323; Moore *v.* Lancaster, Wright (Ohio) 35; Bickett *v.* Garner, 21 Ohio St. 659.

New Cause of Action.—In the following cases the decision was reversed because the amendment introduced a new cause of action: Slater *v.* Nason, 15 Pick. (Mass.) 345; Guilford *v.* Adams, 19 Pick. (Mass.) 376; Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454; Sheldon *v.* Adams, 41 Barb. (N. Y.) 54; Zoller *v.* Kellogg, 66 Hun (N. Y.) 194; Rowell *v.* Jauvrin, 69 Hun (N. Y.) 305; Shaw *v.* Bryant (Supreme Ct.), 19 N. Y. Supp. 618; Newall *v.* Hussey, 18 Me. 249; Snyder *v.* Harper, 24 W. Va. 206; Edwards *v.* Cheraw, etc., R. Co., 32 S. Car. 117; Merrill *v.* Merrill, 92 N. Car. 657; Powell *v.* Allen, 103 N. Car. 46; Irwin *v.* Paulett, 1 Kan. 418.

Where an amendment is allowed the burden of proof is upon the exceptant to show that it made a new cause of action. Farr *v.* Wheeler, 20 N. H. 569.

2. Logan *v.* Tibbott, 4 Greene (Iowa) 389, a refusal to allow defendant to answer to an amended petition; Allen *v.* Bidwell, 35 Iowa, 218, where defendant was denied the statutory right to amend as of course; Ewing *v.* Patterson, 35 Ind. 326, where the statute providing for leave to amend after demurrer sustained was imperative.

3. Welch *v.* Hull, 73 Mich. 47; Bebb *v.* Preston, 3 Iowa 336; Sanger *v.* Newton, 134 Mass. 308: Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669; Reed

cretion of the court is not called into operation, and its decision will be reviewed and reversed where the error is prejudicial.

(3) *Presumptions in Favor of Trial Court.*—In all cases the presumption is in favor of the legality and propriety of the ruling of the trial court. And error or abuse of discretion must be affirmatively shown by the record in order to justify an appellate court in reversing a judgment.[1]

v. New York, 97 N. Y. 620, *reversing* 31 Hun (N. Y.) 311; McElwain *v.* Corning, 12 Abb. Pr. (N. Y. Supreme Ct.) 16; White *v.* Stevenson, 4 Den. (N. Y.) 193; Hochstetter *v.* Isaacs, 44 How. Pr. (N. Y. Super. Ct.) 495, 14 Abb. Pr. N. S. (N. Y.) 235, n.; Cashman *v.* Reynolds, 25 Abb. N. Cas. (N. Y. Ct. of App.) 392; Gilman *v.* Emery, 54 Me. 460; Romero *v.* Luna (N. Mex., 1892), 30 Pac. Rep. 855; McKinnon *v.* Faulk, 68 N. Car. 279; Jarrett *v.* Gibbs, 107 N. Car. 303; Henderson *v.* Graham, 84 N. Car. 496; Gilchrist *v.* Kitchen, 86 N. Car. 20; Murphy *v.* Gibbs (N. Car., 1890), 12 S. E. Rep. 272.

In Stevens *v.* Sibbett, 31 Neb. 612; Sibley *v.* Young, 26 S. Car. 415; Richmond *v.* Second Avenue R. Co. (Super. Ct.), 29 N. Y. Supp. 586, and Tighe *v.* Pope, 16 Hun (N. Y.) 180, the erroneous ground of refusal was that the proposed amendment introduced a new cause of action.

Ground of Decision, How Ascertained.—In order to ascertain whether the court refused leave on the ground of want of power, it seems that the opinion of the court may not be resorted to if the order is silent on the subject; and that the opinion can only be examined when the order expresses the ground and the expression is coupled with phrases that make doubt. Fisher *v.* Gould, 81 N. Y. 228. In McElwain *v.* Corning, 12 Abb. Pr. (N. Y. Supreme Ct.) 16, the court glanced at the opinion.

Where a referee denied an amendment which was objected to on the ground of want of power, but no ground for his ruling was stated in his decision, it was presumed to have been denied merely in the exercise of his discretion. Haight *v.* Littlefield, 71 Hun (N. Y.) 289. *Compare* Zimmerman *v.* Amaker, 10 S. Car. 101.

1. *Ohio.*—Clark *v.* Clark, 20 Ohio St. 128; Brock *v.* Bateman, 25 Ohio St. 609.

Kansas.—Kansas Farmer Mut. F. Ins. Co. *v.* Amick, 37 Kan. 73; Byington *v.* Saline County, 37 Kan. 654.

Florida.—Mitchell *v.* Cotten, 3 Fla. 158; Neal *v.* Spooner, 20 Fla. 38.

Indiana.—Grand Rapids etc., R. Co. *v.* Ellison (Ind., 1888), 18 N. E. Rep. 507; Darrell *v.* Hilligoss, etc., Gravel Road Co., 90 Ind. 264; Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193; Citizens' State Bank *v.* Adams, 91 Ind. 280; State *v.* Peackmo, 8 Blackf. (Ind.) 246; Adams *v.* Main, 3 Ind. App. 232; Levy *v.* Chittenden, 120 Ind. 37.

Alabama.—Mahan *v.* Smitherman, 71 Ala. 563; Odorn *v.* Shackleford, 44 Ala. 331; Mock *v.* Walker, 42 Ala. 668.

Wisconsin.—Lander *v.* Hall, 69 Wis. 326; Patten Paper Co. *v.* Kaukauna Water Power Co. 79 Wis. 33.

Other States.—Skagit R., etc., Co. *v.* Cole, 2 Wash. 57; Suber *v.* Chandler, 28 S. Car. 382; Singer Mfg. Co. *v.* Doggert, 16 Neb. 609; Buckley *v.* How, 86 Cal. 596; Waterman *v.* Hall, 17 Vt. 128; State *v.* Keokuk, 18 Iowa 388; Allen *v.* Ranson, 44 Mo. 263; Dougan *v.* Turner, 51 Minn. 330; Penobscot Boom Corp. *v.* Baker, 16 Me. 233.

Showing Required in Trial Court.—It should appear of record that the party complaining presented to the trial court by affidavit or otherwise sufficient grounds for a different ruling. Garrison *v.* Goodale, 23 Oregon 307; Hay *v.* State, 58 Ind. 337; Sandford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204; Hoffman *v.* Rothenberger, 82 Ind. 474; Martinsville *v.* Shirley, 84 Ind. 546; Judd *v.* Small, 107 Ind. 398; Dewey *v.* State, 91 Ind. 173; Burns *v.* Fox, 113 Ind. 205; Meyer *v.* State, 125 Ind. 335; Child *v.* Swain, 69 Ind. 230; Omaha, etc., R. Co. *v.* Moschel, 38 Neb. 281; Ruege *v.* Gates, 71 Wis. 634; Canfield *v.* Bates, 13 Cal. 606; Nevada County, etc., Canal Co. *v.* Kidd, 37 Cal. 282; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Barker *v.* Walbridge, 14 Minn. 469.

Sufficiency of Record.—The amendment made or proposed must appear in the record. Shaw *v.* Binkard, 10 Ind. 227; Rooker *v.* Wise, 14 Ind. 276; Barnett *v.* East Tennessee, etc., R. Co.,

(4) *Harmless Error.*—The allowance or refusal of an amendment, whether the action of the court is contrary to law[1] or merely an abuse of discretion,[2] will not constitute reversible error if the party complaining is not prejudiced thereby; and a refusal to allow an amendment on the ground of a supposed lack of power will not be disturbed if it was nevertheless correct from the standpoint of discretion.[3]

Circumstances Rebutting Prejudice.—Where a party seeks to have the action of the trial court reversed on error for allowing his opponent to amend, his omission to ask for delay on account of the amendment is a cogent circumstance indicating that he was not prejudiced thereby.[4]

(5) *Objection and Exception.*—In order to present any question on appeal touching the action of the trial court with reference to amendments, the record must show that an objection was made[5]

87 Ga. 766, *following* Sibley *v.* Mutual Reserve Fund L. Assoc., 87 Ga. 738; Martin *v.* Thompson, 62 Cal. 618; Jessup *v.* King, 4 Cal. 331; Harvey *v.* Spaulding, 7 Iowa 423; Schumann *v.* Mark, 35 Minn. 379; McCain *v.* Louisville, etc., R. Co. (Ky., 1892), 18 S. W. Rep. 537.

The insufficiency of an amended petition cannot be shown when the original petition is not copied in the transcript. Huffaker *v.* Monticello Nat. Bank, 13 Bush (Ky.) 644.

1. Cox *v.* Lacey, 3 Litt. (Ky.) 334; Robertson *v.* Robertson, 9 Daly (N. Y.) 44; Ansonia Brass, etc., Co. *v.* Gerleck (C. Pl.), 28 N. Y. Supp. 546; National Steamship Co. *v.* Sheahan, 122 N. Y. 461; Dexter *v.* Ivins, 133 N. Y. 551; Wilson *v.* Stewart, 69 Ala. 302.

2. Shadburne *v.* Daly, 76 Cal. 355; Beronio *v.* Southern Pac. R. Co., 86 Cal. 415; Bulwer Consolidated Min. Co. *v.* Standard Consolidated Min. Co., 83 Cal. 613; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69; Burr *v.* Neudenhall, 49 Ind. 496; Kennedy *v.* Brown, 50 Mich. 336; State *v.* Keokuk, 18 Iowa 388; Allison *v.* Barrett, 16 Iowa 278; Schneider *v.* Hosier, 21 Ohio St. 109; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345; Richie *v.* Levy, 69 Tex. 133; Baxter *v.* State, 15 Wis. 488; Monaghan *v.* School Dist. No. 1, 38 Wis. 100; Sharpe *v.* Birmingham, 87 Ala. 644; Golden *v.* Conner, 89 Ala. 598; Roberts *v.* Fleming, 31 Ala. 683; Blewett *v.* Front St. Cable R. Co., 51 Fed. Rep. 625; Kellogg *v.* Gilfillan (Pa., 1887), 10 Atl. Rep. 888; Rehfuss *v.* Gross, 108 Pa. St. 521; Middletown Mfg. Co. *v.* Philadelphia, etc., R. Co., 145 Pa. St. 443; Diehl *v.* Adams Co. Mut. Ins. Co., 58 Pa. St. 443; Horner *v.* Marietta, 135 Pa. St. 418; Blakemore *v.* Wood, 3 Sneed (Tenn.) 470; Tennessee Bank *v.* Skillern, 2 Sneed (Tenn.) 698.

3. Polhemus *v.* Ann Arbor Sav. Bank, 27 Mich. 45. See also Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238; Boettcher *v.* Colorado Nat. Bank, 15 Colo. 16.

4. Bunyan *v.* Loftus (Iowa, 1894), 57 N. W. Rep. 685; Walsh *v.* McKeen, 75 Cal. 519; Richardson *v.* Wallace, 39 S. Car. 216; Powers *v.* Fox (City Ct.), 11 N. Y. St. Rep. 651; Klemm *v.* New York Cent., etc., R. Co. (Supreme Ct.), 28 N. Y. Supp. 861; Frankfurter *v.* Home Ins. Co. (City Ct.), 26 N. Y. Supp. 81; Lester *v.* Thompson, 91 Mich. 245; Wolscheid *v.* Thorne, 76 Mich. 265; Burr *v.* Mendenhall, 49 Ind. 496; Union Pac. R. Co. *v.* Broderick, 35 Neb. 739; Bussey *v.* Rothschild, 27 La. Ann. 316. See also Meyer *v.* State, 125 Ind. 335.

5. Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633; Kennedy *v.* Brown, 50 Mich. 336; Bruns *v.* Schrieber, 48 Minn. 366; Bryan *v.* Wilson, 27 Ala. 208; Stewart *v.* Goode, 29 Ala. 476; Lea *v.* Hopkins, 7 Pa. St. 492; Pass *v.* McKea, 36 Miss. 143.

Specific Objection Required. — The grounds of the objection should be stated. Reynolds *v.* Dismuke, 48 Ala. 209; Parsons Water Co. *v.* Hill, 46 Kan. 145.

Waiver of Objection.—By the acceptance of costs paid as a condition of amending the complaint, the defendant waives the objection thereto upon

in seasonable time,[1] and exceptions taken to the adverse ruling.[2]

(6) *Method of Review.*—The method of bringing orders allowing or refusing amendments before an appellate court for review is usually by appeal from or error to the final judgment.[3] But a

the ground of want of power. Smith *v.* Savin, 69 Hun (N. Y.) 311, 23 N. Y. Supp. 568. Smith *v.* Rathbun, 75 N. Y. 122, applies the same principle. See also *infra*, 16, *b*.

1. The objection to the allowance of an amendment must be made at the same term. Felkel *v.* Hicks, 32 Ala. 25; Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438; Sutherland *v.* Kittridge, 19 Me. 424.

It comes too 'ate when made for the first time in a motion for a new trial. Hooks *v.* Hays, 86 Ga. 797.

2. Browne *v.* Moore, 32 Mich. 254; Holliday *v.* Mansker, 44 Mo. App. 465; Peck *v.* Smith, 3 Vt. 265; Mock *v.* Walker, 42 Ala. 668; Blair *v.* Miller, 42 Ala. 308; Jarman *v.* McMahon, 37 Ala. 431; Hooks *v.* Hays, 86 Ga. 797; Pettis *v.* Campbell, 47 Ga. 596; Penobscot Boom Corp. *v.* Baker, 16 Me. 233; Gilman *v.* Emery, 54 Me. 460; Sutherland *v.* Kittridge, 19 Me. 424; Healy *v.* Aultman, 6 Neb. 349; Sinclair *v.* Western N. Car. Co., 111 N. Car. 507; Durham *v.* Fechheimer, 67 Ind. 35; Evansville, etc., R. Co. *v.* Murphy, 59 Ind. 515; Burnett *v.* Abbott, 51 Ind. 254; Lammers *v.* Balfe, 41 Ind. 218; Vawter *v.* Brown, 20 Ind. 280; Sandford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204; Lowrey *v.* Reef, 1 Ind. App. 244; Wilday *v.* Wight, 71 Ill. 376; Wilson *v.* Jamieson, 7 Pa. St. 126; Pennsylvania R. Co. *v.* Keller, 67 Pa. St. 305; Gilbank *v.* Stephenson, 31 Wis. 598; Pelham *v.* State Bank, 4 Ark. 202; Brock *v.* Bateman, 25 Ohio St. 609; Clark *v.* Clark, 20 Ohio St. 128; Wallace *v.* Baisley, 22 Oregon, 572.

A mere Clerical Error in the exception will not vitiate it. Schuessler *v.* Wilson, 56 Ala. 510.

Formal Exceptions, When Unnecessary.—In Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454, it was held that a formal exception is not indispensable in order to authorize a review by the general term, *citing* Maier *v.* Homan, 4 Daly (N. Y.) 168; Maudeville *v.* Marvin, 30 Hun (N. Y.) 287; Standard Oil, etc., Co. *v.* Amazon Ins. Co., 79 N. Y. 510; Hamilton *v.* Third Ave. R. Co., 53 N. Y. 27; Lattimer *v.* Hill, 8 Hun (N. Y.) 171; Ackart *v.* Lansing, 6 Hun (N. Y.) 476.

Waiver of Exception.—In Gale *v.* Foss, 47 Mo. 276, where defendant excepted to an order striking out his original and amended answer, it was held that he waived the exception by answering over.

3. Sinclair *v.* Western N. Car. Co., 111 N. Car. 507; Denton *v.* Stephens, 32 Miss. 194, holding that error in allowing an amendment cannot be corrected by a motion to dismiss the suit.

In Minnesota an order allowing an amendment is not appealable. It may be reviewed on appeal from the judgment or from an order upon a motion for a new trial. Winona *v.* Minnesota R. Const. Co., 25 Minn. 328, 27 Minn. 415.

Upon an appeal from an order refusing a new trial, an order of the court allowing an amendment of the pleadings previous to the commencement of the trial, and not as a part of it, cannot be reviewed. Winona *v.* Minnesota R. Const. Co., 27 Minn. 415.

California.—An order striking out a portion of the complaint, not being itself appealable, may be reviewed on appeal from the final judgment. Swain *v.* Burnette, 76 Cal. 299.

New Trial by Trial Court.—In Peters *v.* Foss, 16 Cal. 357, and Lestrade *v.* Barth, 17 Cal. 285, the Supreme Court affirmed a decision of the lower court granting a new trial for its own error of discretion in refusing to amend an answer.

Order Not Involving Merits.—An order allowing an answer in a divorce suit to be amended in a matter relating to community property, as it does not involve the merits of the case, is not subject to review on appeal from the judgment entered. Sharon *v.* Sharon, 77 Cal. 102.

Certiorari.—Where plaintiff was allowed to amend his complaint in a case in the Superior Court appealed from a justice of the peace, it was held that *certiorari* would not lie to review it. Kitts *v.* Nevada County Ct., 62 Cal. 203.

different or additional remedy is sometimes authorized under statutes defining appealable orders or judgments.[1]

5. In Respect of Parties — *a.* MISNOMER.—**At Common Law** the power to amend in case of a misnomer depends, not upon the question whether the amendment changes the name, but whether or not it changes the party. If it only cures a mistake in the name of the party by or against whom the suit is prosecuted, it may be made; but if it introduces a different party it is inadmissible.[2]

1. **New York**—*Orders Affecting "Substantial Rights."*—An order of the County Court granting a motion to amend an answer affects a "substantial right" and is appealable. New *v.* Aland, 62 How. Pr. (N. Y. Supreme Ct.) 185. So an order of a special term allowing an amendment to the complaint by inserting an entirely new cause of action, Sheldon *v.* Adams, 41 Barb. (N. Y.) 54; and an order allowing a defendant to put in a supplemental answer setting up a new defense which, if established, will be fatal to the plaintiff's action. Harrington *v.* Slade, 22 Barb. (N. Y.) 161. See also Union Bank *v.* Mott, 19 How. Pr. (N. Y. Supreme Ct.) 115; Bowman *v.* De Peyster, 2 Daly (N. Y.) 203; Travis *v.* Barger, 24 Barb. (N. Y.) 614; Woodruff *v.* Dickie, 5 Robt. (N. Y.) 619; Union Bank *v.* Bassett, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 359; Kissam *v.* Roberts, 6 Bosw. (N. Y.) 154; Sleeman *v.* Hotchkiss (Supreme Ct.), 14 N. Y. Supp. 78; Gowdy *v.* Poullain, 2 Hun (N. Y.) 218; Brady *v.* Cassidy (Supreme Ct.), 13 N. Y. Supp. 824.

But the exercise of discretion in allowing or refusing amendments will not in general be reviewed. Gould *v.* Rumsey, 21 How. Pr. (N. Y. Supreme Ct.) 97; McCarty *v.* Edwards, 24 How. Pr. (N. Y. Supreme Ct.) 236; Dennis *v.* Snell, 54 Barb. (N. Y.) 411; Saltus *v.* Genin, 19 How. Pr. (N. Y. Supreme Ct.) 233; Bailey *v.* Johnson, 1 Daly (N. Y.), 61; Binnard *v.* Spring, 42 Barb. (N. Y.) 470; Phincle *v.* Vaughan, 12 Barb. (N. Y.) 215; Sayre *v.* Frazer, 47 Barb. (N. Y.) 26.

Reviewing Decision of Referee.—It seems that the proper mode of reviewing the decision of a referee allowing an amendment is by exception thereto and appeal from the judgment. Quimby *v.* Claflin, 77 N. Y. 270; Zoller *v.* Kellogg, 66 Hun (N. Y.) 194; Shaw *v.* Bryant (Supreme Ct.), 19 N. Y. Supp. 618.

Where a referee refuses to allow an amendment, on the ground of a supposed want of power, the court will review the decision on motion. Hochstetter *v.* Isaacs, 44 How. Pr. (N. Y. Super. Ct.) 495, 14 Abb. Pr. N. S. (N. Y.) 235, note.

Order Not Affecting Final Judgment.—An order made in an action tried before a judge without a jury, denying a motion to amend an answer after the filing of his decision, does not affect the final judgment, and is not appealable under § 1316 of the Code. Callanan *v.* Gilman, 52 N. Y. Super. Ct. 112.

In **Wisconsin** an order refusing to strike an amended complaint from the file is appealable. Kewaunee County *v.* Decker, 34 Wis. 378.

In **Iowa** a motion to strike an amended petition from the file is appealable under § 3614, par. 4, of the Code, which secures an appeal from an "intermediate order involving the merits and materially affecting the final decision." Bicklin *v.* Kendall, 72 Iowa 492.

In **South Dakota** an order allowing an amendment of the complaint after judgment, and satisfaction without vacating the judgment, was held to be appealable, as it involved the merits of the case. Greeley *v.* Winsor (S. Dak., 1891), 50 N. W. Rep. 630.

In **Michigan** an allowance of an amendment by a justice of the peace after the cause was submitted cannot be reviewed on special appeal, as it does not involve a jurisdictional question. Webster *v.* Williams, 69 Mich. 135.

In **Massachusetts** an order of a justice of the Supreme Judicial Court on a probate appeal, declining to allow an amendment to an issue of fact framed for the jury, cannot be revised by bill of exceptions, but only by appeal. Ogden *v.* Greenleaf, 143 Mass. 349.

2. Elliott *v.* Clark, 18 N. H. 421, where the plaintiff was allowed to

Modern Statutes.—Specific or general provisions in modern statutes are usually held to confer ample authority to make such amendments, but ordinarily with the limitation just stated.[1]

amend by striking out his Christian name "Lafayette" and inserting instead thereof "Benjamin F.," the parties being the same.

Chief Justice Parker deduces the rule stated in the text from a consideration of the cases cited in the following opinion: "Thus, in Poitvin *v.* Tregeagle, 2 Ld. Raym. 771, it was held that the Christian name of the plaintiff could not be amended by inserting Peter for John. So it was held that a declaration in favor of Emerson & Godfrey could not be amended by inserting, instead, John Emerson, as the plaintiff. Emerson *v.* Wilson, 11 Vt. 359. This was treated as an amendment changing the parties. But in Moulsworth's Case, Comb. 287, Richard for Robert was amended by the bill on file, after judgment. So Harvert for Harbert was amended after issue and the cause entered. Comb. 4. In Scull *v.* Briddle, 2 Wash. (U. S.) 200, upon motion in arrest of judgment, Briddle was inserted for Biddle in the declaration. There is another class of cases relating to bail. In Bingham *v.* Dickie, 5 Taunt. 814, the court refused to allow a clerical error in spelling the plaintiff's name in the bail-piece to be amended without the consent of the bail, holding Tarbart for Tabart a fatal variance. But the bail-piece was amended by a change of name in Andrews *v.* Noah, 1 Bos. & P. 31, and in Croft *v.* Coggs, 4 Moore 65, 16 E. C. L. 363; and a *capias* was amended by a similar change in Stevenson *v.* Danvers, 2 Bos. & P. 109. A defendant was misnamed in the declaration, being called John instead of George, and it was held to be a fatal variance, and the plaintiff was nonsuited. Waterbury *v.* Mather, 16 Wend. (N. Y.) 611. But, on the other hand, it was held that a declaration by a wrong Christian name is no ground for a nonsuit. Boughton *v.* Frere, 3 Camp. N. P. 29; Stafford *v.* Bolton, 1 Bos. & P. 40."

1. **Misnomer of Plaintiffs** was cured by amendment in Merrill *v.* Kalamazoo, 35 Mich. 211, a change in the official title of plaintiffs; Berrien County Treasurer *v.* Bunbury, 45 Mich. 79, a similar case; McLaughlin *v.* Wilks, 42 Mich. 553, changing plaintiff's name from Dilks to Wilks; McEvoy *v.* Bock, 37 Minn. 402, an amendment allowed after the trial; Tyron *v.* Butler, 9 Tex. 553, and Tousey *v.* Butler, 9 Tex. 525, amending the Christian name, in the latter case, after plea in abatement; Dewey *v.* McLain, 7 Kan. 126, correction of Christian name; Merriam *v.* Wolcott, 61 How. Pr. (N. Y. Supreme Ct.) 377, the plaintiff's name having been changed by marriage pending the suit; Glick *v.* Hartman, 10 Iowa 410; Fink *v.* Manhattan R. Co., 15 Daly (N. Y.) 479, changing the initial letter of plaintiff's middle name; Abshive *v.* Mather, 27 Ind. 381; South & North Ala. R. Co. *v.* Small, 70 Ala. 499, correcting the Christian name; Smith *v.* Plank-road Co., 30 Ala. 650, changing the name of the plaintiff corporation; Beggs *v.* Wellman, 82 Ala. 391, inserting full Christian name in place of initial after plea in abatement. See also Moore *v.* Lewis, 76 Mich. 300; Bauman *v.* Grubbs, 26 Ind. 419; Ferguson *v.* Ramsey, 41 Ind. 511; Paine *v.* Waterloo Gas Co., 69 Iowa 211.

In Woodson *v.* Law, 7 Ga. 105, the Christian name of the plaintiff was changed from William to James.

Formerly the Christian name of a plaintiff could not be changed in *Pennsylvania*. Horbach *v.* Knox, 8 W. & S. (Pa.) 30. But misnomer of parties is now amendable in case of mistake. Porter *v.* Hildebrand, 14 Pa. St. 129; Wood *v.* Philadelphia, 27 Pa. St. 502, holding it reversible error to refuse leave to amend in a proper case; Wood *v.* Philadelphia, 27 Pa. St. 502, holding that the fact of mistake may be shown by any sufficient evidence; Ward *v.* Stevenson, 15 Pa. St. 21, holding that the mistake need not be proved by the attorney who made it; and Horbach *v.* Knox, 6 Pa. St. 377, holding that the mistake may be shown by *ex parte* affidavit. Rangler *v.* Hummel, 37 Pa. St. 130; Leonard *v.* Parker, 72 Pa. St. 236; Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488, hold that the fact of mistake will be presumed.

Leave to Amend Denied.—In Dulany

b. MISDESCRIPTION OF PLAINTIFF — CHANGING NOMINAL PLAINTIFF.—Under the statutes of amendment it is the general rule that the plaintiff may be changed by amendment if the real parties in interest and the essential elements of the controversy remain the same.[1]

v. Norwood, 4 Har. & M. (Md.) 497, leave to amend the Christian name of the plaintiff after the jury were sworn was refused.

Misnomer of Defendants was cured by amendment in the following cases: Cheshire *v.* Milburn Wagon Co., 89 Ga. 249, where the omission of the Christian name of one of the defendants was corrected. Nelson *v.* Barker, 3 McLean (U. S.) 379; Bullard *v.* Nantucket Bank, 5 Mass. 99; Heslep *v.* Peters, 4 Ill. 45, amendment allowed after demurrer to plea in abatement for misnomer, by withdrawing the demurrer and joining issue on the plea; Parry *v.* Woodson, 33 Mo. 347, changing defendant's Christian name from Benjamin to Branham; Tuller *v.* Ginsburg, 99 Mich. 137; Webber *v.* Bolte, 51 Mich. 113, substituting the full Christian name of the defendant for an initial; Welch *v.* Hull, 73 Mich. 47, where it was held to be reversible error to refuse leave to amend the Christian name of one of the defendants; Fogg *v.* Greene, 16 Me. 282, amending the Christian name on the trial; Thomson *v.* Wilson, 26 Iowa 120, after verdict and pending motion in arrest; Arbuckle *v.* Bowman, 6 Iowa 70, where "Bowman" was substituted for "Bauman;" Farris *v.* Merritt, 63 Cal. 118, inserting defendant's true name where he had been sued under a fictitious name; McDonald *v.* Swett, 76 Cal. 257, after a default, where defendant was sued as "Sweet;" Porter *v.* Hildebrand, 14 Pa. St. 129; New Albany, etc., R. Co. *v.* Laiman, 8 Ind. 212; New Albany, etc., R. Co. *v.* Chamberlain, 8 Ind. 278; Weaver *v.* Jackson, 8 Blackf. (Ind.) 5, changing defendant's Christian name from "William" to "Boston," after plea in abatement for misnomer; Griel *v.* Solomon, 82 Ga. 85, striking out the middle initial, and reversible error to refuse leave; Singer Mfg. Co. *v.* Greenleaf (Ala., 1893), 14 So. Rep. 109, where defendant was originally sued as the "Singer Sewing Machine Co.;" New York, etc., Contracting Co. *v.* Meyer, 51 Ala. 325; Maxey *v.* Strong, 53 Miss. 280.

A declaration against the Chattanooga, Rome & Carrollton R. Co. was amended by substituting "Columbus" for "Carrollton," Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676; likewise by substituting "railroad company" for "railroad," Rome R. Co. *v.* Sullivan, 14 Ga. 277, and "railway company" for "railroad company," East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311; Propst *v.* Georgia Pac. R. Co. (Ala., 1888),3 So. Rep. 764.

Misnomer of a defendant corporation was also corrected in Johnson *v.* Cent. R. Co., 74 Ga. 397, and Stanton *v.* Proprietors, etc., 47 Vt. 172, the former case being decided under a statute authorizing an amendment "in the Christian or surname," which was held to include the name of a corporation. But another company could not be substituted under the guise of correcting a misnomer. Nashville, etc., R. Co. *v.* Edwards, 91 Ga. 24; Western R. Co. *v.* McCall, 89 Ala. 375. See also Lyons *v.* Donges, 1 Disney (Ohio) 142.

Christian and Surname.—A statute allowing an amendment in the Christian name or surname will authorize an amendment of an error in both. Ward *v.* Stevenson, 15 Pa. St. 21.

Only in Furtherance of Justice.—A mistake in the name of a party cannot be cured by amendment where the right of third parties will be prejudiced thereby. Fullerton *v.* Campbell, 25 Pa. St. 345.

Misnomer of Parties in Process.—See *infra*, IV, 1, *e*.

1. Dixon *v.* Dixon, 19 Iowa 512; Wood *v.* Lane, 84 Mich. 521; Cragin *v.* Gardner, 64 Mich. 399; Kron *v.* Smith, 96 N. Car. 389; Granby *v.* Sawyer, 2 Hawks (N. Car.) 61; Bullard *v.* Johnson, 65 N. Car. 436; Lewis *v.* Austin, 144 Mass. 383; Winch *v.* Hosmer, 122 Mass. 438; Clawson *v.* Cone, 2 Handy (Ohio) 67; Heckemann *v.* Young, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 196; Boudreau *v.* Eastman, 59 N. H. 467; Atchison *v.* Twine, 9 Kan. 350; Price *v.* Wiley, 19 Tex. 142; Lilly *v.* Tobbein, 103 Mo. 477; Challe-

When a party sues in his own right he may, if the facts warrant it, amend his complaint so as to make the suit stand in a representative capacity;[1] or conversely, if he sues as a represen-

nor *v.* Niles, 78 Ill. 78; Neal *v.* Spooner, 20 Fla. 38; Farrier *v.* Schroeder, 40 N. J. L. 601; Rawles *v.* People, 2 Colo. App. 501; Hamill *v.* Ashley, 11 Colo. 180; Druckenmiller *v.* Young, 27 Pa. St. 97.

In Dixon *v.* Dixon, 19 Iowa 512, and Hodges *v.* Kimball, 49 Iowa 577, a suit was brought in the name of a partner upon a cause of action belonging to the firm, and an amendment was allowed by inserting the name of the firm.

In Lewis *v.* Locke, 41 Vt. 11, a suit was brought in the name of a firm, and the names of the partners were inserted by amendment. Likewise where the suit was brought in the name of a liquidator of the firm. Estlin *v.* Ryder, 20 La. Ann. 251.

In Lake Erie, etc., R. Co. *v.* Boswell (Ind., 1894), 36 N. E. Rep. 1103, the name of a town was substituted for that of its trustees as plaintiff, the court citing Burk *v.* Andis, 98 Ind. 59.

In Wood *v.* Lane, 84 Mich. 521, a suit upon an insurance policy, the heirs of the deceased were substituted for an administrator. So in Teutonia L. Ins. Co. *v.* Mueller, 77 Ill. 22.

Where a suit is brought in the name of an infant the latter may on coming of age be made a party to the action. Chisolm *v.* Skillman, 2 La. 146.

Substituting Beneficiary.—The name of one for whose use the action is brought may be substituted for that of the nominal plaintiff where the legal right of action is shown to be in the former. McLewis *v.* Furgerson, 59 Ga. 644; Wilson *v.* First Presbyterian Church, 56 Ga. 554; Childers *v.* Adams, 42 Ga. 352; Glenn *v.* Black, 31 Ga. 393; Whittaker *v.* Pope (Ga.), 2 Woods (U. S.) 463; Miller *v.* Pollock, 99 Pa. St. 202; Dwyer *v.* Kennemore, 31 Ala. 404; Montague *v.* King, 37 Miss. 441; Martel *v.* Somers, 26 Tex. 551; Fenwick *v.* Phillips, 3 Met. (Ky.) 87; Buckland *v.* Green, 133 Mass. 421. See also Johnson *v.* Martin, 54 Ala. 271; McColley *v.* Collins, 5 Harr. (Del.) 391. But not where the effect would be to deprive the defendant of a just set-off. Morrow *v.* Merchants', etc., Bank, 35 Ga. 267. And where the amendment is properly allowed there should be another amendment striking out the name of the nominal plaintiff. Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591.

Substituting Holder of Legal Title.—One having the legal title to sue may be substituted as plaintiff suing for the use of the equitable owner who was the original plaintiff. Estes *v.* Thompson, 90 Ga. 698; Nicholson *v.* Harris, 90 Ga. 257; Lewis *v.* Austin, 144 Mass. 383; Walthour *v.* Spangler, 31 Pa. St. 523; Boles *v.* Jessup, 57 Ark. 469; and Costello *v.* Crowell, 134 Mass. 280, where the plaintiff suing as the endorsee of a non-negotiable note was allowed to substitute the name of the payee as plaintiff. American Union Tel. Co. *v.* Daughtery, 85 Ala. 191; Harris *v.* Plant, 31 Ala. 659; Downey *v.* Garard, 24 Pa. St. 52. See also Kaylor *v.* Saffner, 24 Pa. St. 489.

Entirely New Plaintiff.—In Wood *v.* Metropolitan L. Ins. Co., 96 Mich. 437, it was held that an assignee of the plaintiff could not be made a party plaintiff, because it was a change of the real parties in interest. *Contra*, Talbert *v.* Becton, 111 N. Car. 543. See also, as to making entirely new plaintiffs, *infra* 5, *h*.

Laches in Applying for Leave.—Leave to amend by substituting the name of another person in the place of one for whose use the plaintiff sues may be refused at a late stage of the case. Burrus *v.* Fisher, 27 Miss. 418.

Actual Amendment, When Unnecessary.—In *Illinois* it is not the practice, where the representatives of a deceased party are substituted, to amend by actually inserting their names in the declaration. Hoes *v.* Van Alstyne, 20 Ill. 201.

1. Hunt *v.* Collins, 4 Iowa 56; Agee *v.* Williams, 30 Ala. 636; Crimm *v.* Crawford, 29 Ala. 623; Farrow *v.* Bragg, 32 Ala. 260; Longmire *v.* Pilkington, 37 Ala. 296; Lucas *v.* Pittman, 94 Ala. 616; Humphries *v.* Dawson, 38 Ala. 199; Ikelheimer *v.* Chapman, 32 Ala. 676; McCoy *v.* Watson, 51 Ala. 466; Reed *v.* Cooper, 30 Kan. 574; Hines *v.* Rutherford, 67 Ga. 606; Smith *v.* Pinney, 86 Mich. 484; Morford *v.* Dieffenbacker, 54 Mich. 593;

tative, he may be allowed to amend by declaring in his individual capacity.[1] So a misdescription of the plaintiff,[2] or of the representative or other capacity in which the plaintiff sues, is amendable.[3] But a proceeding in the name of neither a natural nor an

Wiley *v.* Lovely, 46 Mich. 87; Buffington *v.* Blackwell, 52 Ga. 129; Smith *v.* Anderson, 39 Tex. 496; Anderson *v.* Brock, 3 Me. 243. See also Smith *v.* Proctor, 1 Sandf. (N. Y.) 72; Flower *v.* Garr, 20 Wend. (N. Y.) 668; Megargell *v.* Hazleton Coal Co., 8 W. & S. (Pa.) 342.

A coplaintiff with a minor may amend by describing himself as next friend of the minor. Sick *v.* Michigan Aid Assoc., 49 Mich. 50.

A declaration in the name of a guardian may be amended by making the ward plaintiff suing by her next friend, who is the guardian. Morford *v.* Dieffenbacker, 54 Mich. 593; Wiley *v.* Lovely, 46 Mich. 87; Slater *v.* Nason, 15 Pick. (Mass.) 345; Perine *v.* Grand Lodge, 48 Minn. 82; and Van Pelt *v.* Chattanooga, etc., R. Co., 84 Ga. 706, were cases of a similar nature. See also Greenman *v.* Cohee, 61 Ind. 201. But Fowlkes *v.* Memphis, etc., R. Co., 38 Ala. 310, is an authority to the contrary.

In Hagerty *v.* Hughes, 4 Baxt. (Tenn.) 222, it was held that where a husband sues in his own name as such and afterwards amends so as to claim as administrator for the use of his children, it is an abandonment of the original suit and operates as a discontinuance.

1. Heard *v.* Lockett, 20 Tex. 162; Payne *v.* Furlow, 29 La. Ann. 160; Bragdon *v.* Harmon, 69 Me. 29. See also Bryant *v.* Helton, 66 Ga. 477.

If the declaration leaves it uncertain whether plaintiff is suing individually or as a representative, an amendment is proper. Wolscheid *v.* Thome, 76 Mich 265.

A plaintiff suing as executor cannot amend so as to sue in his own right on a distinct and separate title. Phillips *v.* Melville, 10 Hun (N. Y.) 211.

In Alabama a plaintiff cannot amend by striking out the name of the person for whose use the suit is instituted. Teer *v.* Sandford, 1 Ala. 525; Jemison *v.* Planters', etc., Bank, 23 Ala. 168. *Compare* Lucas *v.* Pittman, 94 Ala. 616. But the statutory action in the nature of ejectment is an exception. Caldwell *v.* Smith, 77 Ala. 157.

In Mississippi the name of the usee may be struck out. Anderson *v.* Robertson, 32 Miss. 241; Archer *v.* Stamps, 4 Smed. & M. (Miss.) 352.

So in *Georgia*. Ætna Ins. Co. *v.* Sparks, 62 Ga. 187.

2. In a suit by a foreign corporation an omission to aver its corporate character may be amended. Southern L. Ins. Co. *v.* Roberts, 60 Ala. 431. See also Jemison *v.* Planters', etc., Bank, 23 Ala. 168; St. Louis, etc., R. Co. *v.* Camden Bank, 47 Ark. 541.

Members of a corporate board suing in their own names on a corporate right may amend by describing themselves as a corporation. M. E. Church *v.* Town, 49 Vt. 29; Shoudy *v.* School Directors, 32 Ill. 290; Yocum *v.* Waynesville, 39 Ill. 220.

Plaintiff suing on a note may amend by adding averments that he sues not as a payee, but as assignee or owner. Long *v.* Patterson, 51 Ala. 414.

Plaintiff may amend by describing himself as "doing business under the name of" another person. Hathaway *v.* Sabin, 61 Vt. 608.

Plaintiffs suing as heirs of B. may amend by claiming as the heirs of A. Reams *v.* Spann, 28 S. Car. 530.

An infant suing in his own name may amend so as to sue by guardian. Sabine *v.* Fisher, 37 Wis. 376.

A suit by a voluntary association cannot be amended into a suit under the name by which it was subsequently incorporated. Marsh River Lodge *v.* Brooks, 61 Me. 585.

3. Johr *v.* St. Clair County, 38 Mich. 532; O'Connell *v.* Schwanabeck, 76 Mich. 517; Donovan *v.* Halsey Fire Engine Co., 58 Mich. 38; Rutherford *v.* Hobbs, 63 Ga. 243; Van Pelt *v.* Chattanooga, etc., R. Co., 89 Ga. 706; Tumlin *v.* Quarles, 26 Ga. 395; Humphries *v.* Dawson, 38 Ala. 199. See also Cannon *v.* Mathis, 10 Heisk. (Tenn.) 575.

One suing as an heir at law may amend so as to sue as executor. Hines *v.* Rutherford, 67 Ga. 606. Or, suing as executor may amend by declaring as administrator. Risley *v.* Wightman, 13 Hun (N. Y.) 163.

Plaintiff suing as agent may strike

artificial person is beyond the reach of amendment.[1]

c. MISDESCRIPTION OF DEFENDANT—NOMINAL CHANGE.—A misdescription of the defendant,[2] or of the capacity in which he is sued, may be corrected by amendment;[3] and the party legally

out the descriptive words. McDuffie *v.* Irvine, 91 Ga. 748.

Plaintiff suing as receiver of a corporation may amend by substituting the name of the corporation. Chandler *v.* Frost, 88 Ill. 559.

Plaintiff suing as executor may amend by correcting the name of the testator. Benjamin *v.* Boyce, 2 Harr. (Del.) 316. Or by describing himself as administrator. Risley *v.* Wightman, 13 Hun (N. Y.) 163.

Where an action on an administration bond was brought in the name of the administrator *de bonis non* instead of in that of the state on his relation, an amendment making the proper plaintiff was allowed. Grant *v.* Rogers, 94 N. Car. 755. Harris *v.* Plant, 31 Ala. 639; Judge of Probate *v.* Jackson, 58 N. H. 458; State *v.* Shelby, 75 Mo. 482; Waterman *v.* Dockray, 79 Me. 149; Clement *v.* Com., 95 Pa. St. 107; and Meyer *v.* State, 125 Ind. 335, were decided on precisely the same principle. But if not amended, the omission is too radical to be corrected in the appellate court under the statute of jeofails. Snyder *v.* State, 21 Ind. 77; Cutshaw *v.* Fargo (Ind., 1894), 36 N. E. Rep. 650; Taggart *v.* State, 49 Ind. 43.

A party who sues in the name of another when he might sue in his own name may amend and proceed in his own name. Frank *v.* Kaigler, 36 Tex. 305.

A relator in an action by the state on a trustee's bond against the trustee and his sureties may be permitted to amend his complaint so as to make it an action by the relator as plaintiff against the trustee alone to set aside as fraudulent the defendant's final report. Boyd *v.* Caldwell, 95 Ind. 392.

In an action on an account between plaintiff and defendant, an amendment alleging that the plaintiff sues as transferee of a third person introduces a different cause of action, and is not allowable. Barron *v.* Walker, 80 Ga. 121. See also Henry *v.* Central R., etc., Co., 89 Ga. 815.

1. Mexican Mill *v.* Yellow Jacket Silver Min. Co., 4 Nev. 40.

2. Nary *v.* Henni, 45 Wis. 473.

The plaintiff may strike out the description of the defendants as trading in a firm-name. Schollenberger *v.* Seldonridge, 49 Pa. St. 83.

An amendment may be made so as to show that the defendant is a body corporate and sued in that capacity. Alabama Western R. Co. *v.* Sistrunk, 85 Ala. 352.

An amendment by which the defendant was described as "executor of J. B., Jr.," instead of "administrator of J. B.," was allowed. Ballou *v.* Tilton, 52 N. H. 605. See also McElwain *v.* Corning, 12 Abb. Pr. (N. Y. Supreme Ct.) 16; Proctor *v.* Andrew, 1 Sandf. (N. Y.) 70.

A declaration alleging that "the defendant testator, etc., being indebted, etc., promised," may be amended by declaring that "the intestate, etc., promised." Eaton *v.* Whitaker, 6 Pick. (Mass.) 465.

3. Where a suit is brought against "defendants, receivers" of a corporation, etc., an amendment may be made charging them "as receivers," etc. Eddy *v.* Powell, 49 Fed. Rep. 814.

If a defendant is sued in his representative character, the complaint may be amended so as to stand against him as an individual. Lucas *v.* Pittman, 94 Ala. 616, *overruling* Christian *v.* Morris, 50 Ala. 585, and Taylor *v.* Taylor, 43 Ala. 649; and holding Kirkman *v.* Benham, 28 Ala. 501, inapplicable. Jemison *v.* Planters', etc., Bank, 23 Ala. 168, was decided before the Code.

Under the *Connecticut* Practice Act, §§ 12, 15, and 16, a complaint against the defendant as administrator can be amended so as to make it charge the defendant in his individual capacity. McDonald *v.* Ward, 57 Conn. 304, *citing*, as exactly in point, Tighe *v.* Pope, 16 Hun (N. Y.) 180; Fuller *v.* Webster F. Ins. Co., 12 How. Pr. (N. Y. Supreme Ct.) 293; Haddow *v.* Haddow, 3 Thomp. & C. (N. Y.) 777.

But the amendment cannot be made after trial to enable a judgment to be entered against the defendant individually. Van Cott *v.* Prentice, 104 N. Y. 45.

A defendant sued personally may

liable may be substituted as a defendant where the amendment does not work a substantial change in the cause of action.[1]

d. ADDING PLAINTIFFS.—**At Common Law** new plaintiffs could not be added by amendment.[2]

Statutory Provisions, especially in the Code states, have substantially adopted the liberal practice of the Court of Chancery, and allow new plaintiffs to be added when it becomes necessary in order to bring the merits of the controversy fairly to trial.[3]

be charged by amendment in his capacity as administrator. Hutchinson *v.* Tucker, 124 Mass. 240.

In a suit on a bill of exchange an omission to charge the defendants as drawers and endorsers may be supplied by amendment. Ware *v.* Macon City Bank, 59 Ga. 840.

After Submission of Case.—An amendment by charging the defendant in a new capacity may be refused where the application is made after submission of the case. Hays *v.* Turner, 23 Iowa 214.

1. The person in whom the legal title is vested may be substituted as a defendant. Seitz *v.* Buffum, 14 Pa. St. 69.

Where suit was brought against the president of a company to enforce a company liability, the declaration was held amendable by striking out his name, so that it should stand against the corporation. Kimball, etc., Mfg. Co. *v.* Vroman, 35 Mich. 310; Prairie Lodge *v.* Smith, 58 Miss. 301, identical in principle. But see Davis Ave. R. Co. *v.* Mallon, 57 Ala. 168; Shuler *v.* Meyers, 5 Lans. (N. Y.) 170.

So where suit was brought against a voluntary association in its own name, an amendment was allowed by substituting its proper officers, so as to comply with the statute. McKane *v.* Democratic Gen'l Committee, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 89.

Defendants sued as individuals may be charged as a partnership by amendment. Williams *v.* Bowdin, 68 Ala. 126; and, *vice versa*, Sims *v.* Jacobson, 51 Ala. 186; Bannerman *v.* Quackenbush, 11 Daly (N. Y.) 529. *Compare* La Société, etc., *v.* Weidemann, 97 Cal. 507.

In Ohio, where the petition is filed before the summons is issued, if the names of partners are substituted in the place of the partnership name, there must be a new service of process. Marienthal *v.* Amburgh, 2 Disney (Ohio) 586.

2. Choteau *v.* Hewitt, 10 Mo. 131; Chamberlin *v.* Hite, 5 Watts (Pa.) 373; Wilson *v.* Wallace, 8 S. & R. (Pa.) 53; Carskadden *v.* McGhee, 7 W. & S. (Pa.) 140; Elliott *v.* Clark, 18 N. H. 421; Ayer *v.* Gleason, 60 Me. 207; White *v.* Curtis, 35 Me. 534; Winslow *v.* Merrill, 11 Me. 127; Pitkin *v.* Roby, 43 N. H. 138; Willink *v.* Renwick, 22 Wend. (N. Y.) 608; McWilliams *v.* Anderson, 68 Ga. 772.

In Maine the common law, so far as relates to defendants, was changed by statute in 1835, c. 178, § 4, by allowing the insertion or striking out of the names of the defendants. Rev. Stat. 1871, c. 82, § 11. But this provision has never been held to authorize any amendment of a similar character as to plaintiffs. Ayer *v.* Gleason, 60 Me. 207, 208; White *v.* Curtis, 35 Me. 534. Thus, where the defendant was summoned in an action of trover to answer to "James C. Ayer and —— of," etc., "copartners under the style and firm-name of James C. Ayer & Co.," an amendment by inserting the names of the other members of the firm was not allowed. Ayer *v.* Gleason, 60 Me. 207.

3. Tayon *v.* Ladew, 33 Mo. 205; Wellman *v.* Dismukes, 42 Mo. 101; Berry *v.* Ferguson, 58 Ala. 314; Harris *v.* Swanson, 62 Ala. 299; Godbold *v.* Blair, 27 Ala. 592; Reynolds *v.* Smathers, 87 N. Car. 24; Dutcher *v.* Slack, 1 Code R. (N. Y.) 113; Acquital *v.* Crowell, 1 Cal. 191; Polk *v.* Coffin, 9 Cal. 56; Cerf *v.* Ashley, 68 Cal. 419; Hubler *v.* Pullen, 9 Ind. 273; Flatley *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 230; Brazelton *v.* Turney, 7 Coldw. (Tenn.) 267; Lanes *v.* Squyres, 45 Tex. 382; Weinsteine *v.* Harrison, 66 Tex. 546; Reagan *v.* Copeland, 78 Tex. 551; Galveston, etc., R. Co. *v.* House, 4 Tex. Civ. App., 263; Hanlin *v.* Baxter, 20 Kan. 134; Leavenworth

c. ADDING DEFENDANTS —**At Common Law** new defendants could not be added by way of amendment unless by the express consent of the parties;[1] but legislative sanction for such amendments is now common where the presence of the new parties is essential to a complete determination of the case.[2]

First Nat. Bank *v.* Tappan, 6 Kan. 456; Shaffer *v.* Eichert, 132 Pa. St. 285; Hite *v.* Kier, 38 Pa. St. 72; Baltimore, etc., Extension Co. *v.* Seiple (Pa., 1889), 18 Atl. Rep. 568; Hasbrouck *v.* Winkler, 48 N. J. L. 431; Boles *v.* Jessup, 57 Ark. 469.

In the Appellate Court.—Where ejectment was brought by a plaintiff in right of his wife, and on the trial verdict and judgment were had for the plaintiff, an amendment adding the name of the wife as a necessary coplaintiff, doing no injury to the defendant, may be made on the argument in the Supreme Court. Shaffer *v.* Eichert, 132 Pa. St. 285.

On Appeal in County Court.—In *Vermont*, Revised Laws, § 939, authorizes the addition of necessary plaintiffs in actions on contract at any time before judgment, and leave may be granted by the County Court in a case appealed from the Probate Court. Wyman *v.* Wilcox's Estate, 63 Vt. 487.

After Verdict.—Where the merits of the case have been fully tried the plaintiff may have leave to amend after verdict by joining another party as plaintiff, so as to conform to the proof. Fenton *v.* Lord, 128 Mass. 466.

Joining Tenants in Common.—A tenant in common or joint tenant suing alone for rent may be permitted to join his cotenant as plaintiff. Weinsteine *v.* Harrison, 66 Tex. 546.

In Ejectment.—In actions of ejectment in *Illinois* a declaration may be amended by adding a count making new parties plaintiffs. Chapin *v.* Curtenius, 15 Ill. 427. See also Strean *v.* Lloyd, 128 Ill. 493.

In Partnership Suits.—In all suits by partners or persons jointly interested, where the name of any one who ought to have joined is omitted, it may be inserted *instanter* on motion; but a suit brought by one in his individual name cannot be changed into a suit in the name of the partnership. Blackwell *v.* Pennington, 66 Ga. 240. But see Dixon *v.* Dixon, 19 Iowa 512; Lewis *v.* Locke, 41 Vt. 11.

The *Connecticut* statute provides that all suits for or against a partnership may be commenced in the company name, and that the plaintiff may amend by inserting the names of the members of the firm. It was held that a suit commenced in the names of several persons as constituting a partnership might be amended by inserting the name of another partner. Stuart *v.* Corning, 32 Conn. 105.

At What Stage.—Although the statute allows the names of partners to be inserted within the first three days of the term, the court may in its discretion allow plaintiff to insert them at a later stage of the case, the statute being liberally construed. Phelps *v.* Enz, 19 Conn. 58.

Process upon Amending.—The *Tennessee* Code allows the name of a new plaintiff to be substituted without any process. Flatley *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 230.

Answer to Amendment.—A defendant who has answered a petition is not in default because an amended petition is filed making a new party plaintiff to which no new answer is filed. Stevens *v.* Thompson, 5 Kan. 305.

1. Winslow *v.* Merrill, 11 Me. 127; Ayer *v.* Gleason, 60 Me. 208; Noll *v.* Swineford, 6 Pa. St. 187; Gove *v.* Lawrence, 24 N. H. 128, an action on a joint contract; Seitz *v.* Buffum, 14 Pa. St. 70; Commission Co. *v.* Russ, 8 Cow. (N. Y.) 122.

2. Richter *v.* Cummings, 60 Pa. St. 441; Reber *v.* Wright, 68 Pa. St. 471; Hilton *v.* Osgood, 49 Conn. 110; Alexander *v.* Thacker, 30 Neb. 614; Harkins *v.* Edwards, 1 Iowa 296; Lewis *v.* Adams, 70 Cal. 403; Johnston *v.* Neville, 68 N. Car. 177; Riley *v.* Stern, 23 Abb. N. C. (N. Y. City Ct.) 435; Bank *v.* Hornsey, 13 Civ. Pro. Rep. (N. Y. City Ct.) 158; Lewin *v.* Wright, 31 Hun (N. Y.) 327; Peyser *v.* Wendt, 87 N. Y. 322, an amendment allowed by a referee; Bergmann *v.* Salmon (Supreme Ct.), 53 N. Y. St. Rep. 236. See also Boute *v.* Taylor, 24 Ohio St. 628.

In regard to the right of the new defendant to set up defenses as of the date when he is brought in, see *infra*, 12, *a*, (2).

f. STRIKING OUT PLAINTIFFS.—**At Common Law,** amendments by striking out the names of existing plaintiffs were not allowable,[1] where nothing had occurred since the commencement of the suit to change the relations of the parties or the character of the claim.[2]

When not Allowed. — A defendant cannot be added at so late a period as to deprive him of any substantial right that he might have asserted if he had been made a party at the commencement of the proceedings. Young *v.* Young, 88 Pa. St. 422.

Amendment of Course.—Under the provisions of *Wisconsin* Gen. Laws 1859, c. 181, the plaintiff in an action might amend *of course* by making new defendants. Mead *v.* Bagnall, 15 Wis. 156.

Before Plea in Abatement.—*Massachusetts* Stat. 1833, c. 194, provided for adding proper defendants in certain cases "at any time before issue joined on a plea of nonjoinder," and it was construed to allow the insertion of a defendant although no plea of nonjoinder had been filed. Goddard *v.* Pratt, 16 Pick. (Mass.) 412. See also Pitkin *v.* Roby, 43 N. H. 138.

After Plea in Abatement Sustained.—A new defendant may be cited in, although there is no cause of action against the original defendants; and this may be done after the writ has been abated, a statute expressly providing for amendment of defects after plea in abatement sustained. Hilton *v.* Osgood, 49 Conn. 110. See Chamberlin *v.* Noyes, 7 Hill (N. Y.) 145; Shute *v.* Davis, 2 Johns. Cas. (N. Y.) 336.

After Demurrer Sustained.—The plaintiff may bring in defendants by amendment after demurrer has been sustained for nonjoinder. Alexander *v.* Thacker, 30 Neb. 614; State *v.* Leckie, 14 La. Ann. 651.

Insufficient Amendment. — Where a complaint stating no cause of action or ground of relief against a particular person is not so amended as to do so, an order making such person a party defendant and requiring him to appear and answer such complaint is erroneous. Penfield *v.* Wheeler, 27 Minn. 358. But an amendment which is insufficient in that respect may be remedied by further amendment. Detroit Third Nat. Bank *v.* Reilly, 81 Mich. 438.

Improper Defendants. — Where the statute allows the insertion of "proper parties" by amendment, the court may refuse to allow defendants to be introduced against whom the suit cannot be maintained. Tennessee Bank *v.* Skillern, 2 Sneed (Tenn.) 698.

Where Liability Accrues Pending Suit. —A defendant who was not liable when the suit was commenced cannot be added, although he may have rendered himself liable by ratification of the contract of the original defendant, his agent, pending the suit. Burns *v.* Campbell, 71 Ala. 272.

Effect of Refusing Leave. — Where leave to add a new defendant is denied, the ruling may be deemed as made with the consent of the defendant on record, so that he cannot subsequently complain of a nonjoinder or misjoinder of parties. Fulton *v.* Cox, 40 Cal. 101.

Effect of Making a New Defendant.— Where a new defendant is brought in by order of court, the complaint must be amended or another complaint filed as to him, unless he waives his right by answering the original complaint. Vass *v.* People's Bldg., etc., Assoc., 91 N. Car. 55; Smith *v.* Weage, 21 Wis. 440; Levi *v.* Engle, 91 Ind. 330; Vance *v.* Schroyer, 77 Ind. 501.

Where new defendants are brought in by amendment of the complaint, the summons must be amended accordingly; otherwise the amendment may be stricken out on motion of the original defendant. Follower *v.* Laughlin, 12 Abb. Pr. (N. Y. Supreme Ct.) 105.

1. Ayer *v.* Gleason, 60 Me. 207; White *v.* Curtis, 35 Me. 534; Roach *v.* Randall, 45 Me. 438; Treat *v.* McMahon, 2 Me. 120, where the court refused leave to strike out the name of a demandant improvidently inserted in a writ of entry; Pickett *v.* King, 4 N H. 212, a similar case; Kelly *v.* Eichman, 3 Whart. (Pa.) 419; Crump *v.* Wallace, 27 Ala. 277; Moores *v.* Carter, Hempst. (U. S.) 64. See also Carskadden *v.* McGhee, 7 W. & S. (Pa.) 140.

2. In Chadbourne *v.* Rackliff, 30 Me. 354, an amendment by striking out the name of one of the demandants in a writ of entry was allowed, but this was upon the ground that the tenant

Statutory Provisions in almost every state authorize amendments by striking out one or more of several plaintiffs.[1]

g. STRIKING OUT DEFENDANTS.—**At Common Law** amendments by striking out one or more of several defendants were allowed in actions for torts and in real actions,[2] but not in actions on contracts.[3]

had acquired the title of one of the original demandants after the commencement of the suit. So in Treat *v.* Strickland, 23 Me. 234, where one of the demandants died after suit brought.

1. Thompson *v.* Mosely, 29 Mo. 477; Davis *v.* Ritchie, 85 Mo. 501; Tayon *v.* Ladew, 33 Mo. 205; Farrow *v.* Com. Ins. Co., 18 Pick. (Mass.) 57; Finney *v.* Bedford Commercial Ins. Co., 8 Met. (Mass.) 348; Thayer *v.* Hollis, 3 Met. (Mass.) 369; Dodge *v.* Wilkinson, 3 Met. (Mass.) 292; Parker *v.* Chambers, 24 Ga. 518; Whitaker *v.* Pope, 2 Woods (U. S.) 463; Hinkle *v.* Davenport, 38 Iowa 355; Butcher *v.* Carleton, 11 Iowa 47; Collins *v.* Townsend, 2 Harr. (Del.) 317 *n. a.*; Reed *v.* Northeastern R. Co., 37 S. Car. 42; Hudson *v.* Feige, 58 Mich. 148; Miller *v.* Cappel, 39 La. Ann. 881; Neal *v.* Spooner, 20 Fla. 38; Hamill *v.* Ashley, 11 Colo. 180; Jarrett *v.* Gibbs, 107 N. Car. 303; Tormey *v.* Pierce, 49 Cal. 306; Heath *v.* Lent, 1 Cal. 410; Wilson *v.* King, 6 Yerg. (Tenn.) 493; Lillard *v.* Rucker, 9 Yerg. (Tenn.) 64; Weaver *v.* Young, 37 Kan. 70; Hanlin *v.* Baxter, 20 Kan. 134, a case in a justice court; Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235; Holt *v.* Thacher, 52 Vt. 592; Miller *v.* Pollock, 99 Pa. St. 202; Musser *v.* Gardner, 66 Pa. St. 242; Rangler *v.* Hummel, 37 Pa. St. 130; Lapham *v.* Rice, 55 N. Y. 472, holding that in a justice court one of two joint plaintiffs may be struck out; Pomboy *v.* Sperry, 16 How. Pr. (N. Y. Supreme Ct.) 211, Holmes *v.* Schermerhorn, 5 How. Pr. (N. Y. Supreme Ct.) 440; Lowery *v.* Rowland (Ala., 1894), 16 So. Rep. 88; Lansburg *v.* Cohen, 52 Ala. 180; McBrayer *v.* Cariker, 64 Ala. 50; Steed *v.* McIntyre, 68 Ala. 407; Berry *v.* Ferguson, 58 Ala. 314; State *v.* Rice, 65 Ala. 83; Dwyer *v.* Kennemore, 31 Ala. 404; Jemison *v.* Smith, 37 Ala. 185

Contra in Alabama before the Code. Crump *v.* Wallace, 27 Ala. 277. A party plaintiff may be made a defendant. Liggett *v.* Ladd, 23 Oregon 26.

Leave Discretionary. — Leave to amend during the trial by striking out the name of some of the plaintiffs was held to be discretionary, and a refusal not a subject of exception, in Gwynn *v.* Globe Locomotive Works, 5 Allen (Mass.) 317.

In the Appellate Court.—When the petition shows a cause of action in one plaintiff only and a judgment is rendered in favor of both, an amendment cannot be made in the appellate court by striking out the name of the one erroneously included in the judgment. Megher *v.* Stewart, 6 Mo. App. 498.

2. Winslow *v.* Merrill, 11 Me. 127; Reddington *v.* Farrar, 5 Me. 380.

3. Redington *v.* Farrar, 5 Me. 379; Fleming *v.* Freese, 26 N. J. L. 263; Cooper *v.* Whitehouse, 6 C. & P. 545, 25 E. C. L. 535. See also Burr *v.* Ross, 19 Ark. 250. *Contra*, Colcord *v.* Swan, 7 Mass. 291, *disapproved* in Redington *v.* Farrar, *supra*.

Entering Nol Pros.—Where a suit is brought against several upon a contract which is several as well as joint, or where the contract sued on is joint, and the defendants sever in their pleas, the plaintiff may at common law, according to the decisions in this country, enter a *nol pros* as to one defendant, whether before or after judgment, without affecting his right to recover or the validity of his judgment as against other defendants. Austin *v.* Jordan, 5 Tex. 130, where the court cites as maintaining this rule,—which departs in some degree from the English practice as laid down in 1 Chitty Pl. 50,—Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46; Hartness *v.* Thompson, 5 Johns. (N. Y.) 160; Woodward *v.* Newhall, 1 Pick. (Mass.) 500. See also Forbes *v.* Davis, 18 Tex. 268; Andrus *v.* Pettus, 36 Tex. 108; Coburn *v.* Ware, 25 Me. 330; Beaman *v.* Whitney, 20 Me. 413; Beringer *v.* Meanor, 85 Pa. St. 223; Ganzer *v.* Fricke, 57 Pa. St. 316.

Where there is no severance of pleas, and the plaintiff fails to prove a joint contract, and after a finding equivalent to a verdict of no joint

By Statute.—Statutory authority to allow amendments striking out defendants who are improperly joined is now almost or quite universal.[1]

h. ENTIRE CHANGE OF PARTIES.—Although there is much latitude in allowing amendments by substitution in order to conform to the law of parties,[2] yet an entirely new plaintiff with a different and independent cause of action cannot be admitted to displace the original plaintiff;[3] nor can there be a change of de-

promise, the plaintiff cannot amend by striking out one of the defendants. Griffin *v.* Simpson, 45 N. H. 18.

Under the *Illinois* Practice Act of 1874 the court may allow the plaintiff, after verdict against two defendants, to amend his declaration by discontinuing as to one of them. Cogshall *v.* Beesley, 76 Ill. 445.

In *New Jersey*, where too many defendants are joined in an action on contract, the proceedings can be amended only in the manner pointed out by the statute [by notice of objection, etc.], and if not so amended cannot be amended on the trial by striking out those improperly joined. Fleming *v.* Freese, 26 N. J. L. 263, *citing* Cooper *v.* Whitehouse, 6 C. & P. 545, 25 E. C. L. 535.

1. Beall *v.* Territory, 1 N. Mex. 507; Brown *v.* Pickard, 4 Utah 292; Riley *v.* Stern, 23 Abb. N. C. (N. Y. City Ct.) 435; Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214; Fitch *v.* Stevens, 2 Met. (Mass.) 505; Turner *v.* Bissell, 14 Pick. (Mass.) 192; Ridley *v.* Knox, 138 Mass. 83; Turner *v.* Hillerline, 14 How. Pr. (N. Y. Supreme Ct.) 231; Harney *v.* Corcoran, 60 Cal. 314; Atlantic, etc., R. Co. *v.* Laird (Cal.), 58 Fed. Rep. 760; Blaisdell *v.* Bohr, 68 Ga. 56; Chattanooga, etc., R. Co. *v.* Whitehead, 89 Ga. 190; Solomon *v.* City Compress Co., 69 Miss. 319, under § 1581, Rev. Code, allowing amendments so as to bring the merits of the controversy fairly to trial; Beaman *v.* Whitney, 20 Me. 413; Coburn *v.* Ware, 25 Me. 330; Fuller *v.* Miller, 58 Me. 40; Cutts *v.* Haynes, 41 Me. 560; West *v.* Furbish, 67 Me. 17; Winn *v.* Averill, 24 Vt. 283, where a defendant dead when the suit was brought was struck out; Henry *v.* State Bank, 3 Ind. 216; Taylor *v.* Jones, 1 Ind. 17; Trees *v.* Eakin, 9 Ind. 554; Barncord *v.* Kuhn, 36 Pa. St. 383; Ganzer *v.* Fricke, 57 Pa. St. 316; Jackson *v.* Lloyd, 44 Pa. St. 82; Steed *v.* McIntyre, 68 Ala. 407; Jones *v.* Engelhardt, 78 Ala. 505; Odom *v.* Shackleford, 44 Ala. 331; Lowery *v.* Rowland (Ala., 1894), 16 So. Rep. 88; Huntsville, etc., R. Co. *v.* Carpening, 98 Ala. 681; Englehardt *v.* Clanton, 83 Ala. 336; Jones *v.* Nelson, 51 Ala. 471; Masterson *v.* Gibson, 56 Ala. 56; Sellar *v.* Clelland, 2 Colo. 532.

Leave to strike out may be refused in the absence of any showing of mistake. Locke *v.* Daugherty, 43 Pa. St. 88; Mock *v.* Walker, 42 Ala. 668; Bachus *v.* Mickle, 45 Ala. 445; Kendall *v.* Lassiter, 68 Ala. 181; Pool *v.* Devers, 30 Ala. 672, after demurrer for misjoinder; Demeritt *v.* Mills, 59 N. H. 18; Perley *v.* Brown, 12 N. H. 493; Emerson *v.* Shaw, 57 N. H. 223. *Compare* Griffin *v.* Simpson, 45 N. H. 18.

After Judgment.—In *New York* the plaintiff may have leave to strike out some of the defendants after judgment in his favor. Sherman *v.* Fream, 8 Abb. Pr. (N. Y. Supreme Ct.) 33.

2. See *supra*, *b*, *c*.

Substituting Assignee. — The court may on the trial order an amendment substituting as a party plaintiff one to whom the plaintiff assigned his interest before suit. Suber *v.* Chandler, 28 S. Car. 382; Clawson *v.* Cone, 2 Handy (Ohio) 67; Wellman *v.* Dismukes, 42 Mo. 101. *Contra*, Wood *v.* Metropolitan L. Ins. Co., 96 Mich. 437.

In Mississippi under the new Pleading Act of 1850, § 13, the real plaintiff may amend his complaint by substituting the name of one nominal plaintiff for that of another. Denton *v.* Stephens, 32 Miss. 194; Stratton *v.* Taylor, 32 Miss. 201.

3. Pickens *v.* Oliver, 32 Ala. 626; Leaird *v.* Moore, 27 Ala. 326; Davis Ave. R. Co. *v.* Mallon, 57 Ala. 168; Friend *v.* Oliver, 27 Ala. 532; Stodder *v.* Grant, 28 Ala. 416; Fowlkes *v.* Memphis, etc., R. Co., 38 Ala. 310; Miles *v.* Strong, 60 Conn. 393; Lake *v.* Morse, 11 Ill. 587; Merrill *v.* Merrill, 92 N. Car. 657; Grandy *v.* Sawyer, 2 Hawks (N. Car.) 61; Hunnicutt *v.* Stone, 85 Ga. 435; McWilliams *v.* Anderson, 68

fendants by the substitution of entirely different defendants.[1]

Ga. 772; Morrow *v.* Merchants', etc., Bank, 35 Ga. 267; Neal *v.* Robertson, 18 Ga. 399; Lumpkin *v.* Respess, 68 Ga. 822; Blackwell *v.* Pennington, 66 Ga. 240; Marsh River Lodge *v.* Brooks, 61 Me. 585; Thayer *v.* Farrell, 11 R. I. 305; Davis *v.* New York, 14 N. Y. 506; Wright *v.* Storms, 3 Code Rep. (N. Y.) 138; Willink *v.* Renwick, 22 Wend. (N. Y.) 608; Phillips *v.* Melville, 10 Hun (N. Y.) 211; Coffing *v.* Tripp, 1 How. Pr. (N. Y.) 115; Johnson *v.* Mayrant, 1 McCord (S. Car.) 484; Hagerty *v.* Hughes, 4 Baxt. (Tenn.) 222; Wood *v.* Metropolitan L. Ins. Co. 96 Mich. 437; Emerson *v.* Wilson, 11 Vt. 357; Moore *v.* Lancaster, Wright (Ohio) 35; Curacel *v.* Conlon, 2 Martin (La.) 143; Jones *v.* Jenkins, 9 Rob. (La.) 180; Duncan *v.* Helm, 21 La. Ann. 303. *Compare* Farrier *v.* Schroeder, 40 N. J. L. 601.

Restatement of the Rule.—Where a plaintiff in his complaint shows that he has no such interest as entitles him to invoke the jurisdiction of the court, he cannot amend it by making others plaintiffs who have a cause of action. State *v.* Rottaken, 34 Ark. 144, holding that the statutory authority to add or strike out the name of any party assumes that the plaintiff has a cause of action; *citing*, as in point, Davis *v.* New York, 14 N. Y. 506, to which may be added Miles *v.* Strong, 60 Conn. 393.

By Addition and Subtraction.—Such a substitution cannot be accomplished by adding a coplaintiff by one amendment and striking out the original plaintiff by another amendment. Pickens *v.* Oliver, 32 Ala. 626; Tarver *v.* Smith, 38 Ala. 135.

Making a New Cause of Action.—An administrator *de bonis non* has no right of action against the representatives of a former administrator for a *devastavit;* and having brought such an action, he cannot amend by substituting creditors, legatees, etc., in whom the right of action exists. State *v.* Rottaken, 34 Ark. 144.

In Case of Mistake. — In Weaver *v.* Young, 37 Kan. 70, it was held that the name of Joseph M. Young as sole plaintiff could be struck out and that of E. J. Young, a different person, substituted upon a showing that the first name was used by mistake. The court said that if the question was presented for the first time it would be difficult to get over the contrary authorities. See also Hanlin *v.* Baxter, 20 Kan. 134; Atchison *v.* Twine, 9 Kan. 350; Leavenworth First Nat. Bank *v.* Tappan, 6 Kan. 456.

Where Substituted Party has No Right.—After the evidence is closed an amendment will not be allowed which substitutes for the plaintiff a third party who is shown by the proof to have no title to recover. Shaw *v.* Alexander, 32 Miss. 229.

1. Little *v.* Virginia, etc., Water Co., 9 Nev. 317; Shuler *v.* Meyers, 5 Lans. (N. Y.) 170; Stodder *v.* Grant, 28 Ala. 416; Davis Ave. R. Co. *v.* Mallon, 57 Ala. 168; *Ex p.* Collins, 49 Ala. 69; Western R. Co. *v.* McCall, 89 Ala. 375; Hunnicutt *v.* Stone, 85 Ga. 435; Lennard *v.* Jones, 27 Ga. 309; Nashville, etc., R. Co. *v.* Edwards, 91 Ga. 24; Sawyer *v.* New York State Clothing Co. 58 Vt. 588, holding that a partnership with the names of the partners could not be substituted for a corporation as sole defendant. See also Weise *v.* Rich, 77 Mich. 325.

In New York, etc., Milk Pan Assoc. *v.* Remington's Agricultural Works, 25 Hun (N. Y.) 475, an action brought against the defendant corporation on a contract alleged to have been made by it, the summons and complaint were served upon one of the officers who with others constituted a partnership by which the contract was really made, the partnership doing business under the name of the corporation. The plaintiff, after issue joined, was allowed to amend the summons and complaint by striking out the defendant's name and substituting therefor the names of the partners. This ruling was reversed by the Court of Appeals in New York, etc., Milk Pan Assoc. *v.* Remington Agricultural Works, 89 N. Y. 22, where the court said that, "while full authority is conferred for adding or striking out the name of a person or a party or correcting a mistake in such name, it [§ 723 of the Code] does not sanction an entire change of name of the defendant by the substitution of another or entirely different defendants;" *citing*, as directly in point, Bassett *v.* Fish, 75 N. Y. 303, and Shaw *v* Cock 78 N. Y. 194.

6. Introducing a New Cause of Action or Defense—*a.* PREVALENCE AND EXTENT OF THE RULE FORBIDDING.—At Common Law the court had no power to allow the plaintiff to amend by introducing an entirely new and different cause of action.[1] Nor could the defendant amend by setting up a new defense founded upon a transaction entirely different from that stated in the plea.[2] But the last proposition has been disputed.[3]

Other *New York* cases bearing upon the question and discussed in the opinions at general term in the case above quoted from on appeal are: McElwain *v.* Corning, 12 Abb. Pr. (N. Y. Supreme Ct.) 16; Newton *v.* Milleville Mfg. Co., 17 Abb. Pr. (N. Y. Supreme Ct.) 518, note; Fuller *v.* Webster F. Ins. Co., 12 How. Pr. (N. Y. Supreme Ct.) 293; Risley *v.* Wightman, 13 Hun (N. Y.) 164; Tighe *v.* Pope, 16 Hun (N. Y.) 180; Havana Bank *v.* Magee, 20 N. Y. 359; Walsh *v.* Washington Marine Ins. Co., 32 N. Y. 439; Thompson *v.* Kessel, 30 N. Y. 383; Ackley *v.* Tarbox, 31 N. Y. 564.

In Case of Devolution of Liability.—Under the *New York* Code of Civ. Pro. § 756, authorizing the court to direct the person upon whom a liability has devolved to be substituted, such substitution may be made by amendment. Abbott *v.* Jewett, 25 Hun (N. Y.) 603.

Substituting Names of Partners.—Where a statute authorized suits to be brought against a partnership in the firm-name, and the names of the partners to be inserted by amendment, it was held that a writ against "R. P., doing business under the name and firm of R. P. & Son," was not a writ against a partnership but against R. P. only, and could not be amended by inserting the names of A., B., and C. as copartners with R. P. Maritime Bank *v.* Rand, 24 Conn. 9.

1. Shipman Common-Law Pleading, § 142; Andrews' Stephen's Pleading, 167; Heard Civil Pleading, 71.

New York.—Woodruff *v.* Dickie, 31 How. Pr. (N. Y. Supreme Ct.) 164.

Massachusetts. — Ball *v.* Claflin, 5 Pick. (Mass.) 303; Chaffee *v.* Jones, 19 Pick. (Mass.) 265; Brigham *v.* Este, 2 Pick. (Mass.) 425; Mason *v.* Waite, 1 Pick. (Mass.) 452; Guilford *v.* Adams, 19 Pick. (Mass.) 376; Kelley *v.* Taylor, 17 Pick. (Mass.) 218.

Colorado.—Givens *v.* Wheeler, 5 Colo. 598.

Indiana.—Falkner *v.* Iams, 5 Ind. 200.

Michigan. — People *v.* Judges, 1 Dougl. (Mich.) 434.

See also Holmes *v.* Robinson Mfg. Co., 60 Me. 201; Parkman *v.* Nutting, 59 Me. 398; Dana *v.* McClure, 39 Vt. 197; Cassell *v.* Cooke, 8 S. & R. (Pa.) 287; Duffey *v.* Houtz, 105 Pa. St. 96; Gardner *v.* Post, 43 Pa. St. 19; Steffy *v.* Carpenter, 37 Pa. St. 41; Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443; Root *v.* O'Neil, 24 Pa. St. 326; Trego *v.* Lewis, 58 Pa. St. 463; Forward School Dist. Appeal, 56 Pa. St. 318; Fairchild *v.* Dunbar Furnace Co. (Pa., 1889), 18 Atl. Rep. 443; Smith *v.* Smith, 45 Pa. St. 403; Wright *v.* Hart, 44 Pa. St. 454; Dull *v.* Amies, 2 Miles (Pa.) 144; Stout *v.* Stout, 44 Pa. St. 457; Kaul *v.* Lawrence, 73 Pa. St. 410; Tyrrill *v.* Lamb, 96 Pa. St. 464; Royse *v.* May, 93 Pa. St. 454; Frankem *v.* Trimble, 5 Pa. St. 520; Wood *v.* Anderson, 25 Pa. St. 407; Horton *v.* McCurdy, 14 Phila. (Pa.) 221; Diehl *v.* McGlue, 2 Rawle (Pa.) 337; Yohe *v.* Robertson, 2 Whart. (Pa.) 155; Coxe *v.* Tilghman, 1 Whart. (Pa.) 282; Tryon *v.* Miller, 1 Whart. (Pa.) 11; Newlin *v.* Palmer, 11 S. & R. (Pa.) 98; Farmers', etc., Bank *v.* Israel, 6 S. & R. (Pa.) 293; Sweigart *v.* Lowmarter, 14 S. & R. (Pa.) 200.

In Tilton *v.* Cofield, 93 U. S. 166, the court alludes to Tiernan *v.* Woodruff, 5 McLean (U. S.) 135, as holding that a "new and independent cause of action" could be introduced into the suit at common law. But in the case last cited Justice Wilkins expressly declared that the new count there added by amendment was "in strictness and in truth not introductive of a new substantive cause of action." See also Postmaster Gen'l *v.* Ridgway, Gilp. (U. S.) 135; Watts *v.* Weston, 62 Fed. Rep. 136.

2. Heard Civil Pleading, 71; David *v.* Preece, 5 Q. B. 440; Woodruff *v.* Dickie, 31 How. Pr. (N. Y. Supreme Ct.) 164. See also People *v.* McHatton, 7 Ill. 731, holding that an amendment to a plea should at least have some resemblance to the plea itself.

3. Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494.

Under Codes and Statutes.—The practice, even in those states where the Code provisions relating to amendments are identical, is not uniform, although the common-law rule is generally adhered to.[1]

1. Alabama.—The Code, § 2833, allows the amendment of "imperfection and defect of form."

In Mohr *v.* Lemle, 69 Ala. 180, a case where the complaint was amended before trial, Brickell, C.J., says that "the plaintiff may introduce a new cause of action by amendment," so long as "a cause of action *entirely new* [italicized by the court] is not introduced;" and an action for libel was held amendable by adding a libel differing in substance and written and published at a different time, but addressed to the same parties. See also Alabama G. S. R. Co. *v.* Smith, 81 Ala. 229; Dowling *v.* Blackman, 70 Ala. 303; Barker *v.* Anniston, etc., R. Co., 92 Ala. 314; Evans *v.* Richardson, 76 Ala. 329.

But it seems that a new cause of action, although it be not "entirely" new, cannot be introduced by amendment on the trial. Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170; Mahan *v.* Smitherman, 71 Ala. 563; *followed* with caution in Semple *v.* Glenn, 91 Ala. 245.

New Defense.—That the defendant has no right to file an entirely new plea as an amendment, see Jones *v.* Ritter, 56 Ala. 270.

Arkansas.—The statute prohibits a substantial change of the claim or defense only when the amendment is made in order to conform to the proofs. Mansfield's Dig. § 5080.

St. Louis, etc., R. Co. *v.* Dodd (Ark., 1894), 27 S.W. Rep. 227, assumes that such a change cannot be made after the case is submitted to the jury.

California.—A new and separate cause of action cannot be introduced by amendment after answer either before or on the trial. Ramirez *v.* Murray, 5 Cal. 222; Hackett *v.* California Bank, 57 Cal. 335; Deering's Ann. Codes & Stats. **§ 472.** See also Louvall *v.* Gridley, 70 Cal. 507; Jones *v.* Frost, 28 Cal. 245; Atlantic, etc., R. Co. *v.* Laird, 58 Fed. Rep. 760; Ware *v.* Walker, 70 Cal. 591; Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673; Cox *v.* McLaughlin, 76 Cal. 60. *Compare* Anderson *v.* Mayers, 50 Cal. 525; Atkinson *v.* Amador, etc., Canal Co., 53 Cal. 102.

Colorado.—Although not expressly prohibited by statute, an entirely new cause of action cannot be introduced at any stage after answer. Givens *v.* Wheeler, 5 Colo. 598; Rockwell *v.* Holcomb, 3 Colo. App. 1; Wheeler *v.* Northern Colo. I. Co., 10 Colo. 582.

Connecticut.—Before the enactment of the Practice Act of 1879, the plaintiff could not amend at any stage so as to change the "ground of the action." Peck *v.* Sill, 3 Conn. 157; Ross *v.* Bates, 2 Root (Conn.) 198; Minor *v.* Woodbridge, 2 Root (Conn.) 274; Spencer *v.* Howe, 26 Conn. 200; Church *v.* Syracuse, etc., Coal Co., 32 Conn. 372; Nash *v.* Adams, 24 Conn. 33, defining "ground of action" as used in the statute; on which point see also Donahue's Appeal, 62 Conn. 370.

The Practice Act.—Gen. Stat., 1888, § 1023, authorizes the addition of new counts which might have been originally inserted in the complaint; but this does not sanction an amendment setting up an independent cause of action in favor of another plaintiff. Miles *v.* Strong, 60 Conn. 393.

Georgia.—The Code, § 3480, provides that "no amendment adding a new and distinct cause of action * * * shall be allowed unless expressly provided by law," and this provision is enforced at every stage of the case. Roberts *v.* Germania F. Ins. Co., 71 Ga. 478; Steed *v.* McIntyre, 68 Ala. 407; Chattanooga etc., R., Co. *v.* East Rome Town Co., 89 Ga. 732; Broach *v.* Kelly, 66 Ga. 148; Fokes *v.* De Vaughn, 66 Ga. 735; Central R., etc., Co. *v.* Wood, 51 Ga. 515; Matthews *v.* Woolfolk, 51 Ga. 618; Long *v.* Bullard, 59 Ga. 355; Adkins *v.* Hutchings, 79 Ga. 260; Singer Mfg. Co. *v.* Armstrong, 91 Ga. 745; Dinkler *v.* Baer (Ga., 1893), 17 S. E. Rep. 953; Rice *v.* Caudle, 71 Ga. 605; Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659; Cox *v.* Murphy, 82 Ga. 623 [a strong case]; Cox *v.* Richmond, etc., R. Co., 87 Ga. 747; White *v.* Moss, 67 Ga. 89; Ayres *v.* Daly, 56 Ga. 119; Mitchell *v.* Georgia R. Co., 68 Ga. 644; Hall *v.* Waller, 66 Ga. 483; Ransone *v.* Christian, 56 Ga. 351; Croghan *v.* New York Underwriters' Agency, 53 Ga. 109; Williams *v.* Hollis, 19 Ga. 313; Phillips *v.* Dodge, 8 Ga. 51;

Lamar *v.* Russell, 77 Ga. 307; Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441; Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655; Pearson *v.* Reid, 10 Ga. 580; Dawty *v.* Hansell, 20 Ga. 659; Latine *v.* Clements, 3 Ga. 426; Milburn *v.* Davis (Ga., 1893), 17 S. E. Rep. 286; Parmelee *v.* Savannah, etc., R. Co., 78 Ga. 239; Barron *v.* Walker, 80 Ga. 121; Lamar *v.* Russell, 77 Ga. 307; McWilliams *v.* Anderson, 68 Ga. 772; Anderson *v.* Pollard, 62 Ga. 46.

Illinois.—The statute allows amendment at any time before final judgment, "to enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense;" and also provides that the adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action. See Fame Ins. Co. *v.* Thomas, 10 Ill. App. 545.

Indiana.—The statute provides for amendments * * * "to conform the pleadings to the facts proved when the amendment does not substantially change the claim or defense." Rev. Stat. 1881, § 396.

Before the Trial.—In Levy *v.* Chittenden, 120 Ind. 40, it was said that parties may amend their pleading to almost any extent before entering upon the trial; and in Burr *v.* Mendenhall, 49 Ind. 499, that a new cause of action or defense may be added upon good cause shown by affidavit.

In Falkner *v.* Iams, 5 Ind. 200, decided before the adoption of the Code, an amendment converting an action *ex delicto* into one *ex contractu* was denied.

On the Trial.—The right to make amendments on the trial which change the issue or make a new issue was recognized, subject to conditions and limitations therein stated, in the following cases: Wayne County Turnpike Co. *v.* Berry, 5 Ind. 286; Taylor *v.* Dodd, 5 Ind. 246; Ostrander *v.* Clark, 8 Ind. 211; Trees *v.* Eakin, 9 Ind. 554; Kerstetter *v.* Raymond, 10 Ind. 199; Kerschbaugher *v.* Slusser, 12 Ind. 453; Danville, etc., Plank-road Co. *v.* State, 16 Ind. 456; Holcraft *v.* King, 25 Ind. 352; Mason *v.* Seitz, 36 Ind. 516; De Armond *v.* Armstrong, 37 Ind. 35; Koons *v.* Price, 40 Ind. 164; Maxwell *v.* Day, 45 Ind. 509; Hackney *v.* Williams, 46 Ind. 413; Burr *v.* Mendenhall, 49 Ind. 496, where the plaintiff was permitted to add "a new cause of action," the defendant not asking for delay.

The right to make such amendments on the trial was expressly denied in Miles *v.* Vanhorn, 17 Ind. 245. Thompson *v.* Jones, 18 Ind. 476; Hoot *v.* Spade, 20 Ind. 326; Landry *v.* Durham, 21 Ind. 232; Harris *v.* Mercer, 22 Ind. 329; Shank *v.* Fleming, 9 Ind. 189.

After the Cause is Submitted.—"This court has always held that it is error to allow an amendment which changes the nature of the cause of action or defense after the trial has been concluded before the court or jury trying the same. Miles *v.* Vanhorn, 17 Ind. 245; Proctor *v.* Owens, 18 Ind. 21; Hoot *v.* Spade, 20 Ind. 326; Shropshire *v.* Kennedy, 84 Ind. 111." Levy *v.* Chittenden, 120 Ind. 40. See also Blasingame *v.* Blasingame, 24 Ind. 86; Kerstetter *v.* Raymond, 10 Ind. 199.

Iowa.—The Code authorizes various amendments at any time, etc., "or when the amendment does not change substantially the claim or defense by conforming the pleading or proceedings to the facts proved." It does not confer the privilege of adding or substituting a cause of action based on an entirely different right. Cook *v.* Chicago, etc., R. Co., 75 Iowa 171. See also Nelson *v.* Hays, 75 Iowa 671; Wade *v.* Clark, 52 Iowa 158; Sheldon *v.* Booth, 50 Iowa 209; Sweetzer *v.* Harwick, 67 Iowa 488. It would seem from the case last cited that a new defense may be allowed on the trial.

But it is the settled practice to permit the plaintiff before final submission to change an action from law to equity, or *vice versa*. Barnes *v.* Hekla F. Ins. Co., 75 Iowa 11; Esch Bros. *v.* Home Ins. Co., 78 Iowa 334; Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56; Emmet County *v.* Griffin, 73 Iowa 163.

After Judgment.—The defendant cannot amend after judgment by setting up the statute of limitations. McNider *v.* Sirrine, 84 Iowa 58.

Kansas.—The earlier provisions in the Code expressly restricted all amendments at any stage of the cause to such as did not substantially change the claim or defense. Irwin *v.* Paulett, 1 Kan. 427.

In Scott *v.* Smith, 2 Kan. 438, an amendment to the answer was rejected on this ground.

In the present Code a clause is interpolated permitting amendments

to conform pleadings to proof, and whether the old limitation is confined to such cases is uncertain. See Gen. Stat. 1889, § 4222.

The question was expressly left undecided in Kansas Pac. R. Co. *v.* Salmon, 14 Kan. 512. See Culp *v.* Steere, 47 Kan. 746; Byer *v.* Reed, 18 Kan. 86.

The court may in its discretion refuse to allow the plaintiff to set up a new cause of action, Books *v.* Kager, 23 Kan. 114; and may refuse to allow the defendant to add a new defense after the case has been partly tried. Russell *v.* Gregg, 49 Kan. 89.

Granting leave to amend by changing the cause of action or defense is not erroneous unless substantial rights of the adverse party are affected thereby. Stevens *v.* Matthewson, 45 Kan. 594, where all the costs were imposed on the defendant and a continuance granted, the court holding, however, that this conclusion is based upon the language of the statute of jeofails, § 140, Code Civ. Pro.

Kentucky.—The Code provision is substantially the same as in *New York*. See *infra* in this note. Smith *v.* Bogenschutz (Ky., 1892), 19 S. W. Rep. 667, implies that the plaintiff cannot amend by introducing a new cause of action. But in the following cases such amendments were permitted, the plaintiff being required to serve a new summons upon the defendant. Cecil *v.* Sowards, 10 Bush (Ky.) 96; Rutledge *v.* Vanmeter, 8 Bush (Ky.) 354; Joyes *v.* Hamilton, 10 Bush (Ky.) 545; Rutledge *v.* Vanmeter, 8 Bush (Ky.) 354; McGrath *v.* Balser, 6 B. Mon. (Ky.) 141. *Compare* Louisville, etc., R. Co. *v.* Case, 9 Bush (Ky.) 728.

Louisiana.—An amendment to a petition or answer which substantially changes the claim or defense will not be permitted. Guilbeau *v.* Thibodeau, 30 La. Ann. 1099; King *v.* Gantt, 33 La. Ann. 1148; Estill *v.* Holmes, 3 Rob. (La.) 134; Menefee *v.* Johnson, 2 Rob. (La.) 274; Murdock *v.* Browder, 5 Martin N. S. (La.) 677; Abat *v.* Bayon, 4 Martin N. S. (La.) 516; Vavasseur *v.* Bayon, 1 Martin (La.) 639; Melancon *v.* Robechaud, 16 La. 151; Mason *v.* Mason, 12 La. 589; McRae *v.* McRae, 11 La. 571; Babcock *v.* Shirley, 11 La. 73; Calvert *v.* Tunstall, 2 La. 207; Stilley *v.* Stilley, 20 La. Ann. 53; Morrison *v.* Keller, 10 La. Ann. 542. See, for instances where the amendment was not obnoxious to the rule, Haydel *v.* Bateman, 2 La. Ann. 755; Ledoux *v.* Buhler, 21 La. Ann. 130; Castille *v.* Dumartrait, 5 Martin N. S. (La.) 69; Hoover *v.* Richards, 1 Rob. (La.) 34.

Maine.—The statute provides for amendments of "circumstantial errors or defects." Rev. Stat. 1882, c. 82, § 10.

A new cause of action cannot be introduced. Wyman *v.* Kilgore, 47 Me. 184; Annis *v.* Gilmore, 47 Me. 152; Sawyer *v.* Goodwin, 34 Me. 419; Farmer *v.* Portland, 63 Me. 46; Bruce *v.* Soule, 69 Me. 562; Place *v.* Brann, 77 Me. 342; Lambard *v.* Fowler, 25 Me 308; Eaton *v.* Ogier, 2 Me. 46; Bishop *v.* Williamson, 11 Me. 495; Bartlett *v.* Perkins, 13 Me. 87; Skowhegan Bank *v.* Cutler, 49 Me. 315; Cooper *v.* Waldron, 50 Me. 80.

Massachusetts.—The court may at any time before final judgment permit amendments "which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought or the defendant to make a legal defense." Pub. Stat. 1882, c. 167, § 42.

In Sheldon *v.* Smith, 97 Mass 36, an amendment presenting substantially a new cause of action was rejected. But if the amendment expresses the original intention of the plaintiff, it should be allowed regardless of the fact that the declaration thereby becomes demurrable. Daley *v.* Boston, etc., R. Co., 147 Mass. 101. See Townsend Nat. Bank *v.* Jones, 151 Mass. 454; Hayward *v.* Hapgood, 4 Gray (Mass.) 437.

The alteration must be an amendment and not the institution in fact of a new suit upon a new cause of action. Smith *v.* Palmer, 6 Cush. (Mass.) 513, where the court lays down the rule by which to determine the question what shall be considered a new cause.

A plea in abatement offered after pleading to the merits and hearing and report by an auditor is not a "legal defense," and it is error to allow it to be filed at that stage. Hastings *v.* Bolton, 1 Allen (Mass.) 529.

Michigan.—The court has power to amend "either in form or substance * * * at any time before judgment." How. Stat. 1882, § 7631.

A new and different cause of action is not within the province of amend-

ment. Connecticut F. Ins. Co. *v.* Kinne, 77 Mich. 231; Hurst *v.* Detroit City R. Co., 84 Mich. 539; People *v.* Judges, 1 Dougl. (Mich.) 434; People *v.* Wayne Circuit Judge, 13 Mich. 206. Especially if the new cause be barred by limitation. People *v.* Circuit Judge, 27 Mich. 138; People *v.* Judge, 35 Mich. 227; McCreery *v.* Cobb, 93 Mich. 462. See also Wingert *v.* Carpenter (Mich., 1894), 59 N. W. Rep. 662; Weise *v.* Rich, 77 Mich. 325.

Minnesota.—The Code provisions are substantially the same as those in *New York*. See *infra* in this note. An amendment introducing a new cause of action will not be allowed after issue joined. Bruns *v.* Schreiber, 48 Minn. 366.

The refusal of the court to allow an answer setting up a counterclaim to be amended so as to make it applicable to a wholly different subject was held to be a proper exercise of discretion. Iverson *v.* Dubay, 39 Minn. 325.

Mississippi.—The court may allow amendments "at any time before verdict so as to bring the merits of the controversy between the parties fairly to trial." Rev. Code 1880, § 1581.

That an entirely new cause of action cannot be introduced, see Miller *v.* Norton Bank, 34 Miss. 412.

Missouri.—The court may at any time before final judgment amend various defects and "when the amendment does not change substantially the claim or defence by conforming the pleading or proceeding to the facts proved." R. S. § 3567.

The effect of the statute is to inhibit amendments substantially changing the claim or defense on the trial, but not before trial. Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633; Parker *v.* Rodes, 79 Mo. 88; Gibbons *v.* Steamboat, 40 Mo. 253. See, however, Lumpkin *v.* Collier, 69 Mo. 170, holding that the provision of the statute allowing amendments of course before answer does not authorize an amendment changing an action *ex delicto* into an action *ex contractu*.

If the defendant answers an amended complaint setting up a new cause of action, it is a waiver of error in allowing the amendment. Holt County *v.* Cannon, 114 Mo. 514.

The court may refuse to allow an amended answer setting up an entirely new defense to be filed on the day of trial. Lucas Market Sav. Bank *v.* Goldsoll, 8 Mo. App. 596; or at the close of plaintiff's evidence, Corby *v.* Wright, 4 Mo. App. 443.

Rev. Stat. § 3060, provides that on appeal from a justice of the peace no new cause of action "not embraced or intended to be included in the original account or statement shall be added by amendment." See Clark *v.* Smith, 39 Mo. 498. The intention of the party must be gleaned from the face of the statement. Gregory *v.* Wabash, etc., R. Co., 20 Mo. App. 448.

Nebraska.—The court may before or after judgment amend the pleadings by correcting mistakes, inserting material allegations, etc., "or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Cobbey's Consolidated Stat. 1893, § 4681.

It has not been decided whether there is any stage of the case at which the claim or defense may be changed by amendment. See Freeman *v.* Webb, 21 Neb. 169. In the following cases the amendments were held to be germane to the original complaint. Schreckengast *v.* Ealy, 16 Neb. 510; Carmichael *v.* Dolen, 25 Neb. 335; Stevens *v.* Sibbett, 31 Neb. 612; McKeighan *v.* Hopkins, 19 Neb. 33.

Nevada.—In Bullion M. Co. *v.* Crœsus M. Co., 2 Nev. 168, the plaintiff was not allowed to introduce a new cause of action before trial.

New Hampshire.—A rule of court provides that "no new count or amendment of a declaration shall be allowed without the consent of the defendant, unless it be consistent with the original declaration and for the same cause of action." In the following cases the amendments were held to be obnoxious to this rule: French *v.* Gerrish, 22 N. H. 97; Thompson *v.* Phelan 22 N. H. 339; Mt. Washington Hotel Co. *v.* Redington, 55 N. H. 386; Burnham *v.* Spooner, 10 N. H. 165; Wood *v.* Folsom, 42 N. H. 70; Goddard *v.* Perkins, 9 N. H. 488; Burt *v.* Kinne, 47 N. H. 361; Butterfield *v.* Harvell, 3 N. H. 201; Edgerly *v.* Emerson, 4 N. H. 147; Lawrence *v.* Langley, 14 N. H. 70; Pillsbury *v.* Springfield, 16 N. H. 565; Merrill *v.* Russell, 12 N. H. 74; Melvin *v.* Smith, 12 N. H. 462; State *v.* Otis, 42 N. H. 71. See also Ball *v.* Danforth, 63 N. H. 420; Hall *v.* Dodge, 38 N. H. 346.

New Jersey.—The statute authorizes amendment "at all times" to prevent a failure of justice by reason of mistakes and objections of form," and expressly requires that all such amendments shall be made as are necessary for the purpose of determining the "real question in controversy between the parties." The statute is not interpreted according to the technical rules of pleading, but the power of amendment is held to extend to the introduction of matters which the parties hoped and intended to try in the cause, which may be ascertained, not from the pleadings alone, but from the evidence and the opening of the plaintiff's counsel. Hoboken *v.* Gear, 27 N. J. L. 265, allowing an amendment after verdict, following the rule declared by the Court of Common Bench in Wilkin *v.* Reed, 15 C. B. 192, construing identical provisions in 15 & 16 Vic., c. 76, commonly called Lord Tenterden's Act. The same views were adhered to in Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229. For English cases applying the test to Lord Tenterden's Act see also: Smith *v.* Knowelden, 2 M. & G. 561, 40 E. C. L. 514; Jenkins *v.* Phillips, 9 C. & P. 766; Foster *v.* Pointer, 9 C. & P. 718; Carmarthen *v.* Lewis, 6 C. & P. 608, 25 E. C. L. 560; Hanbury *v.* Ella, 1 Ad. & El. 61, 28 E. C. L. 39; Billing *v.* Flight, 6 Taunt. 419; Leigh *v.* Baker, 2 C. B. N. S. 367; Storer *v.* Gordon, 2 Chit. Rep. 27, 18 E. C. L. 237.

New York.—The New York Code, § 723, provides for amendments in respect of parties and the correction of mistakes or the insertion of allegations "material to the case," "or where the amendment does not substantially change the claim or defense, by conforming the pleading or other proceeding to the facts proved."

Before Trial.—Amendments introducing a new cause of action or defense may be allowed at any time before trial. Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494; Marx *v.* Gross (Super. Ct.), 9 N. Y. Supp. 719; Hatch *v.* Central Nat. Bank, 78 N. Y. 487; Daguerre *v.* Orser, 3 Abb. Pr. (N. Y. C. Pl.) 86, where, however, the court in its discretion denied the application; Hurlbut *v.* Interior Conduit, etc., Co. (Super. Ct.), 28 N. Y. Supp. 1007; Clark *v.* Lichtenberg (City Ct.), 26 N. Y. St. Rep. 935; Davis *v.* New York, etc. R. Co., 110 N. Y. 646; Ford *v.* Ford, 53 Barb. (N. Y.) 525; Schreyer *v.* New York, 39 N. Y. Super. Ct. 277; Roessel *v.* Rosenberg (City Ct.), 30 N. Y. Supp. 812, where the court held that replevin may be changed to conversion before trial, but in its discretion denied leave to amend. See also Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Macqueen *v.* Babcock, 13 Abb. Pr. (N. Y. Supreme Ct.) 268; Van Ness *v.* Bush, 22 How. Pr. (N. Y. Supreme Ct.) 491; Union Nat. Bank *v.* Bassett, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 359.

Various changes in the New York Code provisions touching the subject are pointed out in Chapman *v.* Webb, 6 How. Pr. (N. Y. C. Pl.) 390; Beardsley *v.* Stover, 7 How. Pr. (N. Y. Supreme Ct.) 294.

By Amendment of Course.—When a party makes an amendment under the Code provisions allowing amendments "of course," he is at liberty to introduce a substantially new claim or defense. Robertson *v.* Bennett, 52 How. Pr. (N. Y. Super. Ct.) 287, 1 Abb. N. Cas. (N. Y.) 476; Wyman *v.* Remond, 18 How. Pr. (N. Y. Supreme Ct.) 272; Mason *v.* Whitely, 4 Duer (N. Y.) 611; Jackson *v.* Peer, 4 Cow. (N. Y.) 418; McQueen *v.* Babcock, 3 Keyes (N. Y.) 428; Mussinan *v.* Hatton (Super. Ct.), 28 N. Y. Supp. 1006, the two cases last cited holding that all the new causes set up by amendment must be of the same class and of a class to which the summons is appropriate. On the latter point see also Hopf *v.* U. S. Baking Co. (Buffalo Super. Ct.), 21 N. Y. Supp. 589; Gray *v.* Brown, 15 How. Pr. (N. Y. Supreme Ct.) 555; Bockes *v.* Lansing, 74 N. Y. 437. *Contra*, Field *v.* Morse, 8 How. Pr. (N. Y. Supreme Ct.) 47; Kissam *v.* Morris, 2 Wend. (N. Y.) 259.

Effect of Stipulation.—A stipulation of counsel providing for the filing of an "answer and supplemental complaint" does not authorize the insertion of an entirely new cause of action. Deyo *v.* Morss (Supreme Ct.), 26 N. Y. Supp. 305.

After Remand for New Trial.—Upon a new trial the court has the same power as if the action had never been tried. Troy, etc., R. Co. *v.* Tibbits, 11 How. Pr. (N. Y. Supreme Ct.) 168; Hopf *v.* U. S. Baking Co. (Buffalo Super. Ct.), 21 N. Y. Supp. 589. *Compare* Price *v.* Brown, 112 N. Y. 677, 21 N. Y. St. Rep. 573.

On the Trial.—A new cause of action or defense cannot be introduced by amendment on the trial. Gaslight Co. *v.* Rome, etc., R. Co., 51 Hun (N. Y.) 119; Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454; Dexter *v.* Ivins, 133 N. Y. 551; Fisher *v.* Rankin, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 191; Woodruff *v.* Dickie, 5 Robt. (N. Y.) 619; Van Syckels *v.* Perry, 3 Robt. (N. Y.) 621; Peters *v.* Chamberlain (Supreme Ct.), 36 N. Y. St. Rep. 1000; Freeman *v.* Grant (Supreme Ct.), 30 N. Y. St. Rep. 143; Bowen *v.* Sweeney, 63 Hun (N. Y.) 224; Baldwin *v.* Rood, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 56; Law *v.* Pemberton (City Ct.), 29 N. Y. Supp. 605; Balch *v.* Wurzburner (C. Pl.), 29 N. Y. Supp. 62; Cushman *v.* Jewell, 7 Hun (N. Y.) 525; Dows *v.* Morrison (C. Pl.), 20 N. Y. Supp. 860, a case before a justice of the peace; Hong Kong, etc., Banking Corp. *v.* Emanuel, 63 Hun (N. Y.) 629; 17 N. Y. Supp. 790; Mea *v.* Pierce, 63 Hun (N. Y.) 400; Foley *v.* Schiedematl, 63 Hun (N. Y.) 628; Halsey *v.* Trademen's Nat. Bank, 56 N. Y. Super Ct. 7; Storrs *v.* Flint, 46 N. Y. Super. Ct. 498; Van Cott *v.* Prentice, 104 N. Y. 45, *affirming* 35 Hun (N. Y.) 317; Graves *v.* Cameron, 58 How. Pr. (N. Y. C. Pl.) 75; Ransom *v.* Wetmore, 39 Barb. (N. Y.) 104; Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 428. See also Hempstead *v.* New York Cent. R. Co., 28 Barb. (N. Y.) 485; Zboynski *v.* Brooklyn City R. Co. (City Ct.), 30 N. Y. Supp. 540; Owen *v.* King (Supreme Ct.), 6 N. Y. St. Rep. 869; McLaughlin *v.* Webster, 141 N. Y. 76; Whittemore *v.* Judd L. & S. O. Co. (C. Pl.), 10 N. Y. Supp. 737; Hill *v.* London Assur. Corp. (City Ct.), 12 N. Y. Supp. 86; Shaw *v.* Bryant, 65 Hun (N. Y.) 57; Bowen *v.* Sweeney (Supreme Ct.), 17 N. Y. Supp. 752; New York Marbled Iron Works *v.* Smith, 4 Duer (N. Y.) 362; Johnson *v.* Oppenheim, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 449, where it appears that the statute of frauds set up on the trial would be a new defense; Hendricks *v.* Decker, 35 Barb. (N. Y.) 298; Drake *v.* Siebold (Supreme Ct.), 30 N. Y. Supp. 597; Drew *v.* Keufer (Supreme Ct.), 30 N. Y. Supp. 733.

What Stage Is Deemed "Before Trial." — Where an application to amend is made on the trial and the trial is suspended and the case put over the term to enable the plaintiff to apply at special term for leave to amend, an amendment then allowed, changing the cause of action, is considered as made before trial. Shannon *v.* Pickell (Supreme Ct.), 2 N. Y. St. Rep. 160.

Exercise of Discretion.—An amendment should not be denied merely because the identity of the new and old claims is not clear beyond doubt. Campbell *v.* Campbell, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 187.

On Trial by Referee.—A referee on a trial before him cannot allow an amendment constituting a new cause of action or defense. National Steamship Co. *v.* Sheahan, 122 N. Y. 461; Niagara County Nat. Bank *v.* Lord, 33 Hun (N. Y.) 557; Shaw *v.* Bryant (Supreme Ct.), 19 N. Y. Supp. 618; Robeson *v.* Central R. (Supreme Ct.), 28 N. Y. Supp. 104; Zoller *v.* Kellogg, 66 Hun (N. Y.) 194; Livermore *v.* Bainbridge, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 232; Case *v.* Phœnix Bridge Co., 19 Civ. Pro. Rep. (N. Y. Super. Ct.) 373. See *supra*, III, 2, *d*, *e*.

To Conform to Proof.—A substantially new claim or defense cannot be introduced after judgment to conform pleadings to proof. Egert *v.* Wicker, 10 How. Pr. (N. Y. Supreme Ct.) 193; Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420. Nor, perhaps, after the court has announced his intention to dismiss the complaint. Freeman *v.* Grant, 132 N. Y. 22.

As to the allowance of such amendment after vacating a judgment, see Hatch *v.* Central Nat. Bank, 78 N. Y. 487.

North Carolina.—The Code of Civil Procedure authorizing amendments before and after judgment concludes as follows: "or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Code of C. P., § 132.

The court has no authority to allow amendments as to parties or as to the cause of action which will make a new or substantially a new action, unless by consent of the parties. Clendenin *v.* Turner, 96 N. Car. 416. And it seems that permission to make such an amendment will be denied before trial as well as upon the trial. Powell *v.* Allen, 103 N. Car. 46; Robbins *v.* Harris, 96 N. Car. 557; Ely v. Early, 94 N. Car. 1; Merrill *v.* Mer-

rill, 92 N. Car. 657. See also Glover *v.* Flowers, 101 N. Car. 134; Gill *v.* Young, 88 N. Car. 58; McNair *v.* Buncombe County, 93 N. Car. 364. *Compare* Robinson *v.* Willoughby, 67 N. Car. 84.

Ohio.—The statute of amendments [Rev. Stat., § 5114] is the same as that in *North Carolina*, quoted above. The form of the remedy may be changed, but not the identity of the transaction constituting the cause of complaint. Spice *v.* Steinruck, 14 Ohio St. 213. See also Evens *v.* Hall, 1 Handy (Ohio) 434; Ansonia Rubber Co. *v.* Wolf, 1 Handy (Ohio) 236; Delaware County *v.* Andrews, 18 Ohio St. 49; Whittaker's Annotated Code, p. 146, n.

Oregon.—Hill's Code, § 101, provides for amendments at any time before the trial where there is no substantial change in the cause of action or defense. The power is liberally exercised. Garrison *v.* Goodale, 23 Oregon 307; Baldock *v.* Atwood, 21 Oregon 79.

Pennsylvania.—A new cause of action cannot be introduced. In addition to the cases cited in the last note but one see Tatham *v.* Raney, 82 Pa. St. 130; Good Intent Co. *v.* Hartzell, 22 Pa. St. 277; Winder *v.* Northampton Bank, 2 Pa. St. 446; Wager *v.* Chew, 15 Pa. St. 323; Reitzel *v.* Franklin, 5 W. & S. (Pa.) 33.

Rhode Island.—Pub. Stat., 1882, c. 210, § 5, provides that amendments may be made at any time to cure "defects and want of form."

The court cannot allow the substitution of a new cause of action. Wilcox *v.* Sherman, 2 R. I. 540; Thayer *v.* Farrell, 11 R. I. 305.

South Carolina.—The Code, § 194, provides for certain amendments before or after judgment "or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

No amendment proposed during or after the trial of a case can be permitted if it introduces a new cause of action; but this limitation to the power of the court does not apply to motions made anterior to the trial, after as well as before the issues are made. Hall *v.* Woodward, 30 S. Car. 575, where an answer substantially changing the defense was allowed before trial; Chamberlain *v.* Mensing, 51 Fed. Rep. 511; Edwards *v.* Cheraw, etc., R. Co., 32 S. Car. 117; Lilly *v.* Charlotte, etc., R. Co., 32 S. Car. 142; Trumbo *v.* Finley, 18 S. Car. 305; All *v.* Barnwell County, 29 S. Car. 161; Dunsford *v.* Brown, 19 S. Car. 567. See also Sullivan *v.* Sullivan, 24 S. Car. 474; Whaley *v.* Stevens, 26 S. Car. 221; Skinner *v.* Hodge, 24 S. Car. 165; McConnell *v.* Kennedy, 29 S. Car. 180; Wilbanks *v.* Willis, 2 Rich. (S. Car.) 108; Mason *v.* Johnson, 13 S. Car. 21; Cleveland *v.* Cohrs, 13 S. Car. 397; Nesbitt *v.* Cavender, 27 S. Car. 1; Coleman *v.* Heller, 13 S. Car. 491.

Where the original complaint does not set up a cause of action the plaintiff cannot be permitted by any amendment whatever to set up a cause of action. Bleckeley *v.* Branyan, 28 S. Car. 449; Lilly *v.* Charlotte, etc., R. Co., 32 S. Car. 142.

Tennessee.—The Code of 1884 permits "material amendments at any stage of the proceedings."

The practice has been to allow amendments at any stage of the case to attain the ends of justice; but the plaintiff cannot introduce a new cause of action so as to prevent the operation of the statute of limitations. Trousdale *v.* Thomas, 3 Lea (Tenn.) 715.

Texas.—"The pleadings may be amended under leave of the court * * * before the parties announce themselves ready for trial and not thereafter." It is the established practice in Texas to permit the plaintiff to amend within the time prescribed by abandoning the old and setting up a new cause of action. McDannell *v.* Cherry, 64 Tex. 177; Ballard *v.* Carmichael, 83 Tex. 355; Wood County *v.* Cate, 75 Tex. 215; Reagan *v.* Evans, 2 Tex. Civ. App. 35; Hunter *v.* Morse, 49 Tex. 219; Hopkins *v.* Wright, 17 Tex. 30; Irvine *v.* Corp. of Bastrop, 32 Tex. 485; Dailey *v.* Wynn, 33 Tex. 614; Wilbusch *v.* Taylor, 64 Tex. 53; Woods *v.* Huffman, 64 Tex. 98; Ross *v.* Kornrumpf, 64 Tex. 390; Williams *v.* Randon, 10 Tex. 74; Whitehead *v.* Herron, 15 Tex. 127; Smith *v.* McGaughey, 13 Tex. 404, where the plaintiff was allowed to join a new cause of action which accrued after the commencement of the suit—on which point see also Galveston, etc., R. Co. *v.* Borsky, 2 Tex. Civ. App. 545. But it will not be allowed when great confusion in

the proceedings will result. Halcomb *v.* Kelly, 57 Tex. 618. See also Thomas *v.* Browder, 33 Tex. 783, Walker *v.* Howard, 34 Tex. 508. And it seems not to have been allowed in the earlier cases. Carter *v.* Reynolds, 6 Tex. 561; Beal *v.* Alexander, 6 Tex. 531.

Service on Absent Parties.—All parties interested and not already before the court must be served in order to be bound by the judgment on the new pleading. Wortham *v.* Boyd, 66 Tex. 401; Morrison *v.* Walker, 22 Tex. 18; Furlow *v.* Miller, 30 Tex. 28; Stewart *v.* Anderson, 70 Tex. 588, and Pendleton *v.* Colville, 49 Tex. 525, where the original service was made by publication. If the defendants are in court by answer, no new service of process upon them is required; but in other respects the action proceeds as a new suit. Ballard *v.* Carmichael, 83 Tex. 355; De Walt *v.* Snow, 25 Tex. 320.

Terms of Allowance.—The plaintiff must pay all costs which have accrued up to the time of the amendments. Ballard *v.* Carmichael, 83 Tex. 355; Hopkins *v.* Wright, 17 Tex. 30; Whitehead *v.* Herron, 15 Tex. 127; Williams *v.* Randon, 10 Tex. 74; Thomas *v.* Browder, 33 Tex. 783. But in such a case, where the costs have been taxed, and the defendant neither excepted to the amended petition nor asked for costs as a condition, he cannot complain for the first time on appeal that upon judgment against him he was taxed with the entire costs. Woods *v.* Durrett, 28 Tex. 429.

Open to New Defenses.—All defenses, including the statute of limitations, which have accrued at the date of the amendment, are available against the plaintiff. Wortham *v.* Boyd, 66 Tex. 401; American Salt Co. *v.* Heidenheimer, 80 Tex. 344; Speake *v.* Prewitt, 6 Tex. 252; Bell *v.* McDonald, 9 Tex. 378; Hopkins *v.* Wright, 17 Tex. 30; Whitehead *v.* Herron, 15 Tex. 127; Ayres *v.* Cayce, 10 Tex. 99; Williams *v.* Randon, 10 Tex. 74; Texas *v.* Burnett, 27 Tex. 32.

Utah.—The Code of Civ. Pro. § 344, specifies certain amendments that may be made at any time in furtherance of justice, and provides that "the court may likewise in its discretion, after notice to the adverse party, allow * * * an amendment to any pleading or proceeding in other particulars." The defendant will not be allowed to amend his cross-complaint upon the trial so as to make an important and vital change in the issues without showing proper diligence and reasonable grounds. Kelly *v.* Kershaw, 5 Utah 295.

The case of Rhemke *v.* Clinton, 2 Utah 230, implies that a radical change in plaintiff's cause of action will not be allowed even before trial.

Vermont.—Rev. Laws, 1880, § 907, provides that "the court may at any time permit either of the parties to amend a defect in the process or pleading upon such conditions as the court prescribes."

The cause of action cannot be changed by amendment at any stage of the proceedings. Carpenter *v.* Gookin, 2 Vt. 495; Dana *v.* McClure, 39 Vt. 197; Sumner *v.* Brown, 34 Vt. 194; McDermid *v.* Tinkham, 53 Vt. 615; Brodek *v.* Hirshfield, 57 Vt. 12.

A justice of the peace has no power to permit such an amendment. Emerson *v.* Wilson, 11 Vt. 357.

A new declaration filed under a rule of court is subject to the same restriction in this behalf as if it were filed by leave of court. Dewey *v.* Nicholas, 44 Vt. 24.

Wisconsin.—The court may upon the trial, or at any other stage before or after judgment, amend by correcting mistakes, inserting material alterations, etc., "or where the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Rev. Stat., § 2830.

Where the object of the proposed amendment is to entirely change the cause of action, it cannot be allowed either before trial or at the trial. Stevens *v.* Brooks, 23 Wis. 196, emphasizing the rule; Carmichael *v.* Argard, 52 Wis. 607; Stowell *v.* Eldred, 39 Wis. 614; Sweet *v.* Mitchell, 15 Wis. 641; Geary *v.* Bennett, 65 Wis. 554; Johnson *v.* Filkington, 39 Wis. 62; Hollehan *v.* Roughan, 62 Wis. 64; Kewaunee County *v.* Decker, 34 Wis. 378; Shinners *v.* Brill, 38 Wis. 648; Newton *v.* Allis, 12 Wis. 378.

Changing Defense on the Trial.—The defendant will not be allowed to set up on the trial an entirely new substantive defense. Shernecker *v.* Thein, 11 Wis. 556, where the application was made after the jury were impaneled, but before any evidence had been in-

b. GENERAL TESTS.—It has been declared to be a fair test in determining whether a new cause of action is alleged in an amendment to inquire if a recovery had upon the original complaint would be a bar to any recovery under the amended complaint,[1] or if the same evidence would support both,[2] or if the same measure of damages is applicable,[3] or if both are subject to the same

troduced. But see Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669; Brown *v.* Bosworth, 62 Wis. 542.

West Virginia.—The Code of 1887 provides that "the plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant or after such appearance, if substantial justice will be promoted thereby."

No amendment will be allowed which introduces a new and substantive cause of action different from that declared upon, and different from that which the party originally intended to declare upon. Snyder *v.* Harper, 24 W. Va. 206. See also Kuhn *v.* Brownfield, 34 W. Va. 252.

1. Davis *v.* New York, etc., R. Co., 110 N. Y. 636, 14 N. Y. St. Rep. 1, allowing an amendment to the complaint, as a recovery under the latter would bar the matter in the amendment.

Amendments were subjected to this test and allowed in Lustig *v.* New York, etc., R. Co., 65 Hun (N. Y.) 547, 20 N. Y. Supp. 477; Coby *v.* Ibert (City Ct.), 25 N. Y. Supp. 998; Rhemke *v.* Clinton, 2 Utah 230. They were denied in Hurst *v.* Detroit City R. Co., 84 Mich. 539; Deyo *v.* Morss (Supreme Ct.), 26 N. Y. Supp. 305, 56 N. Y. St. Rep. 364.

2. If the same evidence would support both, the amendment does not introduce a new cause of action. The result of this test controlled or influenced in some degree the following cases:

Missouri.—Lottman *v.* Barnett, 62 Mo. 159; Scovil *v.* Glasner, 79 Mo. 449; Lumpkin *v.* Collier, 69 Mo. 170; Hansberger *v.* Pacific R. Co., 43 Mo. 196; Minter *v.* Hannibal, etc., R. Co., 82 Mo. 128; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; Kitchen *v.* Missouri Pac. R. Co., 82 Mo. 686; Holliday *v.* Jackson, 21 Mo. App. 660.

Michigan.—Stubly *v.* Beachboard, 68 Mich. 401; Hurst *v.* Detroit City R. Co., 84 Mich. 539; Connecticut F. Ins. Co. *v.* Kinne, 77 Mich. 231.

Georgia.—Cox *v.* Murphy, 82 Ga. 623; Pearson *v.* Reid, 10 Ga. 580.

New Hampshire.—Melvin *v.* Smith, 12 N. H. 462; Burnham *v.* Plant, 57 N. H. 41; Pillsbury *v.* Springfield, 16 N. H. 565.

Other States.—Montgomery *v.* Harrington, 58 Cal. 274; Rhemke *v.* Clinton, 2 Utah 230; Anniston, etc., R. Co. *v.* Ledbetter, 92 Ala. 326; Brodek *v.* Hirschfield, 57 Vt. 12; Collyer *v.* Collyer, 50 Hun (N. Y.) 422; Liggett *v.* Ladd, 23 Oregon 81; Texas *v.* Burnett, 27 Tex. 32; Willis *v.* DeWitt (S. Dak., 1892), 52 N. W. Rep. 1090; Wilbanks *v.* Willis, 2 Rich. (S. Car.) 108; Wilson *v.* Jamieson, 7 Pa. St. 126; Barker *v.* Burgess, 3 Met. (Mass.) 273; Leekins *v.* Nordyke & M. Co., 66 Iowa 471; Hammond *v.* Sioux City, etc., R. Co., 49 Iowa 450; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471; Steers *v.* Shaw, 53 N. J. L. 358. See also Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655; Fokes *v.* De Vaughn, 66 Ga. 735; Levy *v.* Chittenden, 120 Ind. 41; Rockwell *v.* Holcomb, 3 Colo. App. 1; Meeks *v.* Southern Pac. R. Co., 61 Cal. 149; Clews *v.* Traer, 57 Iowa 459. *Compare* Cotter *v.* Parks, 80 Tex. 539.

Changing Evidence of Negligence.—An action for common-law negligence in killing stock cannot be amended into an action on a statute which makes the negligence a presumption of law. Hansberger *v.* Pacific R. Co., 43 Mo. 196.

Dispensing with Proof of Scienter.—An original declaration claiming to recover for injuries by an animal known to be vicious cannot be amended so as to allege the negligent keeping as a ground of recovery. Cox *v.* Murphy, 82 Ga. 623. But see Connell *v.* Putnam, 58 N. H. 335.

3. If it is not applicable, the amendment is a new cause of action. Scovil *v.* Glasner, 79 Mo. 449; Holliday *v.* Jackson, 21 Mo. App. 660; Liggett *v.* Ladd, 23 Oregon 81; Hurst *v.* Detroit City R. Co., 84 Mich. 539; French *v.* Gerrish, 22 N. H. 97; Skowhegan Bank *v.* Cutler, 49 Me. 315. But this

plea,[1] and in some cases the intention of the plaintiff when he instituted the suit may have a distinct potency in deciding whether an amendment constitutes an unwarranted departure.[2]

Federal Follows State Practice.—The rulings in a state court of last resort as to what constitutes a new cause of action will be followed by the federal courts sitting in that state.[3]

c. WHAT AMENDMENTS ARE ALLOWED—(1) *Amplified Statements.*—Amendments which only amplify the statements or prayer in the original complaint are not deemed to introduce a new cause of action.[4]

is not always a decisive test. Boyd *v.* Bartlett, 36 Vt. 9.

1. Ball *v.* Claflin, 5 Pick. (Mass.) 303; Goddard *v.* Perkins, 9 N. H. 488. See also Van de Haar *v.* Van Domseler, 56 Iowa 671. But the test is not infallible. Downer *v.* Shaw, 23 N. H. 125, holding that in debt on a judgment recovered in a foreign state on a promissory note the declaration might be amended by adding a count on the note.

In Richardson *v.* Fenner, 10 La. Ann. 599, it was said that one of the tests is whether the amendment could have been cumulated with the original pleading.

2. Hoboken *v.* Gear, 27 N. J. L. 265; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229. See also Nash *v.* Adams, 24 Conn. 33; Donahue's Appeal, 62 Conn. 370; Brackett *v.* Crooks, 24 N. H. 173, where an amendment was allowed upon plaintiff's affidavit affirming his original intention; Sumner *v.* Brown, 34 Vt. 194; Baxter *v.* Shaw, 28 Vt. 569. *Compare* Lycoming F. Ins. Co. *v.* Billings, 61 Vt 312.

In Wilhelm's Appeal, 79 Pa. St. 120, it was said: "The true criterion is, as all the authorities show, did the plaintiff so state his cause of action originally as to show that he had a legal right to recover what he subsequently claims? And it makes no difference whether the new matter in the amendment was or was not known or thought of when the declaration was originally filed." To the same point Haley *v.* Hobson, 68 Me. 167.

3. West *v.* Smith, 101 U. S. 263. See *supra*, III, 1, *c*.

4. *Georgia.*—Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485; Cox *v.* Murphy, 82 Ga. 623; Tumlin *v.* Bass Furniture Co. (Ga., 1894) 12 S. E. Rep. 44; Augusta R. Co. *v.* Andrews (Ga., 1893). 19 S. E. Rep. 713; Cooper *v.* Lockett, 65 Ga. 702; Hayden *v.* Burney, 89 Ga. 715; Colley *v.* Gate City Coffin Co. (Ga., 1893), 18 S. E. Rep. 817; Bright *v.* Central City St. R. Co., 88 Ga. 535.

Pennsylvania.—Hunter *v.* Land, 81* Pa. St. 296; Schnable *v.* Koehler, 28 Pa. St. 181.

Texas.—Gulf, etc., R. Co. *v.* McGowan, 73 Tex. 335; Rowland *v.* Murphy, 66 Tex. 534; Lewis *v.* Dennis, 54 Tex. 487; Hanrick *v.* Hanrick, 63 Tex. 618; Perkins *v.* Wood, 63 Tex. 396; I. & G. R. Co. *v.* Irvine, 64 Tex. 529; Thompson *v.* Swearengin, 48 Tex. 555; Becker *v.* Gulf City St. R., etc., Co. (Tex., 1891), 15 S. W. Rep. 1094 Texas Elevator, etc., Co. *v.* Mitchell 78 Tex. 64; Foster *v.* Smith, 66 Tex 680; Chapman *v.* Sneed, 17 Tex. 428 Haynes *v.* Rice, 33 Tex. 167; Scoby *v* Sweatt, 28 Tex. 713; Gulf, etc., R. Co *v.* Wilbanks (Tex. Civ. App., 1894) 27 S. W. Rep. 302.

Alabama.—Phillips *v.* Smith, 62 Ala 575; Pearsall *v.* McCartney, 28 Ala 110.

Iowa.—Hintrager *v.* Richter, 85 Iowa 222; Marsh *v.* Chicago, etc., R. Co., 79 Iowa 332.

Colorado.—California Ins. Co. *v.* Gracey, 15 Colo. 70.

Connecticut.—Peck *v.* Bacon, 18 Conn. 377; Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372.

New York.—Davis *v.* New York, etc., R. Co., 110 N. Y. 646, 14 N. Y. St. Rep. 1; Wilcox *v.* Payne (Supreme Ct.), 28 N.Y. St. Rep. 712; McLaughlin *v.* Webster, 141 N. Y. 76; Nichols *v.* Scranton Steel Co., 137 N. Y. 480; Becker *v.* New York, etc., R. Co. (Supreme Ct.), 31 N. Y. St. Rep. 750.

California.—Redington *v.* Cornwell, 90 Cal. 49.

Missouri.—Smith *v.* Missouri Pac. R. Co. (District of Missouri), 56 Fed. Rep. 458.

Answers are properly amendable in the same manner.[1]

(2) *Correcting Misdescriptions.*—Amendments which change the alleged date of a contract,[2] or the sum to be paid,[3] or correct a misdescription of the contract in other respects,[4] or change any

Louisiana.—Pickett *v.* Haynes, 28 La. Ann. 844.

Michigan.—Abbott *v.* Chambers, 55 Mich. 410; Canal St. Gravel Road Co. *v.* Paas, 95 Mich. 372.

Minnesota.—Bruns *v.* Schrieber, 48 Minn. 366.

Ohio.—Jaynes *v.* Platt, 47 Ohio St. 262; Baltimore, etc., R. Co. *v.* Gibson, 41 Ohio St. 145.

South Carolina.—Miller *v.* Stark, 29 S. Car. 325; Tarrant *v.* Gittelson, 16 S. Car. 231; Chamberlain *v.* Mencing (District of S. Car.), 51 Fed. Rep. 511.

Indiana.—Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Levy *v.* Chittenden, 120 Ind. 37.

North Carolina.—King *v.* Dudley, 113 N. Car. 167.

Massachusetts.—Brown *v.* Tobias, 1 Allen (Mass.) 385; Townsend Nat. Bank *v.* Jones, 151 Mass. 454; Morton *v.* Fairbanks, 11 Pick. (Mass.) 368; Mixer *v.* Howarth, 21 Pick. (Mass.) 205; Lobdell *v.* Baker, 3 Met. (Mass.) 469.

Maine.—Chase *v.* Kenniston, 76 Me. 209; McGee *v.* McCann, 69 Me. 79; Howard *v.* Kimball, 65 Me. 308; Holmes *v.* Gerry, 55 Me. 299.

New Hampshire.—Moses *v.* Boston, etc., R. Co., 32 N. H. 534.

New averments as to the manner, time, and place of the same transaction are not a new cause. Nash *v.* Adams, 24 Conn. 33.

In an action for injury by wilful shooting, new allegations which relate only to the mode of inflicting the injury are allowable. Carmichael *v.* Dolen, 25 Neb. 335.

In a breach of promise case, where the promise was alleged to have been made at a certain date, to which defendant pleaded infancy, it was proper to allow an amendment stating other promises and ratification of the first after defendant became of age. Schreckengast *v.* Ealy, 16 Neb. 510.

A writ of *scire facias* alleging only the rendition of the judgment, and that execution yet remains to be done, may properly be amended by adding averments showing that the apparent satisfaction of an execution already issued was by a levy upon and sale of property subsequently claimed and held by a third person. Baxter *v.* Shaw, 28 Vt. 569.

A plaintiff suing on a note payable to a third person or bearer may amend by inserting an averment of the character of his title to the note. Bowman *v.* Stowell, 21 Vt. 309.

A complaint in an action for death by wrongful act in another state, which does not allege any statute in that state, may be amended on the trial by setting forth the statute. Lustig *v.* New York, etc., R. Co., 65 Hun (N. Y.) 547, 20 N. Y. Supp. 477. *Contra*, Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659, expressly decided upon the ground that there was nothing to amend by, and conceding that the amendment would have been proper if the statute had been originally pleaded, but in a defective manner.

A declaration in trover may be amended by counting on additional property taken at the same time. Haskins *v.* Ferris, 23 Vt. 673.

Narrowing the Complaint by amendment is also proper. Wilson *v.* Johnson, 1 Greene (Iowa) 147.

1. Cawthorn *v.* Kimbell (La., 1894), 15 So. Rep. 101; Bernheim *v.* Daggett, 12 Abb. N. Cas. (N. Y. City Ct.) 316.

2. Wilson *v.* Phillips, 8 Kan. 211; Bussey *v.* Rothschild, 27 La Ann. 316; Warren *v.* Ocean Ins. Co., 16 Me. 439; Bailey *v.* Musgrave, 2 S. & R. (Pa.) 219; Marshall First Nat. Bank *v.* Hosmer, 48 Mich. 200, correcting the date of a judgment; Niemarck *v.* Schwartz, 51 Mich. 467; Stevenson *v.* Mudgett, 10 N. H. 338. See also Ripley *v.* Hebron, 60 Me. 379.

3. Tribby *v.* Wokee, 74 Tex. 142; Cooper *v.* Bailey, 52 Me. 230.

4. Wilson *v.* Jamieson, 7 Pa. St. 126; Kirkner *v.* Com., 6 W. & S. (Pa.) 557; Wilson *v.* Jamieson, 7 Pa. St. 126; Walling *v.* Williams, 4 Tex. 427; Davis *v.* Saunders, 7 Mass. 62; Stevens *v.* Hewitt, 30 Vt. 263; Lycoming F. Ins. Co. *v.* Billings, 61 Vt. 310; Sublett *v.* Hodges, 88 Ala. 491; Ricketts *v.* Weeden, 64 Ala. 548; Stringer *v.* Waters, 63 Ala. 361; Steed *v.* McIntyre, 68 Ala. 407; Zeigler *v.* David, 23 Ala. 127; Wright *v.* Basye, 6 Blackf.

particular of the matter to be performed, or the time or manner of performance, so long as the identity of the matter upon which the action is founded is preserved, are not obnoxious to the rule.[1]

(Ind.) 419; Cooper *v.* Bailey, 52 Me. 230; Cummings *v.* Buckfield Branch Railroad, 35 Me. 478; Starbird *v.* Henderson, 64 Me. 570; Cotton *v.* Stanwood, 67 Me. 25; Hill *v.* Turner, 18 Me. 413; Hapgood *v.* Watson, 65 Me. 510; Dodge *v.* Haskell, 69 Me. 429; Biddeford First Nat. Bank *v.* McKenney, 67 Me. 272; Ross *v.* Jordan, 62 Ga. 298; Newman *v.* Jefferson City, etc., R. Co., 19 Mo. App. 100; Dougan *v.* Turner, 51 Minn. 330.

Misdescription of Instrument.—In an action of covenant broken, omission to allege in the declaration that the instrument declared upon was under seal is amendable. Wing *v.* Chase, 35 Me. 260.

In Reed *v.* Scott, 30 Ala. 640, and in Moore *v.* Christian, 31 S. Car. 337, the complaint described the instrument sued on as a promissory note, and an amendment describing it as a bond or instrument under seal was allowed.

Averments that defendant "obligated and agreed to pay," etc., may be amended by inserting the words "in writing" and by annexing a copy of the writing referred to. Verdery *v.* Barrett, 89 Ga. 349.

In an action of covenant brought by E. B., the plaintiff was allowed to file a new *narr.* setting forth an agreement under seal in the name of J. Y., agent of E. B. Druckenmiller *v.* Young, 27 Pa. St. 97.

Changing Alleged Date.—In a foreclosure suit, the plaintiff was permitted to amend by changing the alleged date of the maturity of the note. Jones *v.* Henderson, 49 Ga. 170.

To Obviate a Variance.—The declaration is amendable so as to make the instrument declared on conform to the one offered in evidence even after defendant prayed oyer and demurred for variance. Colton *v.* Stanwood, 67 Me. 25.

Indorsements on Note.—Indorsements on the note in suit, if not correctly set up, may be rectified by amendment. Hamilton *v.* Powers, 80 Mich. 313. And a note alleged to have been indorsed to plaintiff may be declared by an amendment to have been made payable to the plaintiff. Elliot *v.* Abbot, 12 N. H. 549.

Place of Contract.—The state where the contract was alleged to have been made may be changed by amendment. Trego *v.* Lewis, 58 Pa. St. 463.

Description of Judgment.—In debt on judgment, a misdescription of the judgment may be corrected by amendment. Stevens *v.* Hewitt, 30 Vt. 263. But in Pillsbury *v.* Springfield, 16 N. H. 565, the misdescription of the judgment was so radical as to be incurable.

Express and Implied Contract.—In an action against a physician for malpractice, alleging breach of an express contract, an amendment may be made setting forth the breach of an implied contract. Kuhn *v.* Brownfield, 34 W. Va. 252.

1. Stevenson *v.* Mudgett, 10 N. H. 338; Gilman *v.* Cate, 56 N. H. 166; Perot *v.* Leeds, 13 Phila. (Pa.) 185; Cunningham *v.* Day, 2 S. & R. (Pa.) 1; Coxe *v.* Tilghman, 1 Whart. (Pa.) 282; Smith *v.* Smith, 5 Pa. St. 254; Cotter *v.* Parks, 80 Tex. 539; Dowling *v.* Blackman, 70 Ala. 303; Freeman *v.* Fogg, 82 Me. 408; Spencer *v.* Conrad, 9 Rob. (La.) 78.

Particulars of Contract.—In an action on the case for fraud in making shingles, the original declaration alleged a contract on the part of the defendant to make a certain quantity for the plaintiff, and an amendment was allowed, alleging that by the contract the plaintiff was to furnish the defendant with suitable materials for making the shingles. Morton *v.* Fairbanks, 11 Pick. (Mass.) 368.

In Mixer *v.* Howarth, 21 Pick. (Mass.) 205, the original counts were for work and labor done and materials found, and in his specification the plaintiff claimed the price of a carriage sold and delivered. He was allowed to amend by filing a count upon an agreement by the defendant to take and pay for a carriage to be built by his order.

An Action for Money Deposited does not substantially differ from an amendment claiming to recover the value of a check or bill of exchange sold and delivered, where the transaction was susceptible of either construction. Henderson *v* Morris, 5 Oregon 24.

Adding Special Count.—A declaration

Amendments are also allowed to correct an erroneous description of the property which is the subject of the suit, or to which the suit relates.[1]

(3) *Making Allegations More Formal or Precise.*—The allegations of the complaint may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case,[2] or for the purpose of making the original

on a count annexed for the price of goods sold and delivered, with a count for goods bargained and sold, may be amended by adding a special count for not accepting and paying for the same goods. Bailey *v.* Smith, 43 N. H. 409.

It is quite customary to amend declarations by adding counts upon promises to pay the plaintiff as acting in an official or fiduciary capacity. Smith *v.* Proctor, 1 Sandf. (N. Y.) 72; Flower *v.* Garr, 20 Wend. (N. Y.) 668; Megargell *v.* Hazleton Coal Co., 8 W. & S. (Pa.) 342; Stearns *v.* Wright, 50 N. H. 293.

Changing Defendant's Capacity.—In an action of trover charging defendant "as trustee," etc., the plaintiff may amend by striking out the words "as trustee." Maxwell *v.* Harrison, 8 Ga. 61.

1. Rowland *v.* Murphy, 66 Tex. 534; Lewis *v.* Dennis, 54 Tex. 487; Jones *v.* Burgett, 46 Tex. 285; Heilbron *v.* Heinlen, 72 Cal. 376; Leeds *v.* Lockwood, 84 Pa. St. 70; Mann *v.* Schroer, 50 Mo. 306; Kansas City, etc., R. Co. *v.* Cobb (Ala., 1894), 14 So. Rep. 763; Allen *v.* Sallinger, 108 N. Car. 159; Rau *v.* Minnesota Valley R. Co., 13 Minn. 442; Sinclair *v.* Western N. Car. R. Co., 111 N. Car. 507; Cooper *v.* Granberry, 33 Miss. 117. *Compare* Troxler *v.* Gibson, 1 Hayw. (N. Car.) 465.

In Trespass, plaintiff may amend by giving a more accurate description of the premises. Cuminge *v.* Rawson, 7 Mass. 440; Nettleton *v.* Redfield, 2 Root (Conn.) 119; Box *v.* Lawrence, 14 Tex. 545; Haynes *v.* Jackson, 66 Me. 93; Gilman *v.* Cate, 56 N. H. 160. But if a new parcel of land be included, the amendment will be open to the statute of limitations. Atkinson *v.* Amador, etc., Canal Co., 53 Cal. 102. And such an amendment was denied in Robinson *v.* Miller, 37 Me. 312.

In Trover, an amendment may be allowed adding a count for additional property which was taken at the same time, Haskins *v.* Ferris, 23 Vt. 673; or changing the description of the property, Heushoff *v.* Miller, 2 Johns. (N. Y.) 295.

So in an action for conversion an allegation of demand is proper for an amendment. Hulbert *v.* Brackett, 8 Wash. 435.

A complaint apparently in trover may be amended by adding an allegation of the conversion. Lord *v.* Pierce, 33 Me. 350.

In Real Actions.—In real actions, an amendment embracing a different piece of land from that described in the declaration is inadmissible, Wyman *v.* Kilgore, 47 Me. 184; unless the omission was accidental, Noyes *v.* Richardson, 59 N. H. 490.

A writ of entry may be amended so as to limit the land demanded. Wilson *v.* Eaton, 5 N. H. 141.

2. Stevenson *v.* Mudgett, 10 N. H. 338, *quoted* in Gilman *v.* Cate, 56 N. H. 160, 166; Kirkner *v.* Com., 6 W. & S. (Pa.) 557; Diehl *v.* McGlue, 2 Rawle (Pa.) 337; Houghton *v.* Stowell, 28 Me. 215; Avery *v.* New York Cent., etc., R. Co., 106 N. Y. 142; Daley *v.* Boston, etc., R. Co., 147 Mass. 101; Lanahan *v.* Porter, 148 Mass. 596; Heridia *v.* Ayres, 12 Pick. (Mass.) 334; Bishop *v.* Baker, 19 Pick. (Mass.) 517; Myers *v.* Lyon, 51 Vt. 272; McCannon *v.* Detroit, etc., R. Co., 66 Mich. 442.

Assumpsit for Rent.—A declaration in assumpsit for rent may be amended by declaring more formally for use and occupation. Bachop *v.* Hill, 54 Vt. 507.

Action on Bill of Exchange. — Presentation, refusal to pay, and notice may be allowed by amendment to a declaration against the drawer of a bill of exchange. Jones *v.* Warren, 60 Ga. 359.

Waiver of Condition. — And in an action on an insurance policy, an averment of the waiver of a condition therein. California Ins. Co. *v.* Gracey, 15 Colo. 70. See also Lewis *v.* Monmouth Mut. F. Ins. Co., 52 Me. 492.

Trespass Quare Clausum.—A declaration for trespass *quare clausum*, and also for carrying away goods, may be amended by adding a count for trespass *de bonis asportatis*. Hill *v.* Penny, 17 Me. 409; Bishop *v.* Baker, 19 Pick. (Mass.) 517; Mechanics', etc., Ins. Co. *v.* Spang, 5 Pa. St. 113; Burnham *v.* Plant, 57 N. H. 41. *Compare* Duncan *v.* Sylvester, 13 Me. 417.

The date of the alleged trespass may be changed. Moore *v.* Boyd, 24 Me. 242; Hammatt *v.* Russ, 16 Me. 171.

Death by Wrongful Act. — In an action for death by wrongful act, the omission of necessary averments that the deceased left a parent, wife, or child may be supplied by amendment. South Carolina R. Co. *v.* Nix, 68 Ga. 572. See also Klemm *v.* New York Cent., etc., R. Co. (Supreme Ct.), 28 N. Y. Supp. 861.

Amendment of Answer.—A defendant may amend his answer by stating in definite form how he claims a title which he has previously asserted in a general form. Woodward *v.* Williamson, 39 S. Car. 333.

In Actions for Flowage of Land.—A declaration alleged that the defendant by means of a dam caused the waters of a stream to overflow the plaintiff's land. An amendment adding "and the waters flowing upon and running into said land" before the words "to overflow" did not change the cause of action. Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438. But an amendment presenting a new issue as to the manner in which defendant caused the overflow was held to be open to the statute of limitations, in Bunting *v.* Chicago, etc., R. Co., 41 Fed. Rep. 744. And in Pearson *v.* Reid, 10 Ga. 580, it was held that a new and distinct injury caused by the overflow could not be introduced by amendment. See, however, on this point, International, etc., R. Co. *v.* Pape, 73 Tex. 501, and Shearer *v.* Middleton, 88 Mich. 621.

In Ejectment — *New Demise.* — In ejectment in the old form the plaintiff is allowed almost as of course to amend by inserting a new demise where the proposed lessor has a subsisting title. Jackson *v.* Murray, 1 Cow. (N. Y.) 156; Jackson *v.* Travis, 3 Cow. (N. Y.) 356; Jackson *v.* Smith, 6 Cow. (N. Y.) 40, holding that cause must be shown by affidavit; Anonymous, 2 Cai. (N. Y.) 260; Jackson *v.* Kough, 1 Cai. (N. Y.) 251, where leave to amend was given six years after service of the declaration; Den *v.* Ganoe, 16 N. J. L. 439; Den *v.* McShane, 13 N. J. L. 35; Den *v.* Snowhill, 13 N. J. L. 23; Nance *v.* Thompson, 1 Sneed (Tenn.) 321; Wilson *v.* Wallace, 8 S. & R. (Pa.) 56; Giltner *v.* Carrollton, 7 B. Mon. (Ky.) 680; Hume *v.* Langston, 6 J. J. Marsh (Ky.) 254; Tidd's Practice, 1206.

But a count cannot be added on the demise of a person who died since the commencement of the action, although he was alive at the date of the demise in the proposed count. Skipper *v.* Lennon, Busb. (N. Car.) 189; Adderton *v.* Melchor, 9 Ired. (N. Car.) 349; Elliott *v.* Bohannon, 5 T. B. Mon. (Ky.) 121. Nor a count stating a demise after the commencement of the suit. Cox *v.* Lacey, 3 Litt. (Ky.) 334. And a new demise from a different party asserting a different title sets up a new cause of action and is open to the statute of limitations. Sicard *v.* Davis, 6 Pet. (U. S.) 124; Jones *v.* Johnson, 81 Ga. 293; Dawty *v.* Hansell, 20 Ga. 659. See also Gresham *v.* Webb, 29 Ga. 520; Smith *v.* Steelman, 20 N. J. L. 116.

The Term of the fictitious lease may be extended by amendment. Huff *v.* Lake, 9 Humph. (Tenn.) 137; Maus *v.* Montgomery, 10 S. & R. (Pa.) 192; Ledgerwood *v.* Pickett, 1 McLean (U. S.) 143, after judgment; Baxter *v.* Baxter, 3 Jones (N. Car.) 303, where such leave was given in the appellate court. See also English *v.* Register, 7 Ga. 387; Smith *v.* Vaughan, 10 Pet. (U. S.) 366; Tidd's Practice, 1207. *Aliter* after great laches and delay. Gardiner *v.* Wilson, 2 Yeates (Pa.) 186; Woods *v.* Galbreath, 2 Yeates (Pa.) 536.

The Date of the demise may be amended. Den *v.* Smith, 3 N. J. L. 710; Anonymous, 8 N. J. L. 366; Den *v.* Franklin, 5 N. J. L. 850 [after nonsuit]; Den *v.* Lanning, 9 N. J. L. 254, *citing* Doe *v.* Roe, 7 T. R. 465; Miller *v.* Shackleford, 4 Dana (Ky.) 264; Jackson *v.* Tuttle, 6 Cow. (N. Y.) 590; Meeker *v.* Doe, 7 Blackf. (Ind.) 169 [provided no hardship is thereby imposed on the defendant]; Blackwell *v.* Patton, 7 Cranch (U. S.) 471, [during the trial]; Cockshot *v.* Hopkins, 2 Dall. (U. S.) 97. See also Vreeland *v.* Ryerson, 28 N. J. L. 205.

statements more definite and precise.[1]

(4) *Same Allegations in Different Form.*—The particulars set forth in a declaration or complaint by way of inducement and preliminary to the main facts may be changed by amendment;[2] and the cause of action may be narrowed, enlarged, or fortified in varying forms to meet the varied aspects in which the pleader may anticipate its disclosure by the evidence.[3]

A Misdescription of the land may be corrected by amendment. Leeds *v.* Lockwood, 84 Pa. St. 70; Cooper *v.* Ganberry, 33 Miss. 117. See also Heilbron *v.* Heinlen, 72 Cal. 376; Gilman *v.* Cate, 56 N. H. 160; Box *v.* Lawrence, 14 Tex. 545; Cuminge *v.* Rawson, 7 Mass. 440. But not so as to include different land. Troxler *v.* Gibson, 1 Hayw. (N. Car.) 465.

1. Worrill *v.* Taylor, 27 Ga. 398; Brown *v.* Tobias, 1 Allen (Mass.) 385; Lanahan *v.* Porter, 148 Mass. 596; Waverly Timber & Iron Co. *v.* St. Louis Cooperage Co., 112 Mo. 383; Potter *v.* Lucas, 59 Me. 212; Knapp *v.* Clark, 30 Me. 244; McFadden *v.* Hewitt, 78 Me. 24; Newell *v.* Horn, 47 N. H. 379; Taylor *v.* Dustin, 43 N. H. 493; Rollins *v.* Robinson, 37 N. H. 579; *Ex parte* Ryan, 9 Ala. 89; Taylor *v.* Perry, 48 Ala. 240; Cabarga *v.* Seeger, 17 Pa. St. 514; Gulf, etc., R. Co. *v.* McGowan, 73 Tex. 355; Haynes *v.* Rice, 33 Tex. 167; Scoby *v.* Siveatt, 28 Tex. 713; Foster *v.* Smith, 66 Tex. 680; Spencer *v.* McCarty, 46 Tex. 213; Hastings *v.* Kellogg (Tex. Civ. App., 1894), 24 S. W. Rep. 846; Texas Elevator, etc., Co. *v.* Mitchell, 78 Tex. 64; Carter *v.* Hosford, 48 Vt. 433; Richmond *v.* Second Ave. R. Co. (Super. Ct.), 29 N. Y. Supp. 588; Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673.

Where the consideration of a promise was alleged to have been executed, an amendment describing it as executory was allowed. Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

In an action for killing plaintiff's horse an amendment substituting the word "mare" was not for a new cause of action. South, etc., R. Co. *v.* Bees, 82 Ala. 340.

2. Christian *v.* Columbus, etc., R. Co., 90 Ga. 124; Western Union Tel. Co. *v.* Way, 83 Ala. 542.

3. Mahan *v.* Smitherman, 71 Ala. 565; Oden *v.* Bonner, 93 Ala. 393; Stringer *v.* Waters, 63 Ala. 361; Cassell *v.* Cooke, 8 S. & R. (Pa.) 269; Smith *v.* Smith, 5 Pa. St. 254; Stewart *v.* Kelly, 16 Pa. St. 160; Bavington *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 358; Kester *v.* Stokes, 1 Miles (Pa.) 67; Baldock *v.* Atwood, 21 Oregon 79; Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438; Daley *v.* Gates, 65 Vt. 591; McKnight *v.* Cooper, 27 S. Car. 92; Chapman *v.* Sneed, 17 Tex. 428; Thompson *v.* Swearingen, 48 Tex. 555; Silberberg *v.* Trilling, 82 Tex. 523; Sinsheimer *v.* Kahn (Tex. Civ. App., 1893), 24 S. W. Rep. 535; Kamm *v.* California Bank, 74 Cal. 198; McCracken *v.* Chicago, etc., R. Co. (Iowa, 1894), 58 N. W. Rep. 1085; Williamson *v.* Chicago, etc., R. Co., 84 Iowa 583; Seymour *v.* Fisher, 16 Colo. 188; Finan *v.* Babcock, 58 Mich. 301; People *v.* Judge, 1 Dougl. (Mich.) 434; Swan *v.* Nesmith, 7 Pick. (Mass.) 220; Hamill *v.* Phenice, 9 Iowa 525; Mathers *v.* Butler County, 16 Iowa 59.

Avoiding Statute of Limitations.—Where the declaration shows on its face that the statutory period within which the action would be barred has expired, it may be amended by alleging defendant's absence from the state during that period. Hardee *v.* Lovett, 83 Ga. 203.

Action for Enticement.—A declaration for enticing away a minor daughter may be amended by adding a count for harboring and secreting and persuading her to remain absent from her father's service. Stowe *v.* Heywood, 7 Allen (Mass.) 118.

Description of Services.—Where the plaintiff, suing for services rendered, described himself as "superintendent," he was allowed to amend by describing himself as "general manager." Etowah Gold Min. Co. *v.* Exter, 91 Ga. 171.

Action to Rescind Contract.—In a suit to rescind a contract on the ground of fraud and undue influence, an amendment alleging that the petitioner was of weak mind, etc., was permitted. Clough *v.* Adams, 71 Iowa 17.

Striking Out Offer.—In a complaint

(5) *In Actions for Negligence.*—In suits founded on negligence, allegations of facts tending to establish the same act of negligence may properly be added by amendment.[1]

(6) *In Actions for Slander.*—In actions for slander it is within the power of the court to allow the complaint to be amended by setting out the defamatory charges in different forms,[2]

claiming damages for the fraudulent sale of mining property and offering to return the deed, an amendment striking out the offer was allowed. Ahrens *v.* Adler, 33 Cal. 608.

Alleging Additional Grounds.—A complaint, in an action by the assignee of an insolvent firm against a purchaser, alleging that a sale of property by one partner was void for preferences, may be amended by adding a count alleging that it was also void because it was made in excess of the authority of its partner. Carrie *v.* Cloverdale Banking, etc., Co., 90 Cal. 84.

1. Central R., etc., Co. *v.* Kitchens, 83 Ga. 83; Smith *v.* Georgia R., etc., Co., 87 Ga. 764; Georgia R. Co. *v.* Thomas, 68 Ga. 744; Colley *v.* Gate City Coffin Co. (Ga., 1893), 18 S. E. Rep. 817; Rome R. Co. *v.* Barnett, 89 Ga. 718; Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228; Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600, and Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 294, holding, in accord with the uniform rule, that such amendments relate back to the commencement of the suit and arrest the operation of the statute of limitations at that point; Western Union Tel. Co. *v.* Way, 83 Ala. 542, an action for failure to deliver a telegram, the same question being involved; Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600; Alabama, etc., R. Co. *v.* Chapman, 83 Ala. 453; Elyton Land Co. *v.* Mingea, 89 Ala. 521, where the plaintiff, declaring generally for negligence, was permitted to amend by alleging the violation of a city ordinance,—"a new reason for the act of negligence;" Becker *v.* New York, etc., R. Co. (Supreme Court), 31 N. Y. St. Rep. 750, 10 N. Y. Supp. 413; Wilson *v.* Spafford (Supreme Ct.), 32 N. Y. St. Rep. 532, 10 N. Y. Supp. 649, an action against a town for negligence of its officers, the amendment alleging the negligence of a particular officer; Ehlein *v.* Brayton, 66 Hun (N. Y.) 635, 21 N. Y. Supp. 825; Coby *v.* Ibert (City Ct.), 25 N. Y. Supp. 998; Greer *v.* Louisville, etc., R. Co. (Ky., 1893), 21 S. W. Rep. 649, where a refusal to permit such amendment was held reversible error.

Alleging a Different Defect.—In Smith *v.* Bogenschutz (Ky., 1892), 19 S. W. Rep. 667, it was held that a complaint alleging that a certain injury caused by the overflow of molten iron from a ladle in which it was being carried was due to the jostling of the carriers in a narrow passway might be amended so as to allege that the overflow was due to a defect in the ladle. See also Chapman *v.* Nobleboro, 76 Me. 427; Davis *v.* Hill, 41 N. H. 329, actions for injuries from defective highways. McIntire *v.* Eastern R. Co., 58 N. H. 137.

Negligence of Owner of Vicious Animal.—In Connell *v.* Putnam, 58 N. H. 335, the declaration was in case for wrongfully and injuriously keeping a vicious horse which attacked the plaintiff's servant, and a new count was properly allowed charging negligence in permitting the horse to go at large without a keeper. But this is hardly to be reconciled with Cox *v.* Murphy, 82 Ga. 623.

Negligence of Master.—In Smith *v.* Missouri Pac. R. Co. (Mo.), 56 Fed. Rep. 458, an action against a master alleging negligence in employing an incompetent servant, an amendment alleging that the servant was negligent and that plaintiff was not a fellow-servant was allowed. See also Kuhns *v.* Wisconsin, etc., R. Co., 76 Iowa 67; Wilson *v.* New York, etc., R. Co. (R. I., 1894), 29 Atl. Rep. 300.

Changing Plaintiff's Relation.—A complaint for negligence against a carrier, the plaintiff describing himself as a passenger, may be amended by alleging that he was being transported as an employé. Kansas Pac. R. Co. *v.* Salmon, 14 Kan. 512; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48. See also Pennsylvania Co. *v.* Sloan, 125 Ill. 72; Atlantic, etc., R. Co. *v.* Laird (Cal.), 58 Fed. Rep. 760.

2. Gay *v.* Homer, 13 Pick. (Mass.) 535; Collyer *v.* Collyer, 50 Hun (N. Y.) 422; Collyer *v.* Collyer (Supreme Ct.), 3 N. Y. Supp. 310; Conroe *v.* Conroe,

or in a foreign language,[1] or by stating that the words were spoken of the plaintiff in his professional or official capacity,[2] or by changing the date of the alleged slander.[3] But an amendment setting out an essentially different slander uttered at a different time is not permissible.[4]

(7) *Summary Statement of the Rule.*—As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony.[5]

47 Pa. St. 198; Geary *v.* Bennett, 65 Wis. 554; Summan *v.* Brewin, 52 Ind. 140.

Adultery and Fornication.—A complaint for charging adultery may be amended by adding a count for charging fornication by the use of the same words. Baldwin *v.* Soule, 6 Gray (Mass.) 327, where the amendment was allowed after the commencement of the argument.

Larceny of Different Goods.—In Williams *v.* Cooper, 1 Hill (N. Y.) 321, where the alleged slander consisted in charging plaintiff with stealing apples, an amendment alleging that defendant accused him of stealing boards was not allowed. But the amount of money charged to have been stolen may be changed. Miller *v.* Holmes (Super. Ct.), 19 N. Y. Supp. 701.

Malpractice and Quackery.—A charge of malpractice as a physician, although it may be amended by adding words of the same character, cannot be amended into a charge that the plaintiff was a quack or practiced without a diploma after the statute of limitations has attached. Weston *v.* Worden, 19 Wend. (N. Y.) 648.

1. Rahauser *v.* Schwerger Barth, 3 Watts (Pa.) 28.

2. Skinner *v.* Grant, 12 Vt. 456; Powers *v.* Cary, 64 Me. 9.

3. Beneway *v.* Thorp, 77 Mich. 181.

4. Hester *v.* Mullen, 107 N. Car. 724; Proctor *v.* Owens, 18 Ind. 21. See also Thompson *v.* Jones, 18 Ind. 476; Miles *v.* Vanhorn, 17 Ind. 245. *Compare* Mohr *v.* Lemle, 69 Ala. 180, a libel case; Daggy *v.* Green, 12 Ind. 303.

5. Daley *v.* Gates, 65 Vt. 591, *citing* Cassell *v.* Cooke, 8 S. & R. (Pa.) 268; Stewart *v.* Kelly, 16 Pa. St. 160; Maxwell *v.* Harrison, 8 Ga. 61; Stevenson *v.* Mudgett, 10 N. H. 338. See also Coxe *v.* Tilghman, 1 Whart. (Pa.) 282; Strong *v.* State, 75 Ind. 440; Rodrique *v.* Curcier, 15 S. & R. (Pa.) 81; Jacobs *v.* Gilreath (S. Car., 1894), 19 S. E. Rep. 308; Perot *v.* Leeds, 13 Phila. (Pa.) 185.

In Van de Haar *v.* Van Domseler, 56 Iowa 671, the court, in denying leave to amend the petition, pointed out that the new and old matter could not have been joined in the same count without making the petition demurrable. An opposite ruling was supported by stating the proposition conversely, in Smith *v.* Missouri Pac. R. Co., 56 Fed. Rep. 458: "The subject-matter of the new count must be the same as of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing." Ball *v.* Claflin, 5 Pick. (Mass.) 303. *Cited* in Smith *v.* Palmer, 6 Cush. (Mass.) 513, where the rule was clearly stated and an amendment was allowed. See also Pillsbury *v.* Springfield, 16 N. H. 565.

Accounting in Surrogate Court.—In an accounting before a surrogate the accounting itself is the subject-matter of the proceeding, and any amendment may be allowed which does not include a transaction subsequent to the return day of the citation. *In re* Munzor's Estate (Sur. Ct.), 25 N. Y. Supp. 818, 4 Misc. Rep. 374.

Assault and Battery.—It seems that an amended complaint charging "assault and battery" is not wholly different from one charging "assault"

The question is one of acknowledged difficulty, for in a strict

only. Sullivan *v.* Sullivan, 24 S. Car. 476.

Assigning New Breaches of Covenant.—Where several covenants in one instrument are set out, but a breach of only one is alleged, an amendment alleging the breach of another or others may be allowed. Wilson *v.* Widenham, 51 Me. 566; Heath *v.* Whidden, 24 Me. 383; Spencer *v.* Howe, 26 Conn. 200; Boyd *v.* Bartlett, 36 Vt. 9; Coxe *v.* Tilghman, 1 Whart. (Pa.) 282; Hunt *v.* Gaylor, 25 Ohio St. 620; Harris *v.* Wadsworth, 3 Johns. (N. Y.) 257.

In an action on a sheriff's official bond, the plaintiff may assign new breaches of the condition of the bond after the jury is sworn. Shannon *v.* Com., 8 S. & R. (Pa.) 444.

A Libel for Divorce *a vinculo* for adultery may be amended by adding a charge of extreme cruelty and praying for divorce from bed and board. Anderson *v.* Anderson, 4 Me. 100.

Ejection from Train.—A complaint for wrongfully expelling plaintiff from a train may be amended by alleging simply an ejection with unnecessary violence. Chicago, etc., R. Co. *v.* Bills, 118 Ind. 221.

A complainant alleging that the plaintiff was wrongfully ejected from a certain train on which his ticket was good may be amended so as to show that he was ejected from another train for which he had no ticket. Brassell *v.* Minneapolis, etc., Railway Co. (Mich., 1894), 59 N. W. Rep. 426.

A Petition on Account may be amended by setting up a draft signed by the defendant and alleging that the indebtedness thereon is the same. Kimball *v.* Bryan, 56 Iowa 632.

Description of Property.—In an action for negligently burning "ash lumber," an amendment was allowed substituting "birch" for "ash." Walker *v.* Fletcher, 74 Me. 142.

Striking out Claim.—Plaintiff may amend by striking out an illegal part of his claim if it be not inseparably connected with the rest. Boyd *v.* Eaton, 44 Me. 51.

Loss of Services.—In an action for injuries to a son, claiming damages for loss of services, an amendment claiming damages for loss of services by his death is not a new cause of action. Bradford *v.* Downs, 126 Pa. St. 622.

Action for Enticement.—Where in an action on the case the original declaration charges that defendant enticed away plaintiff's husband *per quod consortium amisit*, a new count which charges defendant with criminal conversation with him and the same *per quod* is allowable. Daley *v.* Gates, 65 Vt. 591.

Allegation of Gift Inter Vivos.—A complaint alleging a gift *inter vivos* may be amended by alleging a gift *causa mortis*. Walsh *v.* Bowery Sav. Bank (City Ct.), 26 N. Y. St. Rep. 95.

Use and Occupation.—An action for use and occupation may be changed into one of covenant on the lease. Bedford *v.* Terhune, 30 N. Y. 453, 27 How. Pr. (N. Y.) 422. See also Nelson *v.* Webb, 54 Ala. 436.

Assumpsit on a Bill of Exchange may be amended by inserting a count for money had and received. Cram *v.* Sherburne, 14 Me. 48.

Qui Tam Action.—A declaration in *qui tam* action embracing in one count a claim for several penalties on account of distinct violation of the statute may be amended by filing counts for each violation. Mitchell *v.* Tibbetts, 17 Pick. (Mass.) 298.

Withdrawing Charge.—In a suit by a corporation for "driving" and "booming" lumber it is proper to allow the plaintiffs to amend by withdrawing the charge for "driving." Bangor Boom Corp. *v.* Whiting, 29 Me. 123.

Fraud Changed to Negligence.—An action for false warranty of an article made to order, and for fraud in the manufacture and sale of it to the defendant, may be amended by charging negligence in the manufacture of it. Beers *v.* Woodruff & B. Iron Works, 30 Conn. 308.

Setting up Quantum Meruit.—Where the contract upon which an action is brought for services is void by the statute of frauds, the plaintiff may amend so as to recover on a *quantum meruit*. Turnow *v.* Hochstadter, 7 Hun (N. Y.) 80.

A complaint seeking to recover the contract price for services together with benefits prevented by the defendant may be amended by declaring upon a *quantum meruit*. Cox *v.* McLaughlin, 76 Cal. 60. See also Copeland *v.* Johnson Mfg. Co. (Supreme Ct.), 3 N. Y. Supp. 42.

The Ad Damnum may be changed

sense almost every amendment which is important may be said

without constituting a new cause of action. Frankfurter *v.* Home Ins. Co. (City Ct.), 26 N. Y. Supp. 81; Johnson *v.* Brown, 57 Barb. 118; Arrigo *v.* Catalano (Super. Ct.), 27 N. Y. Supp. 995; Chamberlain *v.* Mensing, 51 Fed. Rep. 511; Harris *v.* Belden, 48 Vt. 478; Tassey *v.* Church, 4 W. & S. (Pa.) 141. See also Townsend Nat. Bank *v.* Jones, 151 Mass. 454.

Or the insertion of an *ad damnum* where the original was left blank. Burleigh *v.* Merrill, 49 N. H. 35.

The Prayer for Relief may be changed. McIlhenny *v.* Lee, 43 Tex. 205; Case *v.* Blood, 71 Iowa 632; Cook *v.* Chicago, etc., R. Co., 75 Iowa 169.

Common Counts and Special Contract.—A complaint for "work, labor, and services" may be amended by stating that the services were rendered under a special contract. Tarrant *v.* Gittelson, 16 S. Car. 231. But not after an action of the special contract is barred by the statute of limitations. People *v.* Circuit Judge, 27 Mich. 138.

Common *indebitatus* counts, upon a sale to the defendant, cannot be amended by adding counts upon a contract of guaranty. Brodek *v.* Hirschfield, 57 Vt. 12.

The common counts cannot be amended by claiming unliquidated damages for breach of a special contract in a lease. Burt *v.* Kinne, 47 N. H. 361.

Neglect of Deputy.—A declaration in an action against a sheriff for default of one of his deputies may be amended by adding a count for the neglect of another deputy in the same matter. Grafton Bank *v.* White, 17 N. H. 389.

Adding Money Count.—A declaration with a special count against defendants as indorsers of a promissory note, and a count for money had and received, may be amended by a new count for money paid, the identity being preserved. Libbey *v.* Pierce, 47 N. H. 309.

Title to Possession.—Amending a petition in ejectment by causing it to state that both the husband and wife are entitled to the possession, instead of the wife alone, does not change the cause of action. Hughes *v.* McDivitt, 102 Mo. 77.

In Account Render, a count charging defendant as bailiff for the plaintiff's land may be joined to a count charging him as tenant in common with the plaintiff, and such count may be added on the trial as an amendment. M'Adam *v.* Orr, 4 W. & S. (Pa.) 550.

Sale and Refusal to Accept.—A complaint containing a count for goods sold and delivered cannot be amended by adding a count for the price of stock bargained and sold and which the defendant refused to accept. Mt. Washington Hotel Co. *v.* Redington, 55 N. H. 386.

Express and Implied Contract.—A complaint against a physician for malpractice, alleging an express contract, may be amended by alleging breach of an implied contract. Kuhn *v.* Brownfield, 34 W. Va. 252. See also Gray *v.* Bass, 42 Ga. 270; Smith *v.* Lippincott, 49 Barb. (N. Y.) 398.

Debt and Assumpsit.—A count in debt may be substituted for a count in assumpsit upon the same transactions. Garlock *v.* Bellinger, 2 How. Pr. (N. Y.) 43.

Insimul Computasset.—Where plaintiff declared on a note and for money expended on an *insimul computasset* and for work and labor and materials, he was allowed to amend by claiming to recover on a duebill and a book account. Fairchild *v.* Dennison, 4 Watts (Pa.) 258.

Note and Judgment.—In a suit upon a note the plaintiff may amend by setting forth the note and a judgment obtained on it in another state, Thompson *v.* Minford, 11 How. Pr. (N. Y. Supreme Ct.) 273; or in the same state, Teberg *v.* Swenson, 32 Kan. 224.

In McDermid *v.* Tinkham, 53 Vt. 615, it was held that debt on judgment could not be amended into debt on a promissory note. And to the same effect see Latine *v.* Clements, 3 Ga. 426; Anderson *v.* Mayers, 50 Cal. 525. But in Goodrich *v.* Bodurtha, 6 Gray (Mass.) 323, such an amendment was allowed where the judgment had been reversed.

McVicker *v.* Beedy, 31 Me. 314, an action on a foreign judgment is not distinguishable for principle.

In Downer *v.* Shaw, 23 N. H. 125, debt on a foreign judgment, an amendment was allowed counting on a note upon which the judgment was rendered.

Notes and Consideration Therefor.—An action for money had and received may be amended by declaring on a

to introduce a cause of action upon which the plaintiff could not recover without the amendment.[1] And where an amendment is offered at a seasonable time the liberal policy of the courts will warrant a presumption in favor of its propriety.[2]

d. WHAT AMENDMENTS ARE NOT ALLOWED—(1) *Changing Contract to Tort, and Vice Versa.*—It was a general rule of the common law that counts *ex contractu* and counts *ex delicto* could not be joined.[3] And it is still held even in some of the Code states that an attempt to change the nature of the action from one in tort to one in contract,[4] or *vice versa*,[5] is properly not an

promissory note given therefor. Brackett *v.* Crooks, 24 N. H. 173.

Under like circumstances an action on a note may be converted into an action for goods sold and delivered. Burnham *v.* Spooner, 10 N. H. 165. But see Lansford *v.* Scott, 51 Ala. 557. And *compare* Mahan *v.* Smitherman, 71 Ala. 563.

In Sibley *v.* Young, 26 S. Car. 415, which was an action on promissory notes due, plaintiff was allowed to amend by setting up the original indebtedness. So in Stephens *v.* Thompson, 28 Vt. 77. See also Pierce *v.* Wood, 23 N. H. 519.

A suit against a partnership upon a note executed by one member without authority may be amended by filing a count for the original claim. Perrin *v.* Keene, 19 Me. 355.

Where a note is not considered as payment, it is not a new cause to add a count on a note in a suit on an account. Vancleef *v.* Therasson, 3 Pick. (Mass.) 12; Stephens *v.* Thompson, 28 Vt. 77.

Adding Other Common Counts.—Counts for work and labor cannot be added to counts for goods sold and delivered. Dewey *v.* Nicholas, 44 Vt. 24.

1. Trescott *v.* Baker, 29 Vt. 459; Boyd *v.* Bartlett, 36 Vt. 9; Kansas Pac. R. Co. *v.* Salmon, 14 Kan. 512; McConnell *v.* Leighton, 74 Me. 415.

The court may allow an amendment to a declaration which does not change the cause of action, even though the action could not have been sustained on the original declaration. Skinner *v.* Grant, 12 Vt. 456.

2. Waterman *v.* Hall, 17 Vt. 128; Campbell *v.* Campbell, 23 Abb. N. Cas. (N. Y.) 187.

3. 1 Chitty Pl. 223; Wilson *v.* Stewart, 69 Ala. 302; Lumpkin *v.* Collier, 69 Mo. 170.

4. Givens *v.* Wheeler, 6 Colo. 149; Kewaunee County *v.* Decker, 34 Wis. 378; Brayton *v.* Jones, 5 Wis. 117, Appendix 627; Hollehan *v.* Roughan, 62 Wis. 64; Wilson *v.* Stewart, 69 Ala. 302; Hackett *v.* California Bank, 57 Cal. 335; Cox *v.* Richmond, etc., R. Co., 87 Ga. 109; People *v.* Wayne Circuit Judge, 13 Mich. 206; Wood *v.* Foster, 3 La. 338; Minor *v.* Woodbridge, 2 Root (Conn.) 274; Foster *v.* Penry, 76 N. Car. 131 (*quære*). *Contra*, Culp *v.* Steere, 47 Kan. 746.

In **New York** such an amendment cannot be made on the trial. Neudecker *v.* Kohlberg, 81 N. Y. 296; Walter *v.* Bennett, 16 N. Y. 251; Andrews *v.* Bond, 16 Barb. (N. Y.) 633; Storrs *v.* Flint, 46 N. Y. Super. Ct. 498; Baldwin *v.* Rood, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 56; Mea *v.* Pierce, 63 Hun (N. Y.) 400, 18 N. Y. Supp. 293; Whitcomb *v.* Hungerford, 42 Barb. (N. Y.) 177; Ransom *v.* Wetmore, 39 Barb. (N. Y.) 104. See Chapman *v.* Webb, 6 How. Pr. (N. Y. C. Pl.) 390.

But it has been allowed before trial. Hopf *v.* U. S. Baking Co. (Super. Ct.), 21 N. Y. Supp. 589.

5. Kewaunee County *v.* Decker, 34 Wis. 378; Mitchell *v.* Georgia R. Co., 68 Ga. 644; Carpenter *v.* Gookin, 2 Vt. 495; American Salt Co. *v.* Heidenheimer, 80 Tex. 344; Lumpkin *v.* Collier, 69 Mo. 170. *Compare* Lee *v.* Lee, 21 Mo. 531; Beard *v.* Yates, 2 Hun (N. Y.) 466; McNair *v.* Compton, 35 Pa. St. 23.

In Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633, it was held that such an amendment was permissible before trial if it related to the same transaction or tort.

One who sues in contract for the proceeds of his property may amend so as to charge conversion if he were ignorant of the facts which rendered the sale a conversion when he brought

amendment, but a substitution of a cause of action different in nature and substance from that originally stated. But redundant or irrelevant allegations in tort may be struck out of a complaint based on contract without changing the cause of action.[1]

(2) *Changing Legal to Equitable Action, and Vice Versa.*—In some of the states where law and equity are administered by the same court, an action at law cannot be changed by amendment into a suit in chancery, or a bill in chancery into a declaration or complaint at law;[2] while in others the distinction between forms

the suit. Smith *v.* Savin, 114 N. Y. 315.

In Massachusetts a count in tort may be amended by adding a count in contract with an averment that both are for the same cause of action. Cunningham *v.* Hall, 7 Gray (Mass.) 559.

1. Field *v.* Morse, 8 How. Pr. (N. Y. Supreme Ct.) 47; Veeder *v.* Cooley, 2 Hun (N. Y.) 74; Hitchcock *v.* Baere, 17 Hun (N. Y.) 604; Bosworth *v.* Higgins (Supreme Ct.), 26 N. Y. St. Rep. 474, 7 N. Y. Supp. 210; Lobdell *v.* Baker, 3 Met. (Mass.) 469; Lane *v.* Cameron, 38 Wis. 603; Pierce *v.* Cary, 37 Wis. 232.

And where the original declaration was in assumpsit, superfluous allegations of fraud in an amendment otherwise proper were held not to render it objectionable. Cavene *v.* McMichael, 8 S. & R. (Pa.) 441. Substantially the same point was decided in Bogle *v.* Gordon, 39 Kan. 31, and Link *v.* Jarvis (Cal., 1893), 33 Pac. Rep. 206. See also McAffee *v.* Mulkey, 40 Ga. 115.

Negligence as a Breach of Contract.—In an action against a common carrier for breach of its undertaking to carry safely and deliver goods, an amendment charging that the goods were destroyed in its warehouse through its negligence was held not to change the action from one *ex contractu* to one *ex delicto*. St. Louis, etc., R. Co. *v.* Dodd (Ark., 1894), 27 S. W. Rep. 227.

2. Lullman *v.* Barrett, 18 Ill. App. 573; Petipain *v.* Frey, 15 La. 195.

New York.—Although the Code permits the joinder of legal and equitable causes of action, all the facts must be alleged which would entitle the plaintiff to relief of either kind had he sought it in separate actions; and a complaint framed solely for equitable relief cannot be changed into one for legal relief,—an action for equitable relief cannot be changed into an action of ejectment. Bockes *v.* Lansing, 74 N. Y. 437, *aff'g* 13 Hun (N. Y.), 38. See also Sleeman *v.* Hotchkiss (Supreme Ct.), 36 N. Y. St. Rep. 540; Bush *v.* Tilley, 49 Barb. (N. Y.) 599. *Compare* Zimmerman *v.* Dieckerhoff (Supreme Ct.), 14 N. Y. St. Rep. 595.

An amendment changing a suit in equity to an action at law cannot be allowed in order to conform the pleadings to the proof. Halsey *v.* Tradesmen's Nat. Bank, 56 N. Y. Super. Ct. 7.

Nor can an action at law be changed into one for equitable relief by an amendment of course, Gray *v.* Brown, 15 How. Pr. (N. Y. Supreme Ct.) 555; nor by amendment on the trial before a referee, Zoller *v.* Kellogg, 66 Hun (N. Y.) 194, 21 N. Y. Supp. 226. *Compare* Beck *v.* Allison, 56 N. Y. 366; Nichols *v.* Scranton Steel Co., 137 N. Y. 471.

Wisconsin.—In Lawe *v.* Hyde, 39 Wis. 345, it was held that a suit in equity may be changed into an action at law by consent; but whether it could be done under other circumstances was not decided. See Tanguay *v.* Felthousen, 45 Wis. 30.

An action to enforce a lien for tolls on logs is considered as an action at law on a contract, and may be amended so as to demand a money judgment. Tewksbury *v.* Bronson, 48 Wis. 581.

Carmichael *v.* Argard, 52 Wis. 607; Kavanagh *v.* O'Neill, 53 Wis. 101; Brothers *v.* Williams, 65 Wis. 401; Fischer *v.* Laack, 76 Wis. 313, and Stevens *v.* Brooks, 23 Wis. 196, decided that an action at law could not be amended into a suit in equity. See Lackner *v.* Turnbull, 7 Wis. 105.

In Johnson *v.* Filkington, 39 Wis. 62, an action to enforce a mechanic's lien, it was held proper to deny leave to plaintiff to amend by claiming damages for defendant's refusal to permit him to perform the contract.

of actions is so far disregarded as to permit such amendments if the identity of the subject-matter of the controversy remains the same.[1]

(3) *Changing Common-law Action to Statutory, and Vice Versa.*—Common-law liabilities and statutory remedies for the same wrong are generally deemed separate and distinct grounds of action, not to be substituted one for the other by amendment.[2]

Georgia.—A complaint upon a note, in the statutory form, cannot be amended by adding a count setting up that plaintiff held title to certain property as security for the payment of the debt sued on, and therefore praying that such property might be sold, and the note paid out of the proceeds. Long *v.* Bullard, 59 Ga. 355. See Tate *v.* Goff, 89 Ga. 184.

Ohio.—An amendment to an answer demanding damages so as to demand judgment for specific performance will not be granted as a matter of course. Evens *v.* Hall, 1 Handy (Ohio) 434.

1. Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56; Emmet County *v.* Griffin, 73 Iowa 163; Barnes *v.* Heckla F. Ins. Co., 75 Iowa 11; Holmes *v.* Campbell, 12 Minn. 221; Cook *v.* Chicago, etc., R. Co., 75 Iowa 169; Weaver *v.* Kintzley, 58 Iowa 191.

In Mississippi a proceeding to enforce a mechanic's lien may be amended by converting it into assumpsit for the price of the work done and materials furnished. Duff *v.* Snider, 54 Miss. 245; Prairie Lodge *v.* Smith, 58 Miss. 301.

Nebraska.—In Homan *v.* Hellman, 35 Neb. 414, a suit to remove a cloud on title was converted into an action of ejectment.

North Carolina.—In Robinson *v.* Willoughby, 68 N. Car. 84, the plaintiff was allowed to change his action for the recovery of land under a deed into one for foreclosure upon a new trial after the appellate court had adjudged the deed to be a mortgage.

In McNair *v.* Buncombe County, 93 N. Car. 364, it was held that a suit for an injunction could not be changed into one for a mandamus.

California. — Where a complaint praying for legal relief states a cause of action entitling the plaintiff to equitable relief, the court may on the trial permit the prayer to be amended so as to ask for the proper equitable relief. Walsh *v.* McKeen, 75 Cal. 519.

Under similar circumstances, an action to enforce a mechanic's lien was converted into an action on the contract. Castagnino *v.* Balletta, 82 Cal. 250.

Texas.—In Nye *v.* Gribble, 70 Tex. 458, an action of trespass to try title, the defendant answered that a certain deed under which the plaintiff claimed was in fact a mortgage, and the plaintiff was allowed to amend his petition so as to demand foreclosure in case the deed should be declared a mortgage.

Massachusetts.—In *Massachusetts* the statute allows an action at law to be converted into a suit in equity and *vice versa*. See George *v.* Reed, 101 Mass. 378. Hayward *v.* Hapgood, 4 Gray (Mass.) 437, and McRae *v.* Locke, 114 Mass. 96, were decided prior to the enactment of the statute.

2. A common-law action cannot be changed by amendment into an action for treble damages under a statute. Fairchild *v.* Dunbar Furnace Co. (Pa., 1889), 18 Atl. Rep. 443; Gregory *v.* Wabash, etc., R. Co., 20 Mo. App. 448; Missiouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114.

Nor can the statutory action be changed to the common-law action. Holliday *v.* Jackson, 21 Mo. App. 660. A similar ruling was made in Melvin *v.* Smith, 12 N. H. 462. *Contra*, Rhemke *v.* Clinton, 2 Utah 230. And see Smith *v.* Chicago, etc., R. Co., 49 Wis. 443.

In Parmelee *v.* Savannah, etc., R. Co., 78 Ga. 239, a suit against a common carrier for excessive charges in violation of a statute, the plaintiff was not allowed to amend by declaring on a common-law liability so as to save his claim from a special statute of limitations.

In Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441, an action against a carrier on a common-law liability, an amendment claiming to recover on a statutory liability was not allowed.

Nor can one statutory remedy be converted into another.[1]

(4) *Libel, Slander, Malicious Prosecution, False Imprisonment, etc.*—An action for libel[2] or slander[3] cannot be changed into an action for malicious prosecution or *vice versa;*[4] nor can an action for malicious prosecution be converted into one for false imprisonment[5] or *vice versa;*[6] nor an action for libel into an action for trespass to the person;[7] nor a civil action for seduction into a civil action for rape.[8]

Other instances where the allowance of an amendment, under the particular circumstances of each case, was held to transcend the power of the court are cited in the note.[9]

A complaint for damages for the *wrongful* erection of a milldam, and for an injunction, cannot be amended so as to claim compensation under the provisions of a milldam law. Newton *v.* Allis, 12 Wis. 378.

An action at common law for negligence in killing stock cannot be amended into an action on a statute which makes the negligence a presumption of law. Hausberger *v.* Pacific R. Co., 43 Mo. 196.

A plaintiff suing for actual damages may amend by setting up wilful negligence so as to avail himself of a statute giving punitive damages. Louisville, etc., R. Co. *v.* Case, 9 Bush (Ky.) 728.

1. **Personal Liability of Stockholder.**—Where a complaint sought to charge defendant as a stockholder in a manufacturing corporation because of a failure to file a certificate that the whole of the stock was paid in as required by *New York* Laws, 1848, c. 40, §§ 10, 11, it was held to be error to permit an amendment seeking to enforce defendant's liability under § 14 of the same act referring to the purchase of property and the issue of stock therefor. Rowell *v.* Janvrin, 69 Hun (N. Y.) 305, 23 N. Y. Supp. 481. See also Milliken *v.* Whitehouse, 49 Me. 527.

For Supplies to Pauper.—For a proper amendment in a statutory action for supplies furnished to a pauper by counting on liability under another statute, see Brewer *v.* East Machias, 27 Me. 489.

Death by Wrongful Act.—The statutory action given to personal representatives for the death of the decedent is separate and distinct from that for personal injuries which survives by statute, and the former cannot be amended into the latter. Hurst *v.* Detroit City R. Co., 84 Mich. 539, where the reasoning of the court is conclusive.

An action for the benefit of the widow and children of a person killed by wrongful act cannot be amended by changing it into an action to recover damages for the benefit of the general administration. All *v.* Barnwell County, 29 S. Car. 161.

2. Larkin *v.* Noonan, 19 Wis. 82.

3. Shock *v.* M'Chesney, 4 Yeates (Pa.) 507.

4. Ebersoll *v.* Krug, 5 Binn. (Pa.) 51.

5. Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454, 34 N. Y. St. Rep. 770.

An action on the case for malicious prosecution cannot be changed to an action of conspiracy, at least not unless it be for some sufficient reason. Ross *v.* Bates, 2 Root (Conn.) 198.

Contra.—It was held in Spice *v.* Steinruck, 14 Ohio St. 213, that the clause in the Code providing that amendments "must not change substantially the claim or defense" does not refer to the form of the remedy, but to the general identity of the transaction constituting the cause of complaint, and that a petition demanding damages for an unlawful arrest and containing averments making a case for malicious prosecution was amendable by striking out the averments of "want of probable cause" and alleging that the same arrest was made "illegally and with force." The same conclusion was reached in People *v.* Wayne Circuit Judge, 27 Mich. 164.

6. Waldheim *v.* Sichel, 1 Hilt. (N. Y.) 45. See also McConnell *v.* Kennedy, 29 S. Car. 180.

7. Ransone *v.* Christian, 56 Ga. 351.

8. Van de Harr *v.* Van Domse.er, 56 Iowa 671.

9. **Charging Common Carrier as Ware-**

c. OBJECTION, HOW TAKEN.—An amendment introducing a new cause of action cannot be objected to by way of answer setting

houseman.—Where a complaint charges a railroad company with loss of goods as a common carrier, an amendment charging it also as a warehouseman sets up a new matter or claim, and the statute of limitations may be pleaded as of the time of the amendment. Anniston, etc., R. Co. *v.* Ledbetter, 92 Ala. 326. See also People *v.* Judge, 35 Mich. 227. *Compare* St. Louis, etc., R. Co. *v.* Dodd (Ark., 1894), 27 S. W. Rep. 227.

Multifariousness. — An amendment will not be allowed, the effect of which is to unite a joint demand against both of the defendants with a demand against one of them. Miller *v.* Northern Bank, 34 Miss. 412. See also Postmaster General *v.* Ridgway, Gilp. (U. S.) 135.

Changing Common Counts. — Where original counts are for money paid and money had and received, a new count for work and labor, as the defendant's factor and agent, will not be received without defendant's consent. State *v.* Otis, 42 N. H. 71.

Different Common Counts.—A declaration containing a single count for work and labor cannot be amended by inserting counts for use and occupation and for goods sold and delivered. Thompson *v.* Phelan, 22 N. H. 339.

Changing Trover to Negligence. — Where the original declaration was trover for certain goods, the plaintiff cannot amend by introducing a new count charging that the defendant attached the same goods on a writ in favor of the plaintiff and by his negligence lost them. Goddard *v.* Perkins, 9 N. H. 488.

Different Interest under Different Title. —Where the cause of action set out in the complaint was to recover land descended to the plaintiff from her father, the court has no power to allow an amendment at the trial so as to allow the plaintiff to claim a different interest as heir of her sister, as this would be substantially bringing a new suit. Robbins *v.* Harris, 96 N. Car. 557.

Changing Corporate Liability. — The liability of officers of a pretended corporation on bills and notes issued by it is different from their liability for illegal acts as officers of a chartered corporation. Gardner *v.* Post, 43 Pa. St. 19.

Conversion of Different Goods. — In trover for converting bonds, an amendment alleging conversion of instruments not under seal makes a new cause of action. Tryon *v.* Miller, 1 Whart. (Pa.) 11.

Changing Money Paid to Liability Incurred.—In an action to recover sums paid by reason of the defendant's acts, an amendment showing that a portion of the amount alleged to have been paid was only a liability incurred to pay makes a new cause of action. Meeks *v.* Southern Pac. R. Co., 61 Cal. 149.

Insurance and Contract to Insure.— A declaration in the usual form upon an insurance policy cannot be amended so as to claim damages for the failure of the defendant to deliver a policy of insurance in conformity to an alleged verbal agreement. Connecticut F. Ins. Co. *v.* Kinne, 77 Mich. 231. See also Hill *v.* London Assur. Corp. (City Ct.), 12 N. Y. Supp. 86. *Compare* Loring *v.* Proctor, 26 Me. 18.

Note and Common Counts.—A count upon a note for specified articles cannot be admitted as an amendment of a declaration for money had and received and for the hire of goods. French *v.* Gerrish, 22 N. H. 97.

Detinue and Trover.—A distinction between actions of *detinue* and trover is carefully preserved in the *Alabama* Code, and an amendment of a complaint which would convert the former into the latter cannot be allowed. Harris *v.* Hillman, 26 Ala. 380.

Account and Breach of Warranty.— A bill for account cannot be turned by amendment into an action for breach of warranty as to the quality of goods sold by the defendant to the plaintiff, in an accounting which took place. Ayres *v.* Daly, 56 Ga. 119.

Changing Character of Services. — Where a person sues under a contract for services as manager, an amendment which claims to recover for services under another contract in a different capacity introduces a new cause of action. Singer Mfg. Co. *v.* Armstrong, 91 Ga. 745.

In Trespass quare clausum for taking away the annual profits of the land, an amendment of the declaration by adding a count for a usurpation of the fee will not be permitted. Bartlett *v.* Perkins, 13 Me. 87.

up such change of ground as a defense,[1] nor by general demurrer,[2] nor by objecting to evidence offered in support of the amendment.[3] The question must be raised, if opportunity is offered,[4] by

Changing Ground of Liability.—A declaration against a sheriff for acts of his deputy cannot be amended by adding the count charging the sheriff for his own acts, although both counts relate to the same loss. Lambard *v.* Fowler, 25 Me. 308.

In an action against an officer for not retaining property attached to be sold to satisfy the execution, an amendment introducing a count of not returning the execution embraces a new cause of action. Annis *v.* Gilmore, 47 Me. 152.

Where the defendant as postmaster was charged with unlawfully neglecting and refusing to deliver a letter, an amendment charging the same act to have been done by one not duly sworn, whom he wrongfully permitted to have the care of the mail in his office, was held to introduce a new cause of action. Bishop *v.* Williamson, 11 Me. 495.

An Action for Waste cannot be amended into an action of tort in the nature of waste. Sheldon *v.* Smith, 97 Mass. 36.

Title to Real Estate.—While the original action presented an issue for injury to the plaintiff's cow, an amendment putting in issue the title to real estate is a new cause of action. Kelly *v.* Taylor, 17 Pick. (Mass.) 218.

Different Contract by Different Agent.—A declaration upon a contract alleged to have been made by a certain agent of defendants on their behalf cannot be amended by setting up a contract materially different and alleged to have been made by another as agent of the defendants Milburn *v.* Davis (Ga., 1893), 17 S. E. Rep. 286.

Lease and Contract to Lease.—An amendment claiming damages for breach of a contract to take a lease is entirely foreign to a complaint to recover for rent alleged to be due under the lease. Law *v.* Pemberton (City Ct.), 29 N. Y. Supp. 605.

Open to Settled Account.—It seems that in an action upon an open account, an amendment alleging a sum due on a settlement by compromise states a new cause of action. Prindle *v.* Aldrich, 13 How. Pr. (N. Y. Supreme Ct.) 466.

Different Title.—In a suit by one heir against others, asserting absolute title to the whole of the estate, an amendment which is in effect a suit for the partition of the property as held by the plaintiff in common is a new cause of action. Hopkins *v.* Wright, 17 Tex. 30.

Additional Item.—In Edwards *v.* Cheraw, etc., R. Co., 32 S. Car. 117, it was held that an additional item could not be added to a quantity of merchandise sued for. See also Gulf, etc., R. Co. *v.* Thompson (Tex. App., 1890), 16 S. W. Rep. 174.

Salary to Unliquidated Damages.—An action for salary cannot be amended so as to claim damages for breach of a contract of employment. Dows *v.* Morrison (C. Pl.), 20 N. Y. Supp. 860; Balch *v.* Wurzburner (C. Pl.), 29 N. Y. Supp. 62. See also Diehl *v.* M'Glue, 2 Rawle (Pa.) 337.

Negligence to Abatement of Nuisance.—An amendment changing a complaint for negligence into one for the correction of a nuisance changes the ground of action. Fisher *v.* Rankin, 25 Abb. N. Cas. (N. Y. Supreme Ct.), 191.

Trover to Fraud.—An action for trover cannot be changed into an action for fraud and deceit. Parker *v.* Rodes, 79 Mo. 88.

1. Wheeler *v.* West, 78 Cal. 95.

2. Turner *v.* Roundtree, 30 Ala. 706. But see Roberts *v.* Germania Fire Ins. Co., 71 Ga. 478, Code of Georgia, § 2794.

3. Greenwood *v.* Anderson, 8 Tex. 225, a case, however, where the objection was based upon the ground of repugnancy between the amendment and the original.

4. Where the amendment to a declaration was filed in the office of the clerk in vacation, without notice to the defendant, and no order was taken allowing it, and at the next term, on discovering it, the defendant claimed a surprise and obtained a continuance, and at the same term filed a motion to strike the amendment from the files, it was held that the motion was not too late. Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655.

objection to the filing of the amendment[1] and excepting to the allowance thereof,[2] or by motion to strike the amended pleading from the files.[3]

f. WAIVER OF OBJECTION.—If the defendant pleads to the amendment and tries the case on the issue thus joined, he waives his right to complain that a new cause of action was introduced,[4] even though it be one that arose after the institution of the suit.[5] And a party who accepts the benefit of terms imposed upon his adversary as a condition of amending is precluded from making an objection.[6]

1. Hancock *v.* Johnson, 1 Met. (Ky.) 242; Wilson *v.* Jamieson, 7 Pa. St. 126; King *v.* Rea, 13 Colo. 69; Busch *v.* Hagenrick, 10 Neb. 415; Wade *v.* Clark, 52 Iowa 158.

Form of Objection.—The objection must be specific; if it be based upon other grounds, the allowance of the amendment cannot be assigned as error on the ground that it sets up a new cause of action. Parsons Water Co. *v.* Hill, 46 Kan. 145; Benton *v.* Beattie, 63 Vt. 186.

When Too Late.—The objection must be made at the time when the amendment is allowed. It cannot avail when urged for the first time in the appellate court, nor even at the trial. Spurlock *v.* Missouri Pac. R. Co., 93 Mo. 530; Ansonia India Rubber Co. *v.* Wolf, 1 Handy (Ohio) 236.

2. Bachop *v.* Hill, 54 Vt. 507; King *v.* Rea, 13 Colo. 69.

3. Wheeler *v.* West, 78 Cal. 95; Turner *v.* Roundtree, 30 Ala. 706; Blodget *v.* Skinner, 15 Vt. 716; Megrath *v.* Van Wyck, 2 Sandf. (N. Y.) 651. *Compare* Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673.

Motion for New Trial.—In Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372, it was held that where the motion to strike from the files is denied and the case goes to trial and a verdict is rendered for the plaintiff, a motion for a new trial is proper.

Pleading to Substance.—The defendant may, of course, controvert the *sufficiency* of the amendment by any proper plea. Van de Haar *v.* Domseler, 56 Iowa 671.

Statute of Limitations.—And the question whether the new matter is barred by the statute of limitations should be made by pleading the statute and not by a motion to strike out. Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48.

But the statute must be pleaded separately to the amendment, not including the original. Pennsylvania Co. *v.* Sloan, 125 Ill. 72.

Verdict against Evidence.—An amendment having been improperly allowed and the evidence not supporting the original declaration, a verdict for plaintiff was held contrary to the law and evidence, and the refusal of a new trial was held to be erroneous. Milburn *v.* Davis (Ga., 1893), 17 S. E. Rep. 286.

4. Sauter *v.* Leveridge, 103 Mo. 615, where a motion to strike out was overruled and the defendant then answered to the merits; Scovill *v.* Glasner, 79 Mo. 449; Evens *v.* Hall, 1 Handy (Ohio) 434; Glover *v.* Flowers, 101 N. Car. 134; Blodget *v.* Skinner, 15 Vt. 716; Bachop *v.* Hill, 54 Vt. 507; Stevens *v.* Hewitt [*obiter*], 30 Vt. 263. See also Snyder *v.* Harper, 24 W. Va. 212; Richards *v.* Smith, 98 N. Car. 509.

Pleading Without Knowledge.—Pleading to the declaration without knowledge of the amendment is not a waiver, nor pleading with knowledge, provided the case did not go to trial. Church *v.* Syracuse Coal, etc., Co. [*obiter*], 32 Conn. 375.

Extent of Waiver.—After a defendant has pleaded the general issue and submitted to a trial of an amended petition which contains a different ground of action from the original, he cannot object to a subsequent amended petition containing matter similar to the last. Spurlock *v.* Missouri Pac. R. Co., 104 Mo. 658, *overruling* Fields *v.* Maloney, 78 Mo. 172.

5. Witkowski *v.* Hern, 82 Cal. 604.

Pleading the statute of limitations is a waiver. Seymour *v.* Brainerd (Vt., 1894), 29 Atl. Rep. 462. But that plea would be effectual if the bar of the statute had actually attached. See *infra*, III, 15, *a*, (2).

6. Woodward *v.* Williamson, 39 S.

g. METHOD OF DETERMINING THE QUESTION.—According to the practice in some jurisdictions, the court, in order to determine whether a proposed amendment introduces a new cause of action, is not confined to a mere inspection of the pleadings, but may look into the evidence in the case,[1] or admit affidavits,[2] or hear parol testimony,[3] or draw the conclusion from the opening statement of counsel.[4]

h. REVIEW OF DECISION OF TRIAL JUDGE.—In the absence of statutory provisions making the decision of the trial court conclusive,[5] an order allowing an amendment which introduces a new cause of action, or denying an amendment upon that ground, is a proper subject for review on appeal or error.[6]

7. Changing the Form of Action.—At common law the allowance of an amendment changing the form of the action seems to be altogether discretionary,[7] provided it does not change the cause

Car. 333. In that case the plaintiff, by accepting a sum of money which the defendant had been ordered to pay as a condition of amending his answer, was held estopped to dispute the validity of the order.

1. Hill *v.* Smith, 34 Vt. 535; Singer Mfg. Co. *v.* Armstrong, 91 Ga. 745; Nash *v.* Adams, 24 Conn. 33..

2. Gilman *v.* Cate, 56 N. H. 167; Brackett *v.* Crooks, 24 N. H. 173; Tilton *v.* Parker, 4 N. H. 142.

In Massachusetts the statute [Pub. Stat., 1882, p. 974, § 85] provides that the cause of action shall be deemed to be the same when it is "made to appear to the court" that it is the cause of action relied on by the plaintiff when the action was commenced. See Daley *v.* Boston, etc., R. Co., 147 Mass. 101.

It was said in Mann *v.* Brewer, 7 Allen (Mass.) 202, that, prior to this enactment, the court could not go beyond the record to determine the question. See, on this point, Gregory *v.* Wabash, etc., R. Co., 20 Mo. App. 448.

Liberal Construction.—The complaint must receive a liberal construction. Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673.

Presumption after Judgment.—After verdict and judgment an amendment will be deemed to have been for the same cause or action unless the contrary appears on the face of the record. Clark *v.* Lamb, 6 Pick. (Mass.) 512.

3. Geroux *v.* Graves, 62 Vt. 280; Lycoming F. Ins. Co. *v.* Billings, 61 Vt. 310.

4. Hoboben *v.* Gear, 27 N. J. L. 265.

5. **In Massachusetts and Illinois** the statutes make the action of the trial court allowing an amendment conclusive evidence of the identity of the cause of action. *Mass.* Pub. Acts, c. 167, § 85; *Illinois* Practice Act, § 23. See Fame Ins. Co. *v.* Thomas, 10 Ill. App. 545.

The purpose of the enactment is "to avoid the anomaly of allowing parties to seek for a revision of conclusions on matters of fact arising on an incidental inquiry not involving the real merits of the case." Mann *v.* Brewer, 7 Allen (Mass.) 202.

6. See *supra*, III, 4, *a*, (2).

7. Bliss Code Pl. (3d ed.) § 429. See also Chitty Pl. (16th Am. ed.), 219, 220; Chapman *v.* Webb, 6 How. Pr. (N. Y. C. Pl.) 390. See also Coggswell *v.* Baldwin, 15 Vt. 404.

In Kirwan *v.* Latour, 1 Har. & J. (Md.) 296, the plaintiff was allowed to amend from assumpsit to trover. And in Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 47, from covenant to assumpsit.

In Stebbins *v.* Lancashire Ins. Co., 59 N. H. 143, an amendment was allowed changing the form of the action from debt to covenant, *overruling* Little *v.* Morgan, 31 N. H. 499, where the court refused to allow assumpsit to be converted into debt, and also Brown *v.* Leavitt, 52 N. H. 619.

In Morse *v.* Whitcher, 64 N. H. 591, assumpsit was changed to case.

Trover may be changed to assumpsit. Peaslee *v.* Dudley, 63 N. H. 220.

In Houghton *v.* Stowell, 28 Me. 215, a change from debt to case was not allowed. See also McVicker *v.* Beedy

of action.[1]

In some of the states amendments changing the form of action are expressly sanctioned by statute,[2] while in others the distinction between forms of action is abolished and the allowance of an amendment is determined only by its effect upon the original cause of action.[3]

31 Me. 314. But trover may be amended to case. Googins *v.* Gilmore, 47 Me. 9; McConnell *v.* Leighton, 74 Me. 415.

In Wilcox *v.* Sherman, 2 R. I. 540, the plaintiff was not allowed to change his action of trover into trespass. Wilcox *v.* Sherman, 2 R. I. 540.

In Boston India Rubber Co. *v.* Hoit, 24 Vt. 92, the court refused to allow an amendment changing the form of action from assumpsit to debt.

1. See *supra*, III, 6, *a*.

2. **Illinois.** — The Practice Act expressly allows a change in the form of the action. See Fame Ins. Co. *v.* Thomas, 11 Ill. App. 545; Garrity *v.* Hamburger Co. (Ill., 1891), 28 N. E. Rep. 743.

In Dart *v.* Horn, 20 Ill. 212, replevin was changed to trover.

In Chapman *v.* Barney, 129 U. S. 677, it appears that the federal Circuit Court sitting in Illinois allowed an amendment changing the action from assumpsit to trover, and its power to do so was recognized by the Supreme Court.

Mississippi. — The Code allows amendments in the form of action so as to bring the merits of the case fairly to trial.

A proceeding to enforce a mechanic's lien may be changed into assumpsit for the price of the work done. Duff *v.* Snider, 54 Miss. 245.

Pennsylvania.—The Act of May 10, 1871, permits the form of action to be changed in certain cases, but not the cause of action. Tyrrill *v.* Lamb, 96 Pa. St. 464. Tatham *v.* Raney, 82 Pa. St. 130.

Formerly it seems that no change in the form of action was allowed. Strock *v.* Little, 33 Pa. St. 409.

In Perdue *v.* Taylor, 146 Pa. St. 163, the plaintiff being in laches was not allowed to change his action from trespass to assumpsit.

Massachusetts.—In Sewall *v.* Sullivan, 108 Mass. 355, *scire facias* on a recognizance was amended into an action on contract.

In Fay *v.* Taft. 12 Cush. (Mass.) 448, a real action was changed to ejectment.

That the form of action may be changed, see also Merrill *v.* Bullock, 105 Mass. 486; Mann *v.* Brewer, 7 Allen (Mass.) 202.

In Wiley *v.* Yale, 1 Met. (Mass.) 553, in view of the laches of the plaintiff and other circumstances the court refused to allow an amendment changing trespass on the case to debt.

In New Jersey every error in the form of action no matter how radical may be corrected at any stage of the action whenever it becomes necessary to enable the parties to try the matter in dispute which they contemplated trying, or to sustain the decision resulting from such trial. Price *v.* New Jersey R., etc., Co., 31 N. J. L. 234, where trespass was changed to case; as also in Price *v.* New Jersey R., etc., Co., 32 N. J. L. 19.

In U. S. Watch Co. *v.* Learned, 36 N. J. L. 429, covenant was changed to assumpsit; and in Hasbrouck *v.* Winkler, 48 N. J. L. 431, case was changed to trespass.

3. **Alabama.**—The distinction between debt and assumpsit is abolished by the Code, and either form may be converted into the other by amendment. Knapp *v.* Kingsbury, 51 Ala. 563.

Missouri.—The cause of action cannot be changed from trover and conversion to an action for fraud and deceit. Parker *v.* Rodes, 79 Mo. 88.

Nebraska.—So long as the identity of the action is preserved the form is immaterial. McKeighan *v.* Hopkins, 19 Neb. 33, where an action in ejectment was changed to a petition to redeem.

New York.—In Carries *v.* Dellay, 3 How. Pr. (N. Y. Supreme Ct.) 173, the action was changed from trespass to trover after verdict, but upon terms.

In Garlock *v.* Bellinger, 2 How. Pr. (N. Y.) 43, debt was substituted for assumpsit.

In Bigelow *v.* Dunn, 53 Barb. (N. Y.) 570, an amendment was allowed before trial changing an action

8. Matter Arising Pendente Lite—Amended and Supplemental Complaint.—Matter which arose prior to the filing of the original complaint must be brought into the suit by amendment, but facts which occurred pending the litigation should be brought in by supplemental complaint.[1]

based on fraudulent representations to an action for a breach of warranty. And in Chapman *v.* Webb, 6 How. Pr. (N. Y. C. Pl.) 390, an action for goods sold was amended so as to aver that they were obtained by fraudulent representations. See also Alston *v.* Mechanics' Mut. Ins. Co., 1 How. Pr. (N. Y.) 82.

In Ransom *v.* Wetmore, 39 Barb. (N. Y.) 104, an amendment changing the nature of the action from tort to assumpsit was denied after the case was finished.

But in *New York* a new cause of action may be introduced by amendment before trial. See *supra*, III, 6, *a*, note. And as to changing tort to contract, and *vice versa* in *New York*, see *supra*, III. 6, *d*, (1).

Ohio.—Forms of action are abolished by the Code, and the only question is whether the amendment makes a new cause of action. Spice *v.* Steinruck, 14 Ohio St. 213.

In Austin *v.* Hayden, 6 Ohio 388, case was changed to trespass.

Tennessee.—The form of the action may be changed by amendment, but only before trial. Smith *v.* Large, 1 Heisk. (Tenn.) 5.

Wisconsin.—Actions *ex contractu* cannot be changed into actions *ex delicto*, nor *vice versa*. Hollehan *v.* Roughan, 62 Wis. 64. See Lane *v.* Cameron, 38 Wis. 603, and *supra*, III, 6, *d*, (1), note.

In State *v.* Baker, 38 Wis. 71, a proceeding in the nature of a *quo warranto* by a private person was amended into an information in the name of the attorney-general.

1. Musselman *v.* Manly, 42 Ind. 462; McCaslan *v.* Latimer, 17 S. Car. 123; Moon *v.* Johnson, 14 S. Car. 434; Muller *v.* Earle, 37 N. Y. Super. Ct. 388; Oelberman *v.* New York, etc., R. Co. (Supreme Ct.), 29 N. Y. Supp. 864; McCullough *v.* Colby, 4 Bosw. (N. Y.) 603; Berford *v.* New York Iron Mine (Super. Ct.), 8 N. Y. Supp. 193; Bull *v.* Rothschild (Supreme Ct.), 22 N. Y. St. Rep. 536; Bynum *v.* Burke County, 101 N. Car. 412; Clendenin *v.* Turner, 96 N. Car. 416; State *v.* Goodman, 72 N. Car. 508; Cox *v.* Lacey, 3 Litt. (Ky.) 334. See Rogers *v.* Hodgson, 46 Kan. 276; Smith *v.* Smith, 22 Kan. 699; Reyburn *v.* Mitchell, 106 Mo. 365; Ward *v.* Davidson, 89 Mo. 445; Wheat *v.* Catterlin, 23 Ind. 85; Jennison *v.* Governor, 47 Ala. 390. See also Bell *v.* Williams, 10 La. 514. *Compare* Warfield *v.* Oliver, 23 La. Ann. 612.

New Cause of Action.—A complaint cannot be amended by setting up a new and distinct cause of action accruing *puis darrein continuance*. Shiners *v.* Brill, 38 Wis. 648.

Where pending a suit the plaintiff therein obtained a judgment against the same defendant on the same cause of action in another state, which judgment the defendant pleaded in bar, it was held that the plaintiff could not amend by declaring on the judgment, since it would be the introduction of a cause of action arising after the suit was brought. Barnes *v.* Gibbs, 31 N. J. L. 317.

It is at least a proper exercise of discretion to refuse to allow an amendment setting up a cause of action accruing after the commencement of the suit. Randall *v.* Christianson, 84 Iowa 501.

In Texas the plaintiff may amend by joining new causes of action arising since the commencement of the suit. Smith *v.* McGaughey, 13 Tex. 464.

Inchoate Title to Sue.—Under the *Minnesota* statute it is necessary for a foreign administrator to file in the proper probate court a duly authenticated copy of his foreign appointment before the commencement of an action as such administrator; and a failure to do so cannot be cured, if proper objection be taken, by filing the copy after the commencement of the suit. Fogle *v.* Shaeffer, 23 Minn. 304.

Marriage Pending Suit.—Where a *feme sole* marries after suit brought against her, a supplemental and not an amended complaint should be filed to make her husband a codefendant. Van Maren *v.* Johnson, 15 Cal. 308.

Amendment to Conform to Proof.—It is error to allow an amendment of the complaint to conform to the proof so as to give the plaintiff the benefit of

Effect of Answering Amendment.—Filing an answer to an amended complaint is a waiver of the objection that it alleges a new cause of action which arose after the institution of the suit.[1]

Effect of Improper Amendment.—But the pleading of matters by amended complaint which should be pleaded by supplemental complaint does not constitute sufficient cause for dismissing the action.[2]

Amended and Supplemental Answer.—If the defendant would avail himself of matter arising since the answer was filed, he should do so by supplemental answer and not by amendment.[3]

9. To Obviate a Variance or Conform to Proof — *a.* TO OBVIATE A VARIANCE.—Where evidence is offered and objected to on the ground of a variance, and the variance is immaterial, it is the common course of the court to allow an amendment;[4] and, under the Code, the materiality of variances is not to be determined

facts occurring after this action was commenced. Fickett *v.* Cohn (C. Pl.), 16 N. Y. St. Rep. 709. But the error will be disregarded unless the point is saved by a bill of exceptions. Lowrey *v.* Reef, 1 Ind. App. 244.

Facts Fortifying Plaintiff's Right.—A plaintiff may set up new grounds of recovery which have occurred since the commencement of the suit which serve only to strengthen his original claim. Sinsheimer *v.* Kahn (Tex. Civ. App., 1893), 24 S. W. Rep. 533; Silberberg *v.* Trilling, 82 Tex. 523; Smith *v.* McGaughey, 13 Tex. 414, holding that if the plaintiff has a cause of action at the commencement of the suit he may join new causes of action for the purpose of avoiding a multiplicity of suits; which point is also supported by Galveston, etc., R. Co. *v.* Borsky, 2 Tex. Civ. App. 545.

1. Witkowski *v.* Hern, 82 Cal. 604. See, however, Farrington *v.* Hawkins, 24 Ind. 253, where it was held that if a defendant demurs he waives the objection.

2. Seevers *v.* Hamilton, 11 Iowa 66.

3. McMinn *v.* O'Connor, 27 Cal. 238; Sylvester *v.* Jerome (Colo., 1893), 34 Pac. Rep. 760. *Compare* State *v.* Moses, 20 S. Car. 465.

In New York City District Courts.—A supplemental pleading cannot be filed in a district court of New York city, and therefore supplemental matter may be inserted in an answer by amendment. Myers *v.* Rosenback (C. Pl.), 29 N. Y. Supp. 34, *affirming* 28 N. Y. Supp. 9.

Judgment Pendente Lite.—That a defendant may by amendment of his answer avail himself of a judgment rendered in another action since the commencement of the suit and affecting the same, see Gaylord *v.* Beardsley (Supreme Ct.), 21 N. Y. Supp. 840, 66 Hun (N. Y.) 634.

Set-off Acquired Pendente Lite.—In Gaines *v.* Salmon, 16 Tex. 311, the defendant was allowed to amend by pleading a set-off acquired after the suit was brought.

4. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471; Wright *v.* Johnson, 50 Ind. 454, McDonald *v.* Yeager, 42 Ind. 388; Clark *v.* Phœnix Ins. Co., 36 Cal. 168; Perdue *v.* Aldridge, 19 Ind. 290; Nimmon *v.* Worthington, 1 Ind. 376; Warder, etc., Co. *v.* Gibbs, 92 Mich. 29; Collins *v.* Beecher, 45 Mich. 436; Murdoch *v.* Finney, 21 Mo. 138; Atwood *v.* Gillespie, 4 Mo. 423; Tarrant *v.* Gittelson, 16 S. Car. 231; Western Union Tel. Co. *v.* Shotter, 71 Ga. 760; Avery *v.* Wilson, 26 Iowa 573; Colton *v.* Stanwood, 67 Me. 25; Harris *v.* Lawrence, 1 Tyler (Vt.) 156; Fallis *v.* Howarth, Wright (Ohio) 303; Williamson *v.* Updike, 14 N. J. L. 270; Ballou *v.* Parsons, 11 Hun (N. Y.) 602; Stringer *v.* Davis, 30 Cal. 322; Bell *v.* Knowles, 45 Cal. 193; Carpentier *v.* Small, 35 Cal. 346; Hart *v.* British, etc., Marine Ins. Co., 80 Cal. 440; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120; Fobes *v.* School Dist., 10 Wis. 117; Gill *v.* Rice, 13 Wis. 549; Fery *v.* Pfeiffer, 18 Wis. 510; Bowman *v.* Van Kuren, 29 Wis. 209; Klopper *v.* Bromme, 26 Wis. 372; Phillips *v.* Jarvis, 19 Wis. 204; Rublee *v.* Tibbetts, 26 Wis. 399.

upon the inconsistency between the pleadings and the evidence, but solely by proof that a party has been actually misled to his prejudice by the incorrect version of the facts given in the complaint;[1] and even then the court may in its discretion order the pleading to be amended, upon such terms as it deems just.[2]

Time to Answer Amendment.—If an amendment of the complaint is allowed upon the trial to avoid an objection for variance, and the court requires the defendant to answer the amendment immediately, such exercise of discretion will not be reviewed unless in a clear case of abuse.[3]

Where evidence constituting a variance is admitted without objection, the variance may be disregarded or cured by amendment at later stages of the proceedings.[4]

b. TO CONFORM TO PROOF—(1) *The Rule Stated—Power, How Derived.*—Where the parties to a cause have directed their proof to a certain issue consistent with the original claim or defense, but not within some of the allegations of the pleadings, an amendment of the latter to conform to the proof may be allowed.[5]

Authority to Allow amendments of pleadings to conform to the proof is commonly conferred by specific provision in the Codes,[6]

1. Place *v.* Minster, 65 N. Y. 89; Gaty *v.* Sack, 19 Mo. App. 470.

Prejudice, How Proved.—It is not necessary that the fact of prejudice be established by extrinsic proof; it may be apparent upon the face of the pleadings. Lyon *v.* Blossom, 4 Duer (N. Y.) 318.

Actual Amendment.—Where the issues are to be changed in any material respect by the proposed amendment, as by changing or striking out averments already made, the amendment must be actually inserted in the pleadings if the opposite party so insist. Ballou *v.* Parsons, 11 Hun (N. Y.) 602.

2. *New York* Code, § 539, may be taken as a type. Gaty *v.* Sack, 19 Mo. App. 470; Fox River Valley R. Co. *v.* Shoyer, 7 Wis. 365; Rublee *v.* Tibbetts, 26 Wis. 399.

3. Ellen *v.* Lewison, 88 Cal. 253; Tribune Pub. Co. *v.* Hamill, 2 Colo. App. 237.

4. See the following subsections and *infra*, III, 12.

Directing Verdict.—The Codes provide that where the variance is not material, according to the prescribed test as stated in the text, the court may direct the facts to be found according to the evidence, or may order an immediate amendment, without costs.

Waiver of Proof of Prejudice.—Where a party states that he was misled and the opposite party apparently assumes the statement to be true, by omitting to require proof of the fact, he cannot afterwards object to the absence of proof. Griggs *v.* Howe, 3 Keyes (N. Y.) 166.

5. See the following notes.

Informal Motion.—A motion "to amend the complaint so as to conform to the evidence so far as to allow the plaintiff every possible advantage under the decisions upon the evidence," was denied on the ground that it was too indefinite. Crooks *v.* Second Ave. R. Co., 66 Hun (N. Y.) 626, 20 N. Y. Supp. 813.

6. *New York.*—Charlton *v.* Scoville, 68 Hun (N. Y.) 348, 22 N. Y. Supp. 883; Brotherson *v.* Consaulus (Supreme Ct.), 5 N. Y. St. Rep. 105; Parsons *v.* Sutton, 66 N. Y. 92; Chapman *v.* Carolin, 3 Bosw. (N. Y.) 456; Scott *v.* Lilienthal, 9 Bosw. (N. Y.) 224; Knapp *v.* Roche, 37 N. Y. Super. Ct. 395; Crosby *v.* Watts, 41 N. Y. Super. Ct. 208; McAleer *v.* Corning, 49 N. Y. Super. Ct. 522; Meyer *v.* Fiegel, 7 Rob. (N. Y.) 122; Smith *v.* Mackin, 4 Lans. (N. Y.) 41; Olendorf *v.* Cook, 1 Lans. (N. Y.) 37; Woolsey *v.* Rondout, 2 Keyes (N. Y. Ct. App.) 603; De Peyster *v.* Wheeler, 1 Sandf. (N. Y.) 719; Clayes *v.* Hooker, 4 Hun (N. Y.) 231; Kellogg *v.* Resse (Supreme Ct.), 1 N. Y. Supp. 291; Miller *v.* Holmes (Super. Ct.), 19 N. Y. Supp. 701; Palmer *v.* Jones (Supreme Ct.), 23 N. Y. Supp.

the usual formulary being, " and when the amendment does not substantially change the claim or defense by conforming the

584; McComber *v.* Granite Ins. Co., 15 N. Y. 495; Hosley *v.* Black, 28 N. Y. 438; Walter *v.* Bennett, 16 N. Y. 251; Dows *v.* Green, 3 How. Pr. (N. Y. Supreme Ct.) 377; Dauchy *v.* Tyler, 15 How. Pr. (N. Y. Supreme Ct.) 399; Fleischmann *v.* Stern, 61 How. Pr. (N. Y. Supreme Ct.) 124; Schlussel *v.* Willett, 34 Barb. (N. Y.) 615; Cornell *v.* Masten, 35 Barb. (N. Y.) 157; Vibbard *v.* Roderick, 51 Barb. (N. Y.) 616; Bonsteel *v.* Vanderbilt, 21 Barb. (N. Y.) 26; Smith *v.* Glens Falls Ins. Co., 66 Barb. (N. Y.) 556; Field *v.* Van Cott, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 349; Hart *v.* Hudson, 6 Duer (N. Y.) 894; Palmer *v.* Jones (Supreme Ct.), 53 N. Y. St. Rep. 355; Cargain *v.* Everett (Supreme Ct.), 42 N. Y. St. Rep. 618; Magee *v.* Troy, 48 Hun (N. Y.) 383; Lounsbury *v.* Purdy, 18 N. Y. 515; Fallon *v.* Lawler, 102 N. Y. 233; Davis *v.* Smith, 14 How. Pr. (N. Y. Supreme Ct.) 187; Evarts *v.* U. S. Mut. Accident Assoc. (Supreme Ct.), 40 N. Y. St. Rep. 878; Reck *v.* Phœnix Ins. Co., 3 Civ. Pro. Rep. (N. Y. Supreme Ct.) 376; Lettman *v.* Ritz, 3 Sandf. (N. Y.) 734; Page *v.* Voorhies (City Ct.), 16 N. Y. Supp. 101; Wilson *v.* Spafford (Supreme Ct.), 32 N. Y. St. Rep. 332, 10 N. Y. Supp. 649; Romeyan *v.* Sickles, 108 N. Y. 650, 1 Silv. (N. Y.) 594; Therasson *v.* Peterson, 22 How. Pr. (N. Y. Supreme Ct.) 98; Elting *v.* Dayton, 67 Hun (N. Y.) 425, 22 N. Y. Supp. 154, where it was held reversible error to refuse to allow plaintiff to amend his complaint, which alleged performance of a contract, so as to conform to proof of a waiver of strict performance; Newerf *v.* Jebb (Supreme Ct.), 6 N. Y. Supp. 581, another case of reversible error for refusal to allow an amendment of the complaint; Liverpool, etc., Ins. Co. *v.* Gunther (District of New York), 116 U. S. 113.

Wisconsin.—Davis *v.* Henderson, 20 Wis. 520; Flanders *v.* Cottrell, 36 Wis. 564; City Bank *v.* McClellan, 21 Wis. 112; Muzz *v.* Ledlie, 23 Wis. 445; Sabine *v.* Fisher, 37 Wis. 376; Northwestern Union P. Co. *v.* Shaw, 37 Wis. 655; Buckland *v.* Wilson, 28 Wis. 581; Smith *v.* Schulenberg, 34 Wis. 41; Matthews *v.* Baraboo, 39 Wis. 674; Horneffer *v.* Duress, 13 Wis. 603; Stacy *v.* Bryant, 73 Wis. 14; State *v.* Pierce County, 71 Wis. 321; Edleman *v.* Kidd, 65 Wis. 18; Hill *v.* Chipman, 59 Wis. 211; Pierce *v.* Kneeland, 53 Wis. 672; Charnley *v.* Honig, 74 Wis. 163, and Edson *v.* Hayden, 18 Wis. 627, where it was held reversible error to refuse to allow an amendment to the complaint; Schumaker *v.* Hoeveler, 22 Wis. 43; Pacquette *v.* Pickness, 19 Wis. 219; Hodge *v.* Sawyer, 34 Wis. 397; K—— *v.* H——, 20 Wis. 239; Hibbard *v.* Peek, 75 Wis. 619; Thomas *v.* Hatch, 53 Wis. 296; McWhinnee *v.* Martin, 77 Wis. 182.

Alabama.—Burkham *v.* Mastin, 54 Ala. 122; Englehardt *v.* Clanton, 83 Ala. 336; Godbold *v.* Blair, 27 Ala. 592, where a new plaintiff was added by amendment.

California. — Hibernia Sav., etc., Soc. *v.* Jones, 89 Cal. 507; Valencia *v.* Couch, 32 Cal. 339, after motion for nonsuit; Pico *v.* Pico, 56 Cal. 453; Kamm *v.* California Bank, 74 Cal. 191, pending a motion for nonsuit; Drew *v.* Hicks (Cal., 1894), 35 Pac. Rep. 563, where it was held reversible error to refuse to allow an amendment of the answer; Jackson *v.* Jackson, 94 Cal. 446.

Indiana.—Levy *v.* Chittenden, 120 Ind. 37; Stanton *v.* Kenrick (Ind., 1893), 35 N. E. Rep. 19, where the name of a coplaintiff was struck out; Sandford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204; Sipe *v.* Sipe, 14 Ind. 477; Smith *v.* Flack, 95 Ind. 116; Leib *v.* Butterick, 68 Ind. 199.

Colorado.—Gwynn *v.* Butler, 17 Colo. 114; Tribune Pub. Co. *v.* Hamill, 2 Colo. App. 237; Martin *v.* Simmons; 11 Colo. 511.

Kentucky. — Carter *v.* West (Ky., 1892), 19 S. W. Rep. 592; Taylor *v.* Arnold (Ky., 1891), 17 S. W. Rep. 361; Kearney *v.* Covington, 1 Met. (Ky.) 339, holding it reversible error not to allow the complaint to be amended.

Missouri.—Collins *v.* Glass, 46 Mo. App. 297; Kerr *v.* Bell, 44 Mo. 120; McMurry *v.* Martin, 26 Mo. App. 437; Fulkerson *v.* State, 14 Mo. 49; Callaghan *v.* M'Mahan, 33 Mo. 111; Riddles *v.* Aikin, 29 Mo. 453; Stephens *v.* Frampton, 29 Mo. 263; Irwin *v.* Chiles, 28 Mo. 576.

Nebraska.—Ward *v.* Parlin, 30 Neb. 376; Klosterman *v.* Olcott, 25 Neb. 382; Whipple *v.* Fowler (Neb., 1894),

pleadings to the facts proved." But the practice of allowing amendments under such circumstances antedates the Codes,[1]

60 N. W. Rep. 15; Catron *v.* Shepherd, 8 Neb. 308; Evarts *v.* Smucker, 19 Neb. 41.

Kansas. — Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202; Wilcox, etc., Organ Co. *v.* Lasley, 40 Kan. 521; Missouri Pac. Ry. Co. *v.* McCally, 41 Kan. 639; School Dist. *v.* Dudley, 28 Kan. 160; Fitzgerald *v.* Hollan, 44 Kan. 499.

Iowa.—Thomson *v.* Wilson, 26 Iowa 120; Tiffany *v.* Henderson, 57 Iowa 490, where it was held to be reversible error not to allow an amendment of the petition after argument of counsel; Ellis *v.* Lindley, 37 Iowa 334; Andrews *v.* Mason City, etc., R. Co., 77 Iowa 669; Blandon *v.* Glover, 67 Iowa 615, where it was said that such amendments are encouraged; Thomas *v.* Brooklyn, 58 Iowa 438; Davis *v.* Chicago, etc., R. Co., 83 Iowa 744; Larkin *v.* McManus, 81 Iowa 723; George *v.* Swafford, 75 Iowa 491; Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306; Correll *v.* Glasscock, 26 Iowa 83.

South Carolina. — Ahrens *v.* State Bank, 3 S. Car. 401.

Arkansas. — Caldwell *v.* Meshew, 53 Ark. 263, an amendment of the complaint after the cause had been submitted for a year; Trippe *v.* Du Val, 33 Ark. 811; McMurray *v.* Boyd, 58 Ark. 504, where it was held reversible error to refuse to allow an amendment to the answer.

Minnesota.—Dougan *v.* Turner, 51 Mo. 330; Rau *v.* Minnesota Valley R. Co., 13 Minn. 442; Cairncross *v.* McGrann, 37 Minn. 130.

Ohio.—Spice *v.* Steinruck, 14 Ohio St. 213; Hoffman *v.* Gordon, 15 Ohio St. 217; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345.

Mississippi. — Miller *v.* Northern Bank, 34 Miss. 412.

Nevada.—McCausland *v.* Ralston, 12 Nev. 195.

South Dakota. — Jenkinson *v.* Vermillion (S. Dak., 1892), 52 N. W. Rep. 1066, and Yetzer *v.* Young (S. Dak., 1892), 52 N. W. Rep. 1054, where it was held reversible error to refuse to allow an amendment of the complaint.

Oregon.—Cook *v.* Croisan (Oregon, 1894), 36 Pac. Rep. 532, reversible error for refusal to allow amendment.

Georgia.—Lathrop *v.* Adkisson, 87 Ga. 339.

North Carolina.—Brown *v.* Mitchell (N. Car., 1889), 9 S. E. Rep. 702.

Montana. — Williston *v.* Camp, 9 Mont. 88; Wise *v.* Jefferis (District of Montana), 51 Fed. Rep. 641; Wormall *v.* Reins, 1 Mont. 627.

New Mexico. — Berry *v.* Hull (N. Mex., 1892), 30 Pac. Rep. 936.

Utah.—Walton *v.* Jones, 7 Utah 462.

West Virginia.—Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

Harmless Error.—An amendment of a complaint to conform to the evidence, even though erroneously allowed, is not a ground for setting aside the judgment founded on it where such evidence tended to establish another cause of action contained in the complaint, and the defendant was therefore not prejudiced. Robertson *v.* Robertson, 9 Daly (N. Y.) 44.

1. New York.—In Flower *v.* Garr (1839), 20 Wend. (N. Y.) 668, which was an action of assumpsit for money had and received brought by executors counting upon promises to the testator, an amendment was allowed after a report of referees by permitting the plaintiffs to allege the promises to have been made to them as executors, it appearing on the hearing that the moneys were received by the defendant subsequent to the death of the testator, though upon a retainer anterior to that time. The court said: "There is no pretence that the defendant has been misled. * * * He has made his defense as fully as he could ever hope to make it if a new trial were granted. Under such circumstances amendments have often been allowed after verdict, and for the purpose of upholding it. Lyon *v.* Burtis, 18 Johns. (N. Y.) 510; Sargent *v.* Dermison, 2 Cow. (N. Y.) 515; Rees *v.* Overbaugh, 4 Cow. (N. Y.) 124; Mott *v.* Jerome, 7 Cow. (N. Y.) 518." See also the opinion of the court in Miller *v.* Watson, 6 Wend. (N. Y.) 506; Davis *v.* Smith, 14 How. Pr. (N. Y. Supreme Ct.) 187.

Other States.—Christine *v.* Whitehill (1827), 16 S. & R. (Pa.) 98; Reeside *v.* Hadden, 12 Pa. St. 243; Downing *v.* Lindsay, 2 Pa. St. 382; Hill *v.* Haskins (1829), 8 Pick. (Mass.) 83; Montgomery *v.* Maynard, 33 Vt. 450; Lewis *v.* Locke, 41 Vt. 14; Harris *v.* Lawrence, 1 Tyler (Vt.) 156.

is not confined to the Code states,[1] and is authorized by general provisions for the amendment of defects in pleadings in furtherance of justice.[2]

Allowance by Referee.—Where a referee has the same powers as the court in respect of allowing amendments at the trial, he may permit the pleadings to be conformed to the facts proved.[3]

(2) *At What Stage of Proceedings.*—An amendment to conform to the proof is usually made after the evidence is closed;[4] but it may be made after the argument of counsel,[5] or after

In Texas.—The Texas statute providing that pleadings may be amended before the parties announce ready for trial, but not thereafter [see *infra*, III, 11, *a*], a petition cannot be amended so as to conform to proofs. Missouri Pac. R. Co. *v.* Howe (Tex. App., 1891), 15 S. W. Rep. 198. But see Western Union Tel. Co. *v.* Bowen, 84 Tex. 476, where it was held that as the defendant did not ask for a continuance upon an amendment of the complaint, he had no ground to claim prejudice. The case is cited in connection with remarks pertinent to the subject in Guinn *v.* O'Daniel, 5 Tex. Civ. App. 112.

1. *New Hampshire.*—Pickering *v.* De Rochemont, 45 N. H. 67.

In Peaslee *v.* Dudley, 63 N. H. 220, the facts appeared upon the trial of an action of trover that the plaintiff was entitled to recover for the same cause in an action of assumpsit; and the court, declining to consider whether trover could be maintained, granted leave to the plaintiff to amend by joining a count in assumpsit, and thereupon ordered judgment.

Michigan. — Foley *v.* Riverside Storage, etc., Co., 85 Mich. 7, where an amendment of the complaint was held not only to be proper, but that it was the positive duty of the court to allow it. Shearer *v.* Middleton, 88 Mich. 621; Portsmouth Sav. Bank *v.* Hart, 83 Mich. 646; Cummin *v.* Wilcox, 47 Mich. 501; Johnson *v.* Spear, 82 Mich. 453; Wallace *v.* Detroit City R. Co., 58 Mich. 231; Keystone Lumber, etc., Mfg. Co. *v.* Jenkinson, 69 Mich. 220.

Massachusetts.—Denham *v.* Bryant, 139 Mass. 110; Deming *v.* Darling, 148 Mass. 504; Batchelder *v.* Hutchinson (Mass., 1894), 37 N. E. Rep. 452; Cleaves *v.* Lord, 3 Gray (Mass.) 66; Augur Steel Axle, etc., Co. *v.* Whittier, 117 Mass. 451; Fenton *v.* Lord, 128 Mass. 466, where it was held that plaintiffs might amend by joining another party.

Illinois.—McCollom *v.* Indianapolis, etc., R. Co., 94 Ill. 539; Carpenter *v.* First Nat. Bank, 19 Ill. App. 549.

New Jersey.—Willis *v.* Fernald, 33 N. J. L. 206; McAndrews *v.* Tippett, 39 N. J. L. 105; American L. Ins. Co. *v.* Day, 39 N. J. L. 89; Westervelt *v.* Demarest, 46 N. J. L. 40; Ware *v.* Millville F. Ins. Co., 45 N. J. L. 177; Finegan *v.* Moore, 46 N. J. L. 602.

2. Bamberger *v.* Terry, 103 U. S. 40, where the court said: "All that had been done was to present by the pleadings fairly and on the merits the controversy as it had actually been tried." There the case had been tried by the court by stipulation. The defendant put in a general denial to the amended declaration and demanded a jury trial, and it was held that the court had a discretionary power to refuse it. In this connection The Tremolo Patent, 23 Wall. (U. S.) 518, although an equity case, may be usefully consulted. See also the cases cited in the preceding note.

Time to Answer Amendment.—There is no error in refusing time to answer an amendment made to the complaint to conform it to the facts proved. George *v.* Swafford, 75 Iowa 491.

3. Merriam *v.* Wolcott, 61 How. Pr. (N. Y. Supreme Ct.) 377; McLaughlin *v.* Webster, 141 N. Y. 76; Knapp *v.* Fowler, 30 Hun (N. Y.) 512; Chapin *v.* Dobson, 78 N. Y. 74; Crismon *v.* Deck, 84 Iowa 344. See *supra*, III, 2, *f*.

4. See the cases cited in the notes to the preceding paragraphs.

Reswearing the Jury.—It is not error to refuse to reswear the jury when the complaint is amended to conform to proofs after the evidence is closed, if a new issue is not thereby tendered. Sandford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204.

5. Correll *v.* Glasscock, 26 Iowa 83,

verdict[1] or judgment;[2] but only for the purpose of sustaining the judgment, not to reverse it;[3] or in the appellate court the amendment may be regarded as made.[4]

where it was held to be no objection that the amendment was not actually filed until after verdict. Tiffany *v.* Henderson, 57 Iowa 490; Smith *v.* Howard, 28 Iowa 51.

1. Colton *v.* King, 2 Allen (Mass.) 317; Denham *v.* Bryant, 139 Mass. 110; Fenton *v.* Lord, 128 Mass. 466; Kimball *v.* Ladd, 42 Vt. 747; Thomas *v.* Hatch, 53 Wis. 296; Evarts *v.* Smucker, 19 Neb. 41; Thomson *v.* Wilson, 26 Iowa 120; Davis *v.* Chicago, etc., R. Co., 83 Iowa 744; Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306; Russell *v.* Turner, 62 Me. 496; Trippe *v.* Du Val, 33 Ark. 811; Brown *v.* Mitchell, 102 N. Car. 347, where the complaint was amended by striking out one of the defendants; Emerson *v.* Bleakley, 5 Abb. Pr. N. S. (N. Y. Ct. App.) 350; Lamb *v.* Camden, etc., R. & T. Co. 2 Daly (N. Y.) 454; Rees *v.* Overbaugh, 4 Cow. (N. Y.) 124, on a motion for a new trial; Smith *v.* Glens Falls Ins. Co., 66 Barb. (N. Y.) 556; Evarts *v.* U. S. Mut. Accident Assoc., 61 Hun (N. Y.) 624, 16 N. Y. Supp. 27, 40 N. Y. St. Rep. 878, on motion for a new trial on case and exceptions. See also Every *v.* Merwin, 6 Cow. (N. Y.) 360. *Compare* Joy *v.* Walker, 28 Vt. 442; Maxwell *v.* Day, 45 Ind. 509.

2. Lounsbury *v.* Purdy, 18 N. Y. 515; Thomas *v.* Nelson, 69 N. Y. 118; Bedford *v.* Terhune, 30 N. Y. 453; Egert *v.* Wicker, 10 How. Pr. (N. Y. Supreme Ct.) 193; City Bank *v.* McClellan, 21 Wis. 112; Buckland *v.* Wilson, 28 Wis. 581; Carter *v.* West (Ky., 1892), 19 S. W. Rep. 592; Davis *v.* Chicago, etc., R. Co., 83 Iowa 744.

Statute of Limitations.—A reply to a counterclaim which does not set up the statute of limitations cannot be amended after judgment to conform to proof that the counterclaim was barred by the statute. Williams *v.* Willis, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 11.

After Nonsuit. — Hill *v.* Haskins, 8 Pick. (Mass.) 83; Jackson *v.* Bailey, 5 Cow. (N. Y.) 265.

3. Steinman *v.* Strauss (Supreme Ct.), 44 N. Y. St. Rep. 380; Weems *v.* Shaughnessy (Supreme Ct.), 24 N. Y. Supp. 271; McGuiniss *v.* New York, 6 Daly (N. Y.) 416.

Where the value of services sued for is found to be more than the amount alleged in the complaint, the latter cannot be amended on appeal to conform to the findings. Perkins *v.* West Coast Lumber Co. (Cal.), 1893, 33 Pac. Rep. 1118.

4. *Michigan.*—Warder, etc., Co. *v.* Gibbs, 92 Mich. 29; Enright *v.* Standard L., etc., Ins. Co., 91 Mich. 238; Smith *v.* Pinney, 86 Mich. 484.

Wisconsin.—Hodge *v.* Sawyer, 34 Wis. 397; Trowbridge *v.* Barrett, 30 Wis. 661; Miller *v.* Spaulding, 41 Wis. 221; Goff *v.* Outagamie County, 43 Wis. 55; Wittman *v.* Watry, 45 Wis. 491; McKinney *v.* Jones, 55 Wis. 39; Murray *v.* Scribner, 74 Wis. 602.

Illinois.—Law *v.* Fletcher, 84 Ill. 45.

New York.—Fallon *v.* Lawler, 102 N. Y. 233; Clark *v.* Dales, 20 Barb. (N. Y.) 42; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493; Pratt *v.* Hudson River R. Co., 21 N. Y. 305; Harris *v.* Tumbridge, 83 N. Y. 92, 8 Abb. N. Cas. (N. Y.) 291; Bartholomew *v.* Lyon, 67 Barb. (N. Y.) 86; Listman *v.* Hickey (Supreme Ct.), 19 N. Y. Supp. 880; Snyder *v.* Snyder, 4 Cow. (N. Y.) 394; Hudson *v.* Swan, 7 Abb. N. Cas. (N. Y. City Ct.) 324; Bowdoin *v.* Coleman, 3 Abb. Pr. (N. Y. Super. Ct.) 431; Vietor *v.* Bauer (Supreme Ct.), 11 N. Y. St. Rep. 531; Hooper *v.* Beecher (Supreme Ct.), 7 N. Y. St. Rep. 405; Rosebrooks *v.* Dinsmore, 5 Abb. Pr. N. S. (N. Y. Ct. App.) 59; Doyle *v.* Mulren, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 258; Rose *v.* Bell, 38 Barb. (N. Y.) 25; Smith *v.* Holland, 60 Barb. (N. Y.) 333; Coleman *v.* Playsted, 36 Barb. (N. Y.) 26; Hamilton *v.* Gridley, 54 Barb. (N. Y.) 542; Bartholomew *v.* Lyon, 67 Barb. (N. Y.) 86; Drexel *v.* Pease (Supreme Ct.), 13 N. Y. Supp. 774; Argersinger *v.* Levor (Supreme Ct.), 7 N. Y. Supp. 923; Tripp *v.* Pulver, 2 Hun (N. Y.) 511; Clemons *v.* Davis, 4 Hun (N. Y.) 200; Tisdale *v.* Morgan, 7 Hun (N. Y.) 583; Parsons *v.* Suydam, 3 E. D. Smith (N. Y.) 276; Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith (N. Y.) 364; Foote *v.* Roberts, 7 Rob. (N. Y.) 17; Hall *v.* Morrison, 3 Bosw. (N. Y.) 520; Riker *v.* Curtis (C. Pl.), 30 N. Y. Supp. 940.

Massachusetts.—Whitney *v.* Houghton, 127 Mass. 527; Arlington *v.* Lyons,

(3) *Confined to Original Cause of Action.*—Under the device of conforming the pleadings to the facts proved a party cannot be permitted to introduce a new cause of action[1] or, in the

131 Mass. 328; Denham *v.* Bryant, 139 Mass. 110; Batchelder *v.* Hutchinson (Mass. 1894), 37 N. E. Rep. 452.

Kansas. — Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202; Tipton *v.* Warner, 47 Kan. 706; Wilcox, etc., Organ Co. *v.* Lasley, 40 Kan. 521.

Indiana.—Hamilton *v.* Winterrowd, 43 Ind. 393; Case *v.* Wandel, 16 Ind. 459, and Hobbs *v.* Cowden, 20 Ind. 310, cases where there was a variance between the instrument sued on and the one admitted in evidence; Torr *v.* Torr, 20 Ind. 118; Carpenter *v.* Sheldon, 22 Ind. 259; Hull *v.* Green, 26 Ind. 388; McKinlay *v.* Shank, 24 Ind. 258; Buchanan *v.* State, 106 Ind. 251; Cleveland *v.* Roberts, 14 Ind. 511; Lucas *v.* Smith, 42 Ind. 103; Krewson *v.* Cloud, 45 Ind. 273; Bristol Hydraulic Co. *v.* Boyer, 67 Ind. 236; Davis *v.* Doherty, 69 Ind. 11.

Nebraska. — Homan *v.* Steele, 18 Neb. 632.

North Carolina.—Gibbs *v.* Fuller, 66 N. Car. 116.

Arkansas.—Railway Co. *v.* Triplett, 54 Ark. 289; Sorrels *v.* Self, 43 Ark. 451; St. Louis, etc., R. Co. *v.* Harper, 44 Ark. 524; Hanks *v.* Harris, 29 Ark. 323.

Minnesota.—Almich *v.* Downey, 45 Minn. 460.

New Jersey.—Finegan *v.* Moore, 46 N. J. L. 602; Ware *v.* Millville F. Ins. Co., 45 N. J. L. 177; Westervelt *v.* Demarest, 46 N. J. L. 40; McAndrews *v.* Tippet, 39 N. J. L. 105; American L. Ins. Co. *v.* Day, 39 N. J. L. 89; Willis *v.* Fernald, 33 N. J. L. 206.

Pennsylvania. — Downing *v.* Lindsay, 2 Pa. St. 382.

See also *infra*, III, 11, *f*, (1).

Increasing Amount Claimed.—Ke-tuc-e-mun-guah *v.* McClure, 122 Ind. 541, where the amount claimed in the prayer of the relief was considered as increased to correspond with the amount found due. *Compare*, on this point, May *v.* State Bank, 9 Ind. 233.

Variance in Dates of Instrument. — And a variance between the date of maturity of a promissory note as alleged in the complaint and the date in a copy filed therewith may be regarded as cured by amendment. Carver *v.* Carver, 53 Ind. 241.

New Defense.—An amendment of the answer cannot be allowed by setting up a different defense. Hondorf *v.* Atwater (Supreme Ct.), 27 N. Y. Supp. 447.

Laches of Applicant.—Nor will an amendment be allowed where the defect was pointed out to the party upon the trial and he neglected to apply for leave to amend. Schmidt *v.* Gunther, 5 Daly (N. Y.) 452.

Issues not Litigated.—It will not be allowed unless the issues sought to be introduced were fully litigated on the trial. Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454.

As to how the appellate court may infer whether the issues were or were not fairly litigated, see Riker *v.* Curtis (C. Pl.), 30 N. Y. Supp. 940.

In Support of the Judgment. — The amendment is allowed in order to sustain and not to reverse the judgment. Gasper *v.* Adams, 24 Barb. (N. Y.) 287; Starr Steamship Co. *v.* Mitchell, 1 Abb. Pr. N. S. (N. Y. C. Pl.) 390.

1. Storrs *v.* Flint, 46 N. Y. Super. Ct. 498; Freeman *v.* Grant (Supreme Ct.), 30 N. Y. St. Rep. 143; Peters *v.* Chamberlain (Supreme Ct.), 36 N. Y. St. Rep. 100; Egert *v.* Wicker, 10 How. Pr. (N. Y. Supreme Ct.) 193; Southwick *v.* First Nat. Bank, 84 N. Y. 420; Buffalo, etc., Ferry Co. *v.* Allen, 12 Civ. Pro. Rep. (N. Y. Supreme Ct.) 64; Freeman *v.* Grant, 132 N. Y. 22; Phillips *v.* Melville, 10 Hun (N. Y.) 211; Walter *v.* Bennett, 16 N. Y. 251; Union Bank *v.* Mott, 11 Abb. Pr. (N. Y. Supreme Ct.) 42; Whittaker *v.* Merrill, 30 Barb. (N. Y.) 389; Nosser *v.* Corwin, 36 How. Pr. (N. Y. C. Pl.) 540; Bradley *v.* Shafer (Supreme Ct.), 19 N. Y. Supp. 640, 20 N. Y. Supp. 312; Hill *v.* London Assur. Corp. (City Ct.), 12 N. Y. Supp. 86; Joslyn *v.* Joslyn, 9 Hun (N. Y.) 388; Saltus *v.* Genin, 3 Bosw. (N. Y.) 250; Grant *v.* Burgwyn, 88 N. Car. 95; Carpenter *v.* Huffsteller, 87 N. Car. 273; Stowell *v.* Eldred, 39 Wis. 614; Newton *v.* Allis, 12 Wis. 378; Geary *v.* Bennett, 65 Wis. 554; Allen *v.* Brooks (Wis., 1894), 60 N. W. Rep. 253; Butcher *v.* Death, 15 Mo. 271; Levy *v.* Chittenden, 120 Ind. 37; Dunsford *v.* Brown, 19 S. Car. 560. See also Joy *v.* Walker, 28 Vt. 442.

Complaint Stating no Cause of Action.—Where a complaint does not state a cause of action it cannot be

language of the Code, to "substantially change the claim or defense." [1]

After Reversal and Remand.—But after a judgment reversed, on the ground of a variance amounting to proof of a new cause of action, and the cause remanded, it seems that the trial court may then allow an amendment to meet the facts so proved.[2]

(4) *Only in Furtherance of Justice.*—Amendments to conform to the proof should be liberally allowed,[3] but only when jus-

amended so as to state a cause of action. Curtis *v.* Cutler, 7 Neb. 315; K—— *v.* H——, 20 Wis. 239; Fox River Valley R. Co. *v.* Shoyer, 7 Wis. 365. *Compare* Teetshorn *v.* Hull, 30 Wis. 162. See also Lounsbury *v.* Purdy, 18 N. Y. 515.

In Alleman *v.* Bowen (Supreme Ct.), 15 N. Y. Supp. 318, it was held that where the trial court improperly denies a motion to dismiss a complaint on the ground that it does not state a cause of action, and the plaintiff does not ask for leave to amend, he will not be permitted to amend on an appeal taken by the defendant.

Changing Suit in Equity to Action at Law.—An amendment changing a suit in equity to an action at law cannot be allowed in order to conform to the proofs. Halsey *v.* Tradesmen's Nat. Bank, 56 N. Y. Super. Ct. 7.

And a variance between a mere legal defense of payment and an equitable counterclaim for specific performance is so vital that it cannot be cured by summary amendment on the trial. Stowell *v.* Eldred, 39 Wis. 614.

Facts Occurring After Suit Brought.—In an action for an accounting the court has no power to amend the complaint so as to give the plaintiff the benefit of facts occurring after his action was commenced, although it conforms to the proof. Fickett *v.* Cohn (C. Pl.), 16 N. Y. St. Rep. 709. *Compare* Lowrey *v.* Reef, 1 Ind. App. 244.

Changing Common Count to Covenant.—An amendment may be made at the trial changing an action for use and occupation into one for covenant on a lease in order to conform to the proof. Bedford *v.* Terhune, 30 N. Y. 453.

Gift Inter Vivos to Gift Causa Mortis.—So where a complaint alleged an absolute gift and transfer the plaintiff was allowed to amend to conform to proof of a gift *causa mortis*. Walsh *v.* Bowery Sav. Bank (City Ct.), 26 N. Y. St. Rep. 95.

Quantum Meruit.—Upon the trial the plaintiff was allowed to amend so as to recover the actual value of services rendered where the contract upon which the action was brought was void by the statute of frauds. Turnow *v.* Hochstadter, 7 Hun (N. Y.) 80.

Quantum Valebat.—Where the complaint proceeds upon the basis of a contract price it may be amended by claiming damages by reason of the breach of a contract so as to conform to the proof. Evans. *v.* Warner, 21 Hun (N. Y.) 574.

Increasing Ad Damnum.—An amendment on the trial increasing the amount claimed so as to equal the amount proved does not make a new cause of action, and is properly allowed. Frankfurter *v.* Home Ins. Co. (City Ct.), 36 N. Y. Supp. 81; Arrigo *v.* Catalano (Super. Ct.), 27 N. Y. Supp. 995, after verdict; Cargain *v.* Everett, 62 Hun (N. Y.) 620; Barth *v.* Walther, 4 Duer (N. Y.) 228. See also Cain *v.* Cody (Cal. 1892), 29 Pac. Rep. 778, and *infra*, III, 10, *a*.

It is unnecessary to cite further authorities as to what constitutes a new cause of action, the subject having been treated in detail in a preceding part of this article. See *supra*, III, 6.

1. Corby *v.* Wright, 4 Mo. App. 443, where the proposed amendment would change the defense.

But the issue may be changed. Caldwell *v.* Meshes, 53 Ark. 263.

2. Prindle *v.* Aldrich, 13 How. Pr. (N. Y. Supreme Ct.) 466.

It must be remembered that in *New York*, contrary to the prevailing rule, amendments may be allowed before trial introducing a new cause of action. See *supra*, III, 6, *a*, note. And as to the power of the court to amend after remand to the same extent as if the case had not previously been tried, see *infra*, III, 11, *k*.

3. Stephens *v.* Frampton, 29 Mo. 263; Guidery *v.* Green, 95 Cal. 630; Bedford *v.* Terhune, 30 N. Y. 453, 27 How. Pr. (N. Y.) 422, 1 Daly (N.Y.) 371.

tice will be promoted thereby.[1] If the case was not tried upon the theory suggested by the amendment, it ought not to be allowed;[2] nor should leave to amend the complaint be granted in order to enable the plaintiff to recover an utterly unconscionable demand.[3]

Sufficiency of Proof.—On appeal it will be presumed, unless the bill of exceptions shows the contrary, that the facts set up in the amendment were supported by the evidence.[4]

(5) *Where the Evidence was Objected to.*—A motion, after the close of the evidence, to conform the pleadings to the proof can never be granted where the admission of the evidence was

1. Hubble *v.* Murphy, 1 Duv. (Ky.) 278; McSween *v.* McCown, 23 S. Car. 342.

Surprise or Prejudice.—The amendment should not be allowed when the opposite party will be surprised or misled. Dunsford *v.* Brown, 19 S. Car. 560.

Setting Up Limitation.—To allow a plaintiff to come in after judgment and plead the statute of limitations in bar of a counterclaim set up by the defendant in his answer, would not be in furtherance of justice. Clinton *v.* Eddy, 54 Barb. (N. Y.) 54.

Denying Admitted Allegations.—It is within the discretion of the court to allow an answer to be amended after the hearing so as to conform to the proofs by denying an allegation of the complaint admitted in the original answer, where the plaintiff has given evidence in support of such allegation both in chief and on rebuttal. Charlton *v.* Scoville, 68 Hun (N. Y.) 348, 22 N. Y. Supp. 883. But under ordinary circumstances he cannot do so. Harrison *v.* Hastings, 28 Mo. 346.

And a complaint cannot be amended so as to take away from it an allegation which has been admitted and relied upon by the defendant. Zimmer *v.* Brooklyn R. Co., 23 Abb. N. Cas. (N. Y. Supreme Ct.) 382.

Making No Cause of Action.—A motion to conform the complaint to the proofs will not be allowed when its effect would be to make the complaint state no cause of action. Richards *v.* Fox, 52 N. Y. Super. Ct. 36.

No Additional Defense.—A motion to conform an answer to the proof may be denied where the proposed amendment contains no additional defense. Steinhauser *v.* Mason (C. Pl.), 19 N. Y. Supp. 228.

Useless Amendment.—After the submission of an equitable action for final determination there was no prejudicial error in refusing an amendment of the petition to meet the proofs where, upon full consideration of all the evidence upon appeal, it is found that the relief prayed must in any event be denied. Horbach *v.* Marsh, 37 Neb. 22.

An amendment of an answer to meet the proofs was properly refused where such amendment, taken in connection with the other averments in the answer, even if clearly proved, constituted no defense. Bush *v.* Bank of Commerce, 38 Neb. 403.

2. Marshall *v.* Golden Fleece Gold, etc., Min. Co., 16 Nev. 156.

The prayer for relief will not be amended after verdict when the result would be to present issues that were not tried. Nevada County, etc., Canal Co. *v.* Kidd, 37 Cal. 282. See also Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454.

3. Daley *v.* Russ, 86 Cal. 114, an amendment seeking to recover an excessive brokerage for obtaining a loan.

4. Dougan *v.* Turner, 51 Minn. 330; Jones *v.* Gregg, 17 Ind. 84; Knox *v.* McFerran, 4 Colo. 348.

Weight of Evidence.—It was held, in Missouri Pac. Ry. Co. *v.* McCally, 41 Kan. 639, that, if there is some evidence to sustain the amendment, the ruling of the court will not be disturbed although it is apparently against the weight of the evidence produced on the trial. But in Hubble *v.* Murphy, 1 Duv. (Ky.) 278, the ruling of the trial court in allowing an amendment to conform to the proof was reversed because the evidence was unsatisfactory.

promptly objected to when it was offered, upon the ground that it did not tend to support the allegations in the pleadings.[1]

(6) *Failure of Proof.*—The Codes provide that where the allegation to which the proof is directed is unproved, not in some particular or particulars but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof. In such a case the variance cannot be disregarded or amended to conform to the proof.[2] The provision is in effect another version of the rule which forbids the introduction of a new cause of action by amendment.[3]

10. Amendment of the Ad Damnum—*a.* NOT A NEW CAUSE OF ACTION.—Amendments of the *ad damnum* are never deemed to

1. Wheaton *v.* Voorhis, 53 How. Pr. (N. Y. Supreme Ct.) 319; Rutty *v.* Consolidated Fruit Jar Co., 52 Hun (N. Y.) 492; Smith *v.* Frost, 39 N. Y. Super. Ct. 389; Barnes *v.* Seligman, 55 Hun (N. Y.) 339; Alleman *v.* Bowen (Supreme Ct.), 39 N. Y. St. Rep. 822; Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420; Cunningham *v.* Hobart, 7 Gray (Mass.) 423; Seymour *v.* Fisher, 16 Colo. 188; Robinson C. M. Co. *v.* Johnson, 13 Colo. 258; Cincinnati, etc., R. Co. *v.* Bunnell, 61 Ind. 183.

Objection Reserved.—Where the parties consented that all objections to the evidence might be reserved until the close of the trial, it was held that an objection made at that time was effectual. Johnson *v.* McIntosh, 31 Barb. (N. Y.) 267.

Proper Time for Amendment.—If any amendment to the pleadings was necessary, it should be made prior to the introduction of the evidence if the evidence is objected to. Beard *v.* Tilghman, 66 Hun (N. Y.) 12, 20 N. Y. Supp. 736.

2. Egert *v.* Wicker, 10 How. Pr. (N. Y. Supreme Ct.) 193; Whitcomb *v.* Hungerford, 42 Barb. (N. Y.) 177; Vrooman *v.* Jackson, 6 Hun (N. Y.) 326; Reed *v.* McConnell, 133 N. Y. 425; Texier *v.* Gonin, 5 Duer (N. Y.) 389; Moore *v.* McKibbin, 33 Barb. (N. Y.) 246; Patterson *v.* Patterson, 1 Rob. (N. Y.) 184; Cowenhoven *v.* Brooklyn, 38 Barb. (N. Y.) 9. Where a note is alleged to be due "one day after date," a note admitted in evidence payable "one —— after date" does not constitute a failure of proof. Brownlee *v.* Kenneipp, 41 Ind. 216.

Radical Change in Plaintiff's Title.—After issue joined in an action brought to recover the possession of personal property the plaintiff died, and thereafter the action was revived in the name of his widow as executrix. Upon the trial it appeared that the husband had no title to the property, but that the same was owned by the wife in her own right. It was held that the court had no power to amend the summons and complaint by striking out the word "executrix" and thus allow the plaintiff to recover by virtue of her own title to the property. Phillips *v.* Melville, 10 Hun (N. Y.) 211.

False Imprisonment and Malicious Prosecution.—An action for false imprisonment cannot be changed on the trial by adding a count for malicious prosecution, the plaintiff having rested his case and failed to sustain his action in its original form. Waldheim *v.* Sichel, 1 Hilt. (N. Y.) 45.

Recovery Against Defendant Not Charged.—In a suit against two defendants demanding damages against only one, after a verdict "in favor of the plaintiff" for a certain sum the complaint cannot be amended so as to demand damages against both defendants. Bradley *v.* Shafer (Supreme Ct.), 19 N. Y. Supp. 140.

Objection on the Trial.—In Doyle *v.* Mulren, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 258, it was held that an objection for failure of proof must be distinctly taken on the trial in order to be available on appeal.

3. See *supra*, III, 6.

Amending to Recover Nominal Damages.—In Bangor, etc., R. Co. *v.* Smith, 49 Me. 9, it was held that if plaintiffs fail to establish their right, as set forth in their declaration, they will not be allowed to amend by making a different description of their cause of action so that they may recover nominal damages.

constitute a new cause of action. Hence that frequent ground of objection will not hold at any stage of the case against amendments increasing or reducing the amount demanded.[1]

b. BEFORE TRIAL—**By Increasing or Reducing.**—It is proper to allow the plaintiff to amend his declaration or complaint before trial by increasing the *ad damnum.*[2] And it is very much a matter of course to allow it to be reduced by amendment.[3]

1. Harris *v.* Belden, 48 Vt. 478; McIlhenny *v.* Lee, 43 Tex. 205; Raleigh *v.* Cook, 60 Tex. 438; Burleigh *v.* Merrill, 49 N. H. 35, where the sum demanded was originally left blank; Reed *v.* New York, 97 N. Y. 620; Johnson *v.* Brown, 57 Barb. (N. Y.) 118; Frankfurter *v.* Home Ins. Co. (City Ct.) 26 N. Y. Supp. 81; Arrigo *v.* Catalano (Super. Ct.), 27 N. Y. Supp. 995; Epperly *v.* Little, 6 Ind. 344; Webb *v.* Thompson, 23 Ind. 428; McOmber *v.* Balow, 40 Minn. 328; Chamberlain *v.* Mensing, 51 Fed. Rep. 511. See also Townsend Nat. Bank *v.* Jones, 151 Mass. 454.

2. Eaton *v.* Case, 17 R. I. 429; May *v.* State Bank, 9 Ind. 233; Gaff *v.* Hutchinson, 38 Ind. 341; Webb *v.* Thompson, 23 Ind. 428; Reed *v.* New York, 97 N. Y. 620; Brady *v.* Cassidy (C. Pl.), 37 N. Y. St. Rep. 591; Merchant *v.* New York L. Ins. Co., 2 Sandf. (N. Y.) 669; Gregg *v.* Gier, 4 McLean (U. S.) 208; Bogart *v.* McDonald, 2 Johns. Cas. (N. Y.) 219, with leave to the defendant to plead *de novo;* Topeka *v.* Sherwood, 39 Kan. 690, where the court refused to allow defendant time to file an amended answer; Graves *v.* New York, etc., R. Co., 160 Mass. 402; Capron *v.* Thompson, 3 Met. (Mass.) 59; Danielson *v.* Andrews, 1 Pick. (Mass.) 156, where the *ad damnum* was increased so as to give the right to appeal; Merrill *v.* Curtis, 57 Me. 152, a strong case; McLellan *v.* Crofton, 6 Me. 307; Brown *v.* Cribbs, 24 Ark. 248; McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124; Geren *v.* Wright, 8 Smed. & M. (Miss.) 360. See *infra*, V, 2.

After Demurrer for Want of Jurisdiction.—In McDannell *v.* Cherry, 64 Tex. 177, it was held that a mistake in placing the value of the claim sued on below the jurisdiction of the court may be cured by amendment after demurrer for want of jurisdiction, unless the value stated in the amended petition be fictitious.

To Cover Punitive Damages.—It is not the practice to allow an amendment increasing the *ad damnum* where it is sought to recover vindictive damages. McGuckin *v.* Sister, 2 Edm. Sel. Cas. (N. Y.) 466.

Notice of Amendment.—An amended petition claiming a larger amount than is demanded in the original is material and should be served upon the defendant and regularly put at issue; and when this is not done it will be presumed that the plaintiff has waived or abandoned it. Clark *v.* Holbrook, 14 La. Ann. 581.

That defendant is entitled to notice of an amendment increasing the *ad damnum*, see also Hittson *v.* Gentry, 2 Tex. Civ. App. 670; Meyer *v.* North River Construction Co., 53 N. Y. Super. Ct. 387.

3. Carlyon *v.* Lennan, 4 Nev. 156; Whitcomb *v.* Straw, 60 N. H. 117; Pierce *v.* Strickland, 2 Story (U. S.) 292; Harvey *v.* Ferguson, 10 Ind. 393, and Brown *v.* Lewis, 10 Ind. 232, where the amount originally claimed was beyond the jurisdiction of the court. The situation was the same in Epperly *v.* Little, 6 Ind. 344, and the amendment was allowed after motion to dismiss for want of jurisdiction. Converse v. Damariscotta Bank, 15 Me. 431; Hart *v.* Waitt, 3 Allen (Mass.) 532; Whitney *v.* Sears, 16 Vt. 587.

In a state court the *ad damnum* may be reduced in order to oust the jurisdiction of the federal courts. Spiers *v.* Halsted, 74 N. Car. 620.

Plaintiff's Purpose Immaterial.—Upon the case being called for trial, it is error to refuse to allow a plaintiff to strike out a claim for damages without regard to the purpose which may influence him. Grass Valley Quartz Min. Co. *v.* Stackhouse, 6 Cal. 413.

Reducing Claim in Writ of Entry.—The court may permit a demandant in a writ of entry or a writ of right to amend his declaration by diminishing the extent of his claim even after a verdict is returned into court and be-

Filling a Blank.—The declaration may be amended by inserting the amount of the plaintiff's claim when the sum was left blank in all cases where the court has jurisdiction of the case.[1]

After Plea in Abatement.—The *ad damnum* in the declaration may be amended to conform to the sum laid in the writ even after plea in abatement for the defect.[2]

c. ON THE TRIAL.—The court may properly allow an amendment upon the trial increasing the *ad damnum.*[3]

To Conform to Proof.—The *ad damnum* may be increased by amendment so as to conform to the proof.[4]

fore it is affirmed. Plummer *v.* Walker, 24 Me. 14.

1. Burleigh *v.* Merrill, 49 N. H. 35; Flanders *v.* Atkinson, 18 N. H. 167; Boddie *v.* Ely, 3 Stew. (Ala.) 182; Eaton *v.* Case, 17 R. I. 429. See also Merrill *v.* Curtis, 57 Me. 152; Stephens *v.* White, 2 Wash. (Va,) 203.

In Eaton *v.* Case, 17 R. I. 429, the court said: "Plaintiff's contention is that the absence of the *ad damnum* was fatal, citing Hoit *v.* Molony, 2 N. H. 322; Deveau *v.* Skidmore, 47 Conn. 19. In both of these cases the defect was in the writ and not in the declaration. It was held that the process did not set forth a demand nor ask for judgment for any sum against the defendant, and hence did not set forth a cause of action within the jurisdiction of the court to which the process was returnable, such jurisdiction being limited by statutory provisions. The ground of those decisions was that, as jurisdiction must appear in the process, there was nothing in court upon which to grant an amendment, and hence it must be dismissed. In the later case of Taylor *v.* Jones, 42 N. H. 25, it was held that the *ad damnum* may be amended after verdict when it is apparent from the declaration that it was left blank, or too small a sum inserted through mistake or inadvertence only. * * * McLellan *v.* Crofton, 6 Me. 307, went further by holding that the *ad damnum* clause in the writ which had been left blank might be amended after verdict by inserting a sufficient sum to cover the verdict. See also Clark *v.* Herring, 5 Binn. (Pa.) 33. In the present case the amendment was granted before the trial, and so the defendant had full opportunity to contest the amount claimed. We think the granting of the amendment was proper." See also Wright *v.* Potomska Mills Corp., 138 Mass. 328; Hook *v.* Turnbull, 6 Call. (Va.) 85.

2. Morton *v.* Smith, 4 T. B. Mon. (Ky.) 313.

3. Johnson *v.* Brown, 57 Barb. (N. Y.) 118; Miaghan *v.* Hartford F. Ins. Co., 24 Hun (N. Y.) 58; Chamberlain *v.* Mensing (S. Car.), 51 Fed. Rep. 511; Austin *v.* Northern Pac. R. Co., 34 Minn. 473.

In *Pennsylvania*, under the act of 1806, the court had power to allow the *ad damnum* to be increased on the trial. Clark *v.* Herring, 5 Binn. (Pa.) 33; Miles *v.* O'Hara, 1 S. & R. (Pa.) 32, before the jury was sworn; Tassey *v.* Church, 4 W. & S. (Pa.) 141.

When Not Allowed.—An amendment at the trial which increases the amount claimed to an amount sufficient to entitle the defendant to a removal of the case, if it had been made at a prior stage, cannot properly be allowed. Balch *v.* Wurzburner (C. Pl.), 29 N. Y. Supp. 62.

During the Argument.—An amendment curing a clerical error in the *ad damnum* clause may be allowed during the argument to the jury and without terms. Borden *v.* Clark, 26 Mich. 410.

But in Brewer *v.* Jacobs, 22 Fed. Rep. 217, it was held reversible error to allow an amendment during the argument so as to cure a defect in the averments relating to damage sustained without at least reopening the case to give the defendant an opportunity to introduce further proof.

In Currie *v.* Natchez, etc., R. Co. 61 Miss. 725, an amendment increasing the *ad damnum* during the argument was held not prejudicial to the defendant where the jury rendered a verdict for a sum less than that declared for originally.

4. Barth *v.* Walther, 4 Duer (N. Y.) 228; Cargain *v.* Everett, 62 Hun (N.

d. AFTER VERDICT OR REFEREE'S REPORT.—Where a verdict is for a sum larger than the *ad damnum*, the difficulty may always be remedied by entering a remittitur;[1] and the *ad damnum* may be amended after verdict or report of a referee when it is apparent that it was left blank, or that too small a sum was inserted through mistake or inadvertence.[2]

Upon Relinquishing the Verdict.—In all actions for the recovery of damages, whether sounding in tort or on contract, the court has no right to amend the declaration or complaint after verdict by increasing the amount of damages for which judgment is demanded without setting aside the verdict, requiring the plaintiff to pay the costs of the trial already had, and granting a new trial to enable the defendant to contest the enlarged demand.[3] This was the old rule,[4] and is adhered to in the practice under the Codes.[5]

After Merits Fully Litigated.—If there has been a full and fair trial on the merits, an amendment increasing the *ad damnum* may be allowed without granting a new trial.[6]

Y.) 620; Davis *v.* Smith, 14 How. Pr. (N. Y. Supreme Ct.) 187; Arrigo *v.* Catalano (Super. Ct.), 27 N. Y. Supp. 995; Frankfurter *v.* Home Ins. Co. (City Ct.) 26 N. Y. Supp. 81; Cain *v.* Cody (Cal., 1892), 29 Pac. Rep. 778.

1. See Taylor *v.* Jones, 42 N. H. 25; Lambert *v.* Blackman, 1 Blackf. (Ind.) 59; Kenyon *v.* Woodward, 16 Mich. 326; Williamson *v.* Canaday, 3 Ired. (N. Car.) 349, and also *post*, REMITTITUR.

2. Taylor *v.* Jones, 42 N. H. 25; Trego *v.* Lewis, 58 Pa. St. 463; Harris *v.* Belden, 48 Vt. 478; Frankfurter *v.* Home Ins. Co. (City Ct.), 26 N. Y. Supp. 81; Arrigo *v.* Catalano (Super. Ct.), 27 N. Y. Supp. 995; Davis *v.* Smith, 14 How. Pr. (N. Y. Supreme Ct.) 187; Cargain *v.* Everett, 62 Hun (N. Y.) 620, 16 N. Y. Supp. 668; Barth *v.* Walther, 4 Duer (N. Y.) 228. See also Tomlinson *v.* Earnshaw, 112 Ill. 311. Cox *v.* Burlington, etc., R. Co., 76 Iowa 478, holds that the amendment ought not to be allowed.

Amendment Exceeding Verdict.—It is not error to allow an amendment increasing the *ad damnum* to an amount exceeding the verdict upon the usual terms of paying costs and consenting to a new trial, where the defendant does not object to its allowance. Elting *v.* Campbell (District of New York), 5 Blatchf. (U. S.) 183.

3. Elting *v.* Campbell (District of New York), 5 Blatchf. (U. S.) 183; Bowman *v.* Earle, 3 Duer (N. Y.) 691; Dox *v.* Dey, 3 Wend. (N. Y.) 356; Curtiss *v.* Lawrence, 17 Johns. (N. Y.) 111; Fish *v.* Dodge, 4 Den. (N. Y.) 311; Girard *v.* Stiles, 4 Yeates (Pa.) 1; Pierce *v.* Northey, 14 Wis. 9; Coulter *v.* American, etc., Express Co., 5 Lans. (N. Y.) 67, where the allowance of an amendment without such terms was held erroneous and reviewable on appeal; Taylor *v.* Jones, 42 N. H. 25; Kenyon *v.* Woodward, 16 Mich. 326. See Stephens *v.* Sweeney, 2 Gilm. (7 Ill.) 375.

4. See the cases cited in the preceding note.

English Cases.—The following are English cases relating to amendments of the *ad damnum* after verdict: Dowkes *v.* Pilfield, Cro. Jac. 297; Pilford's Case, 10 Coke, 115; Chewly *v.* Morris, 2 W. Bl. 1300; Tomlinson *v.* Blacksmith, 7 T. R. 128; Pearse *v.* Cameron, 1 M. & S. 675; Skutt *v.* Woodward, 1 H. Bl. 238; Wilder *v.* Hendy, 2 Str. 1151; Marshall *v.* Riggs, 2 Str. 1162; Ysher *v.* Dansey, 4 M. & S. 94; Perseval *v.* Spencer, Yelv. 45; Green *v.* Rennet, 1 T. R. 782.

5. Corning *v.* Corning, 6 N. Y. 97; Bradley *v.* Shafer (Supreme Ct.), 19 N. Y. Supp. 640; Decker *v.* Parsons, 11 Hun (N. Y.) 295, holding that the same rule applies to an action tried before a judge without a jury by consent; Pharis *v.* Gere, 31 Hun (N. Y.) 443.

6. Barth *v.* Walther, 4 Duer (N. Y.) 228, an amendment to conform to the proofs after report of a referee; Cargain *v.* Everett, 62 Hun (N. Y.) 620; Davis *v.* Smith, 14 How. Pr. (N. Y.

e. AFTER JUDGMENT.—Where a judgment is rendered upon a verdict for an amount exceeding the *ad damnum* in the complaint or declaration, it is erroneous and cannot be validated by amendment[1] without express authority.[2]

11. At What Stage of Proceedings—*a.* BEFORE TRIAL—(1) *In General.*—It is a well-settled rule that it is almost a matter of course to permit parties to amend their pleadings before trial when the amendment will not delay the trial nor work any special hardship to the adverse party.[3] The court may allow an amendment increasing the *ad damnum*,[4] and the plaintiff should always be allowed to strike out a claim for damages regardless of the purpose which may influence him.[5] In some jurisdictions an amendment may be allowed which introduces a new cause of action or a new defense.[6]

After Change of Venue.—Amendments may be allowed by the court to which a cause is removed by a change of venue.[7]

Supreme Ct.) 187; Arrigo *v.* Catalano (Super. Ct.), 27 N. Y. Supp. 995; Frankfurter *v.* Home Ins. Co. (City Ct.), 26 N. Y. Supp. 81. See also Cicotte *v.* Wayne County, 59 Mich. 509; *dictum* in Taylor *v.* Jones, 42 N. H. 25.

1. Kenyon *v.* Woodward, 16 Mich. 326; McLellan *v.* Crofton, 6 Me. 307, holding that it is not a circumstantial error within the *Maine* statute of jeofails; May *v.* State Bank, 9 Ind. 233, to the same point. See, however, Hook *v.* Turnbull, 6 Call (Va.) 85, where it was held that if the damages are omitted from the declaration, as the omission might be amended by the writ, the Court of Appeals will consider the declaration as in fact amended. And in Kennedy *v.* Woods, 3 Bibb (Ky.) 322, the court arrived at the same result where the verdict and judgment exceeded the *ad damnum* in the declaration, but were less than the sum laid in the writ.

Pending Appeal.—A plaintiff cannot amend his petition so as to increase his claim for damages after appeal and while the case is pending in the appellate tribunal. Johnson *v.* Chaplin, 28 Iowa 570.

On Appeals to Intermediate Appellate Courts.—As to amendments increasing the *ad damnum* upon appeals from justice courts to county, circuit, or district courts, see McOmber *v.* Balow, 40 Minn. 388; Cross *v.* Eaton, 48 Mich. 184; Evers *v.* Sager, 28 Mich. 47; Bickett *v.* Garner, 21 Ohio St. 659.

2. By the acts of 1790 and 1824, the Supreme Court of *North Carolina* had authority to make such an amendment. Grist *v.* Hodges, 3 Dev. (N. Car.) 203; State *v.* Broughton, 7 Ired. (N. Car.) 92. See Williamson *v.* Canaday, 3 Ired. (N. Car.) 349.

3. Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317, where the defendant was allowed to amend his answer by setting up the statute of limitations. Benson *v.* McNamee, (Supreme Ct.) 12 N. Y. St. Rep. 503, holding it reversible error to dismiss the complaint without leave to amend; Tannebaum *v.* Marsellus (City Ct.), 52 N. Y. St. Rep. 426, holding that a counterclaim is not an unconscionable defense; Denair *v.* Brooklyn (City Ct.), 5 N. Y. Supp. 835; Balch *v.* Smith, 4 Wash. St. 504; Young *v.* Gay, 41 La. Ann. 758; Pickett *v.* Haynes, 28 La. Ann. 844; McMillan *v.* Dana, 18 Cal. 339; Zimmerman *v.* Amaker, 10 S. Car. 98; Dyer *v.* Brackett, 61 Me. 587; McFadden *v.* Stark, 58 Ark. 7; Greer *v.* Louisville, etc., R. Co. (Ky., 1893), 21 S. W. Rep. 649; Pangborn *v.* Continental Co., 67 Mich. 683. See also Thomas *v.* Com., 8 B. Mon. (Ky.) 371.

The declaration may be amended so as to change the venue. Pain *v.* Parker, 13 Johns. (N. Y.) 329; Fish *v.* Lyon, 1 How. Pr. (N. Y.) 234.

The declaration may be amended to conform to the writ. Fallmer *v.* Steele, 1 Cai. (N. Y.) 22.

4. See *supra*, III, 10, *b*.

5. Grass Valley Quartz Min. Co. *v.* Stackhouse, 6 Cal. 413.

6. See *supra*, III, 6, *a*, note.

7. Hughes *v.* McDivit, 102 Mo. 77.

But the refusal to allow an amendment will not be reviewed except for a

After Plea in Abatement.—If the matter of a proposed amendment to a complaint is proper, the pendency of a plea in abatement, the legal effect of which the amendment may obviate, is rather a reason for than an objection to its allowance.[1] Thus an amendment may be allowed after plea in abatement for a defect in bringing suit in the name of an infant without a next friend,[2] or because the declaration does not conform to the writ,[3] or for want of parties,[4] or for coverture of the plaintiff,[5] or for misnomer,[6] or misjoinder of defendants.[7]

Statutes sometimes provide for amendment after the proceeding has been actually abated.[8]

(2) *After Demurrer*—**The General Rule.**—By the ancient practice no amendment was permitted after demurrer without the consent of the adverse party, upon the principle that if a party chooses to rest his defense or his case upon a point of law, raised upon the record, he must stand or fall upon the point so raised.[9]

clear abuse of discretion. Shelby County *v.* Castetter, 7 Ind. App. 309.

1. Foster *v.* Napier, 73 Ala. 595.

In Mohr *v.* Sherman, 25 Ark. 7, the court said: "This court, in the case of Anthony *v.* Beebe, 7 Ark. 447, distinctly ruled that the motion to amend must be made in apt time, and if not made before the defect is pointed out by a plea in abatement for that cause it cannot be made afterwards so as to defeat the plea; but this decision has in effect been overruled by the case of McLarren *v.* Thurmand, 8 Ark. 314, and Anthony *v.* Humphries, 11 Ark. 664; and directly by the case of Mitchell *v.* Conley, 13 Ark. 419; and the question as to the amendment is left to the discretion of the court, as it was before the case of Anthony *v.* Beebe, 7 Ark. 447." See also Hetten *v.* Lane, 43 Tex. 279.

2. The name of a next friend was inserted by amendment. Blood *v.* Harrington, 8 Pick. (Mass.) 552.

3. Morton *v.* Smith, 4 T. B. Mon. (Ky.) 313, where the variance was in the amount of damages claimed; Mohr *v.* Sherman, 25 Ark. 7; Gilpin *v.* Ebert, 2 Colo. 23.

4. Powell *v.* Myers, 1 Barb. (N. Y.) 427.

5. Jacobs *v.* Cunningham, 32 Tex. 774, where the plaintiff was allowed to amend by averring her husband's insanity as a reason for not joining him.

6. The misnomer of the defendant was pleaded in abatement, and the plaintiff was allowed to amend after demurrer to the plea and then to withdraw his demurrer and take issue on the plea. Heslep *v.* Peters, 4 Ill. 45.

7. Beall *v.* Territory, 1 New Mex. 507.

8. **In Connecticut**, Gen. Stat., 1876, p. 420, § 12, provides that if any plea in abatement of any process be ruled in favor of the defendant, the plaintiff may amend the defect on paying the defendant his costs up to that time. It was held that this statute, in connection with the act of 1875 providing for adding new parties, authorized an amendment by citing in new defendants after the writ had been abated, and where there was no cause of action against the original defendant. Hilton *v.* Osgood, 49 Conn. 110.

9. 1 Tidd Pr. (4th Am. ed.) 709; Bramah *v.* Roberts, 1 Bing. N. Cas. 481, 27 E. C. L. 466. See also Wood *v.* Anderson, 25 Pa. St. 407.

After Judgment on General Demurrer.—After judgment against the plaintiff on general demurrer to his declaration he could not have leave to amend. Chalk *v.* McAlily, 10 Rich. (S. Car.) 92; Moore *v.* Burbage, 2 McMull. (S. Car.) 168; Bagley *v.* Johnston, 4 Rich. (S. Car.) 22. See also McAlister *v.* Clark, 33 Conn. 253; Hart *v.* Bowie, 34 La. Ann. 323. Otherwise after joinder in demurrer but before judgment. Goodwin *v.* Hannah, 5 Strobh. (S. Car.) 157; Mobley *v.* Mobley, 7 Rich. (S. Car.) 431.

After a demurrer to a plea for a bad conclusion was sustained the defendant was denied leave to amend. Fleming *v.* Howard, 1 Brev. (S. Car.) 465.

Where a plea was filed by a wrong Christian name of the defendant, and

The strictness of the rule was gradually relaxed, first by requiring that the amendment should be made only while the proceedings were in paper before the argument of the demurrer,[1] next before the opinion of the court had been pronounced,[2] and at length before the judgment had been rendered;[3] and in modern practice amendments may be made even after judgment upon demurrer whenever the substantial ends of justice require it.[4]

the plaintiff demurred generally to it as the defendant's plea, it was held that the plaintiff had waived any exception for that cause and that the defendant was entitled to amend the plea. Hutchinson *v.* Brock, 11 Mass. 119.

After a general demurrer to a declaration has been sustained and affirmed on appeal without condition or direction the declaration is not amendable. Central R., etc., Co. *v.* Paterson, 87 Ga. 646, *overruling*, *pro tanto*, King *v.* King, 45 Ga. 195.

Under *Maine* Rev. Stat., c. 82, § 23, when exceptions are taken to the overruling of a general demurrer the same must be passed upon by the law court before an amendment to the declaration can be allowed at *nisi prius*. Shorey *v.* Chandler (Me., 1888), 15 Atl. Rep. 24.

After Judgment on Special Demurrer.—After judgment sustaining a special demurrer an amendment was allowed on payment of costs although an amendment had once before been granted. Hallock *v.* Robinson, 2 Cai. (N. Y.) 233. See also Murphy *v.* Lawrence, 2 Ga. 257; Davis *v.* Evans, 2 Murph. (N. Car.) 202.

1. 1 Tidd Pr. (4th Am. ed.) 709.

In Wood *v.* Wilmington Conference Academy, 5 Houst. (Del.) 513; Randel *v.* Canal Co., 1 Harr. (Del.) 151; and Easton *v.* Jones, 1 Harr. (Del.) 433, n. *a*, leave to amend after argument on general demurrer was refused.

In Walker *v.* Maxwell, 1 Mass. 104, defendant had leave to amend his plea, after argument of a demurrer, upon payment of the costs.

After Joinder in Demurrer.—In Lanning *v.* Shute, 5 N. J. L. 778, the plaintiff was allowed to amend his declaration after joinder in demurrer.

In Perkins *v.* Burbank, 2 Mass. 81, the court would not allow an amendment or repleader after joinder in demurrer when the amended or new plea did not go to the merits. See also Barker *v.* Glascow, Tapp. (Ohio) 230.

In Tennessee it has been held that where after demurrer to a plea a new plea is drawn out in proper form, containing a good defense, and the truth of it is verified by affidavit, it would be error not to permit such plea to be filed, provided the motion was made before the demurrer came on for argument. Dockery *v.* Miller, 9 Humph. (Tenn.) 731.

But that, on the other hand, if the amended pleading is not offered so that the court can see that it would, as amended, be a good defense, it is not error to refuse leave to file it. Rainey *v.* Sanders, 4 Humph. (Tenn.) 447.

2. In Harkins *v.* Edwards, 1 Iowa 296, it was held reversible error to refuse leave to plaintiff to amend his petition after demurrer, but before any decision thereon. See also Bell *v.* Byerson, 11 Iowa 233.

3. In Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336, it was declared to be the usual course, when the opinion of the court is in favor of the defendant on a demurrer to the whole declaration, to allow the plaintiff to withdraw his joinder in demurrer and amend his declaration. See also Harp *v.* Bull, 3 How. Pr. (N. Y.) 45; Morris *v.* Gentry, 89 N. Car. 248.

4. Greer *v.* Covington (Ky., 1885, 2 S. W. Rep. 323, and Terry *v.* Bright, 4 Md. 430, where the declaration was amended after demurrer sustained. See also Cayce *v.* Ragsdale, 17 Mo. 32; Davis *v.* Burns, 1 Mo. 265; Hale *v.* Lawrence, 22 N. J. L. 72, holding that after a demurrer to a plea was sustained the defendant might amend his plea or plead anew.

Jones *v.* Ritter, 56 Ala. 270, holds that while he may properly be allowed to amend, he cannot claim the right to file an entirely new plea.

Plaintiff was allowed to amend in Bean *v.* Ayers, 69 Me. 122; McGee *v.* McCann, 69 Me. 79; Frye *v.* Atlantic,

But a party cannot be compelled to amend after a demurrer to his pleading is sustained.[1]

etc., R. Co., 47 Me. 523; Hewett *v.* Thomas, 37 Tex. 520; Hollis *v.* Border, 10 Tex. 360; Teetshorn *v.* Hull, 30 Wis. 162; Johnson *v.* Finch, 93 N. Car. 205; Netherton *v.* Candler, 78 N. Car. 88; Wilbur *v.* Abbot, 6 Fed. Rep. 817; Lake Bigler Road Co. *v.* Bedford, 3 Nev. 399. See Maine Cent. Inst. *v.* Haskell, 71 Me. 487. Not allowed in Burbank *v.* Harris, 32 La. Ann. 395; Stephens *v.* Myers, 12 Pa. St. 302.

In Lansing *v.* Birge, 3 Ill. 375, leave to amend was held to be discretionary, and a refusal not a subject of error. But in Chicago Empire F. Ins. Co. *v.* Real Estate Trust Co., 1 Ill. App. 391, it was said to be now the legal right of the party.

In Whitfield *v.* Wooldridge, 23 Miss. 183, a denial of leave to amend a declaration after demurrer sustained was held to be reversible error.

After Demurrer for Misjoinder.—After a demurrer to a declaration has been sustained on account of a misjoinder of counts the court may grant an amendment on terms. Wilkinson *v.* Moseley, 30 Ala. 562. On that point the English authorities were not entirely in harmony. See Jennings *v.* Newman, 4 T. R. 347. Nor the American decisions. Cooper *v.* Bissell, 16 Johns. (N. Y.) 146; Pell *v.* Lovett, 19 Wend. (N. Y.) 546, 22 Wend. (N. Y.) 369; Governor *v.* Evans, 1 Ark. 349.

After a demurrer sustained for a misjoinder of parties the plaintiff may amend. Butcher *v.* Carleton, 11 Iowa 47.

Misjoinder of Defendants.—A complaint may be amended after sustaining a demurrer for a misjoinder of defendants by striking out the name of one of them. Pool *v.* Devers, 30 Ala. 672.

Defective Citizenship.—After demurrer sustained for want of an averment of citizenship of the parties, it is the common practice to allow the plaintiff to amend. Fisher *v.* Rutherford, 1 Bald. (U. S.) 188.

Amending Plea Puis Darrein Continuance.—Where a plea *puis darrein continuance* is adjudged bad on demurrer, the court may allow a repleader on terms. Field *v.* Cappers, 81 Me. 36; Augusta *v.* Moulton, 75 Me. 551. Or the plea may be withdrawn after the plaintiff has demurred to it. Rixford *v.* Brown, 10 Pick. (Mass.) 30.

Amending Plea of Usury.—A plea setting up usury may be amended after it has been held bad on demurrer to the replication; but a plea setting up a new defense of usury would not be allowed. Utica Ins. Co. *v.* Scott, 6 Cow. (N. Y.) 606.

Amending Declaration in Real Action.—In a real action, the declaration containing a description of the demanded premises adjudged insufficient upon demurrer may be amended by perfecting the description. Bird *v.* Decker, 64 Me. 550.

After Verdict on Issues of Fact.—Where judgment is given against the plaintiff on demurrer after verdict in his favor, leave to amend will be given on his relinquishing the verdict and paying all costs subsequent to the joining of the issue; but where the judgment is against the defendant after verdict for the plaintiff, leave to amend is not granted to the defendant. Fidler *v.* Cooper, 19 Wend. (N. Y.) 285.

Amendment of Plea in Abatement.—After demurrer filed thereto, a plea in abatement cannot be amended. Brown *v.* Nourse, 55 Me. 230.

Leave to Withdraw Demurrer.—A party may sometimes have leave to withdraw his demurrer after it has been argued and to plead or reply *de novo* in order to let in a trial on the merits; but the granting or withholding leave is altogether discretionary. 1 Tidd Pr. (4th Am. ed.) 710. See Blackmore *v.* Phill, 7 Yerg. (Tenn.) 452; Mandeville *v.* Wilson, 5 Cranch (U. S.) 15.

Technical Defect in Replication.—In Bowles *v.* Elmore, 7 Gratt. (Va.) 385, a technical defect in a replication was amended after demurrer sustained.

In Massachusetts the allowance of an amendment to the declaration after demurrer sustained is discretionary and may be denied. Barlow *v.* Nelson, 157 Mass. 395; or allowed, Webber *v.* Davis, 5 Allen (Mass.) 393.

1. Riggs *v.* Parsons, 29 W. Va. 522.

Failure to Amend.—A party who fails to amend a defective pleading after demurrer sustained can have no relief in an appellate court. Pitts *v.* Ennis,

Under Code Provisions.—Many of the Codes contain express provisions touching the allowance of amendments or of permission to plead anew after the decision on demurrer.[1]

1 Tex. 604; Graham *v.* Vining, 1 Tex. 669.

After Affirmance on Appeal.—Where a declaration is adjudged bad on demurrer and affirmed in the supreme court, the court below will not be directed to permit the joinder in demurrer to be withdrawn and the declaration amended. Glenn *v.* Noble, 1 Blackf. (Ind.) 104.

1. **New York.**—The New York Code of Pro., § 497, provides that upon the decision of a demurrer either at a general or special term or in the Court of Appeals, the court may in its discretion allow the party in fault to plead anew or amend upon such terms as are just. Where it is evident that no amendment can make the complaint good, leave will be refused. Lowry *v.* Inman, 37 How. Pr. (N. Y. Super. Ct.) 286; Snow *v.* New York Fourth Nat. Bank, 7 Rob. (N. Y.) 479.

On overruling a demurrer to a complaint as frivolous, leave to answer will not be given without an affidavit of merits. Appleby *v.* Elkins, 2 Sandf. (N. Y.) 673.

As to the granting of leave to answer by the Court of Appeals, see Whiting *v.* New York, 37 N. Y. 600; Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648.

On affirming a judgment sustaining a demurrer to the complaint the Court of Appeals granted leave to amend where it appeared that otherwise the claim would be barred by the statute of limitations. Thatcher *v.* Candee, 3 Keyes (N. Y.) 157.

Upon leave to amend after demurrer to part of an answer, the defendant can amend only the portion to which the demurrer referred. Fielden *v.* Carelli, 26 How. Pr. (N. Y. Supreme Ct.) 173. See Spencer *v.* Tooker, 21 How. Pr. (N. Y. Supreme Ct.) 333; Decker *v.* Kitchen, 21 Hun (N. Y.) 332.

If, after a demurrer for defect of parties, the plaintiff amends by adding the necessary parties but does not amend his summons, the amended complaint may be struck out on motion. Follower *v.* Laughlin, 12 Abb. Pr. (N. Y. Supreme Ct.) 105.

California.—California Code Civ. Pro. § 472, provides that when a demurrer to the complaint is overruled and there is no answer filed, the court may upon such terms as may be just allow an answer to be filed. The same section allows an amendment of a pleading of course and without costs after demurrer and before the trial of the issue of law thereon.

It is error to refuse plaintiff leave to amend before a decision on defendant's demurrer. Lord *v.* Hopkins, 30 Cal. 76.

The allowance of an amendment to the complaint after sustaining a demurrer thereto is discretionary. Buckley *v.* Howe, 86 Cal. 596. But leave will usually be granted unless the complaint is so defective as to be beyond the reach of amendment. Lord *v.* Hopkins, 30 Cal. 76; Gallagher *v.* Delaney, 10 Cal. 410. But the plaintiff must move for leave. Smith *v.* Yreka Water Co., 14 Cal. 201. See also Borland *v.* Thornton, 12 Cal. 440.

Whenever a demurrer to a complaint is sustained, on the ground that it does not state a cause of action, without leave to amend, the defendant is entitled to a final judgment in his favor. Mora *v.* Le Roy, 58 Cal. 8. And the court may in its discretion direct judgment for the plaintiff on overruling defendant's demurrer where no answer is on file. Seale *v.* McLaughlin, 28 Cal. 672; Barron *v.* Deleval, 58 Cal. 95.

After judgment sustaining a demurrer to an answer it is discretionary with the court to grant or refuse leave to amend. Gillan *v.* Hutchinson, 16 Cal. 154.

Virginia.—Under the Virginia Code of 1887, § 3384, providing for amendments at the trial to cure a variance, it is proper to allow a declaration to which a demurrer has been sustained to be amended by striking out immaterial words. Alexander, etc., R. Co. *v.* Herndon, 87 Va. 193.

Nebraska.—Under the Nebraska Code, where a demurrer to a petition is, sustained and the petition is susceptible of amendment, it is the duty of the court to permit the amendment upon terms. Berrer *v.* Moorhead, 22 Neb. 687.

It is not error in an order sustaining a demurrer to omit to provide for leave to amend if the party whose pleading was demurred to does not ask for such leave or for any order on the subject.[1]

Amendment of Demurrer.—The demurrer itself may be amended like any other pleading.[2]

Upon sustaining a demurrer for nonjoinder of parties defendant, it is error to dismiss the action without giving the plaintiff an opportunity to bring in the absent defendant. Alexander *v.* Thacker, 30 Neb. 614.

South Carolina.—Under the old system plaintiff could not amend after a general demurrer to the complaint was sustained. Bagley *v.* Johnston, 4 Rich. (S. Car.) 22; Gaillard *v.* Trenholm, 5 Rich. (S. Car.) 356 and notes. See Mobley *v.* Mobley, 7 Rich. (S. Car.) 431. But it is now a matter of discretion where the complaint is simply defective, and plaintiff may have leave to amend. Miller *v.* Stark, 29 S. Car. 325; Bischoff *v.* Blease, 20 S. Car. 460; Tompkins *v.* Augusta, etc., R. Co., 37 S. Car. 382; Staltings *v.* Barrett, 26 S. Car. 474. But he cannot introduce an entirely new cause of action. Trumbo *v.* Finley, 18 S. Car. 305.

Missouri. — Rev. Stat. Missouri, § 3540, provides that where a pleading has been twice amended and adjudged insufficient in whole or in part, or the whole or some part thereof is stricken out on motion, the party filing it shall pay costs, and no further pleading shall be filed, but judgment shall be rendered.

It is not sufficient that the pleading has been held bad upon objection to the introduction of evidence. Spurlock *v.* Missouri Pac. R. Co., 93 Mo. 530; Spurlock *v.* Missouri Pac. R. Co., 93 Mo. 13, *distinguishing* Beardslee *v.* Morgner, 73 Mo. 22.

Montana.—Where a demurrer to a complaint is overruled, it is error for the court, on subsequently concluding that the ruling on the demurrer was wrong, to exclude evidence in support of the complaint unless the plaintiff is first given the opportunity to amend. Creek *v.* McManus (Mont., 1893), 32 Pac. Rep. 675.

Alabama.—The statute expressly allows an amendment after demurrer sustained. Stewart *v.* Hargrove, 23 Ala. 429. See Brock *v.* South, etc., R. Co., 65 Ala. 79.

Utah.—When a demurrer to a complaint is sustained and a general privilege is given to amend, new parties cannot be substituted by way of amendment; they must be brought in by an order of the court amending the complaint in this respect. Salt Lake County *v.* Golding, 2 Utah 319.

Colorado.—Colorado Code, § 74, provides that after a demurrer decided the court may proceed to final judgment, "unless the unsuccessful party shall plead over or amend upon such terms as shall be just."

A motion to dismiss for a demurrable jurisdictional defect is equivalent to a demurrer, and the plaintiff may be allowed to amend on the trial. Southwestern Land Co. *v.* Hickory Jackson Ditch Co., 18 Colo. 489.

In Wyoming, where a demurrer is sustained or overruled it is entirely discretionary with the court whether either party shall be permitted to amend. Bonnifield *v.* Price, 1 Wyoming 223.

Indiana. — Indiana Code, § 53 (2 G. & H. 81), which provides that "if the court sustain a demurrer, the plaintiff may amend by payment of the costs occasioned thereby," seems to be mandatory, and in the absence of sham or frivolous pleading the party must be allowed to amend. Ewing *v.* Patterson, 35 Ind. 326.

Iowa.—A party may be allowed to amend after decision on demurrer. Hintrager *v.* Richter, 85 Iowa 222. See Bell *v.* Byerson, 11 Iowa 233. But if the amendment is the same in substance as the original it will be struck off the files on motion. Waukon *v.* Strouse, 74 Iowa 547.

1. Smith *v.* Taylor, 82 Cal. 533; People *v.* Jackson, 25 Cal. 630; Buckley *v.* Hine, 86 Cal. 596; Devoss *v.* Gray, 22 Ohio St. 159; Lander *v.* Hall, 69 Wis. 326; Brock *v.* South, etc., R. Co., 65 Ala. 79.

2. Morrison *v.* Miller, 46 Iowa 84; Poweshiek County *v.* Cass County, 63 Iowa 244. But it is discretionary. Citizens' State Bank *v.* Adams, 91 Ind. 280.

(3) *After Issue Joined.*—The fact that the issues have been fully made up does not restrict the discretionary power of the court to allow amendments.[1] But leave to amend at that stage may be

1. **Changing Issue.**—Whether a defendant shall be permitted to file an amended answer which changes the issues already made is a matter for the sound discretion of the court. Harney *v.* Corcoran, 60 Cal. 314; Stuart *v.* Lander, 16 Cal. 372; Page *v.* Williams, 54 Cal. 562; Spanagel *v.* Reay, 47 Cal. 608; Finch *v.* Pindon, 19 Abb. N. Cas. (N. Y. Super. Ct.) 96. Subject to review for abuse. Tucker *v.* Liles, 3 La. 297.

Withdrawal of Answer.—A defendant may be allowed to withdraw his answer and file a general demurrer. Hedges *v.* Roach, 16 Neb. 673.

Notice under General Issue. — It is proper to allow an amendment of the notice attached to a plea of general issue. Beecher *v.* Circuit Judges, 70 Mich. 363; Pangborn *v.* Continental Ins. Co., 67 Mich. 683; Browne *v.* Moore, 32 Mich. 254.

Notice Attached to Plea.—In Frost *v.* Whitcomb, 2 How. Pr. (N. Y.) 194, a defendant was allowed to add to his pleas a notice of set-off and recoupment after issue joined and the case had been twice noticed for hearing.

Perfecting Issue. — After the court has ordered the trial of a case, but before the trial has begun, it is not error to allow an answer to be amended so as to put in issue an averment of the petition the denial of which had been omitted by an oversight. Filbin *v.* Chesapeake, etc., R. Co., 91 Ky. 444.

Additional Pleas.—Leave should be given to a defendant who has pleaded the general issue to file additional pleas where they are necessary to a proper defense and he has been guilty of no culpable negligence in making his application. Misch *v.* McAlpine, 78 Ill. 507; Hagerstown Steam Engine, etc., Co. *v.* Grizzard, 86 Ga. 574; Williams *v.* Cooper, 1 Hill (N. Y.) 637, where defendant in an action for slander added a plea of justification to his plea of the general issue.

Additional Paragraph to Answer. — In Koons *v.* Price, 40 Ind. 164, it was held reversible error not to allow the defendant to file additional paragraphs to his answer before trial, where it was shown by affidavit to be necessary to his defense.

Annexing Affidavit. — In Loving *v.* Fairchild, 1 McLean (U. S.) 333, the defendant was permitted to amend his plea of non-assumpsit by annexing an affidavit denying execution of the instrument sued on as the statute required.

Adding Pleas to General Issue.—In *Georgia*, the general issue being filed at the first term, it may be amended by building on it any other plea at any stage of the case. Simon *v.* Myers, 68 Ga. 74; Howard *v.* Simpkins, 70 Ga. 322.

Adding Statute of Limitations. — Where the statute of limitations was pleaded, leave was given to add a count stating a promise by the administrator. Saltar *v.* Saltar, 6 N. J. L. 405.

Averment of Request.—In Butler *v.* King, 10 Cal. 342, an action for goods furnished, it was held reversible error not to allow the complaint to be amended before trial by alleging a request.

After Overruling Exceptions. — It is a proper exercise of discretion to permit the plaintiff to amend after overruling exceptions to his petition. The court has a right to doubt the correctness of its decision. Hutchins *v.* Wade, 20 Tex. 7.

Absolute Right. — In *Pennsylvania*, under the act of 1806 a plaintiff had an absolute right to amend before trial provided the adverse party was not taken by surprise. Golding *v.* Clayton, 1 Browne (Pa.) 175.

Changing Plaintiffs. — The plaintiff will not be allowed to amend his declaration substantially changing the plaintiffs after issue joined and the case has been noticed for trial. Coffing *v.* Tripp, 1 How. Pr. (N. Y.) 115.

Laches of Applicant.—In Brusie *v.* Peck (Supreme Ct.), 6 N. Y. St. Rep. 709, leave to amend the complaint ten years after joinder of issue was denied. See *supra*, III, 3, *h*.

In Hurlbut *v.* Interior Conduit, etc., Co. (Super. Ct.), 28 N. Y. Supp. 1007, leave to amend an answer was denied on the ground of laches, which was

denied, and a party who assails the refusal of the trial court to open the issues in a case to admit the filing of additional pleadings must affirmatively show an abuse of discretion.[1]

(4) *Before Announcing Ready for Trial.*—In *Texas* the statute provides that the pleadings may be amended by leave of the court before the parties announce ready for trial, and not thereafter.[2] The statute is mandatory so far as to give the parties an absolute right to amend within the time prescribed,[3] and prohibitory in respect of amendments during the trial.[4] And a party may be allowed to withdraw his announcement of ready for trial for the purpose of moving to amend.[5] And an announcement

also a ground of refusing amendments. So in Cavanaugh *v.* Britt, 90 Ky. 273; Fisher *v.* Greene, 95 Ill. 94; Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193; Dow *v.* Blake, 148 Ill. 76.

Facts Occurring after Issue Joined.—And amendments after issue, setting up facts which occurred after joinder of issue, will not be allowed. Morein *v.* Solomons, 7 Rich. (S. Car.) 97.

1. Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193; Bever *v.* North, 107 Ind. 544; Citizens' State Bank *v.* Adams, 91 Ind. 280. *Compare* Dewey *v.* State, 91 Ind. 173; Darrell *v.* Hilligoss, etc., Gravel Road Co., 90 Ind. 264; Gaff *v.* Hutchinson, 38 Ind. 341; Commercial Nat. Bank *v.* Gibson, 37 Neb. 750.

When the complaint is based upon a written lease and an assignment thereof, the former containing a forfeiture clause binding upon all parties, it is not error, when the case is about to be reached for trial, to refuse to permit an amended complaint to be filed by which the written instrument is sought to be set aside or reformed, so as to relieve plaintiff entirely from the effects of the forfeiture clause. Patrick *v.* Crowe, 15 Colo. 543.

In an action on a note providing for attorney's fees, but not stating any amount, the refusal of leave to amend the complaint so as to claim such fees upon the eve of the trial is not an abuse of discretion, "although leave is usually granted." Lindley *v.* Sullivan, 133 Ind. 588.

2. Texas Rev. Stat., art. 1192, with a proviso that no amendment shall prevent the suit from being tried at that term unless the court is satisfied that such amendment operates as a surprise to the opposite party.

What Constitutes Announcement.—Asking for judgment by default is in fact announcing ready for trial, and it is error to allow plaintiff to amend, after taking such a judgment, without first having it set aside. Portwood *v.* Wilburn, 33 Tex. 713.

3. Boren *v.* Billington, 82 Tex. 137; Metzger *v.* Wendler, 35 Tex. 367. See also Whitehead *v.* Foley, 28 Tex. 1; Contreras *v.* Haynes, 61 Tex. 103. *Contra*, Simpson *v.* Foster, 46 Tex. 618; Tulane *v.* McKee, 10 Tex. 335.

4. Love *v.* McIntyre, 3 Tex. 9; Petty *v.* Lang, 81 Tex. 238; Spence *v.* Onstott, 3 Tex. 147. See Miller *v.* Sturm, 36 Tex. 291; Collins *v.* Box, 40 Tex. 190; Trotti *v.* Hobby, 42 Tex. 349.

A petition cannot be amended to conform to the proofs. Missouri Pac. R. Co. *v.* Howe (Tex. App., 1891), 15 S. W. Rep. 198.

Other cases intimate that this part of the statute is merely directory and does not deprive the court of the power to allow amendments at a subsequent stage, and even on the trial, if the ends of justice will be promoted thereby. Whitehead *v.* Foley, 28 Tex. 1; Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122; Texarkana, etc., R. Co. *v.* Goldberg (Tex., 1887), 5 S. W. Rep. 824. But the refusal to allow an amendment at that stage is not error. Burleson *v.* Hancock, 28 Tex. 81; Heflin *v.* Burns, 70 Tex. 347; Harris *v.* Spence, 70 Tex. 616; Davis *v.* Campbell, 35 Tex. 779, where defendant was denied leave to amend his plea in abatement after announcing ready for trial. *Compare* Phillips *v.* Patillo, 18 Tex. 518.

5. Whitehead *v.* Foley, 28 Tex. 1; Foster *v.* Smith, 66 Tex. 680.

The discretion of the court in permitting defendant to withdraw his announcement and file special exceptions to the petition will not be reviewed

made before issues of law have been disposed of is made subject to the right to amend thereafter.[1]

(5) *On the Eve of Trial.*—Where amendments are allowed on the eve of the trial and the adverse party does not ask for further time, it will be presumed that he was not prejudiced.[2]

b. ON THE TRIAL—(1) *In General*—**Formal Errors.**—Amendments to correct mere clerical errors or formal defects are allowed almost as of course.[3]

To Obviate a Variance or Conform to Proof.—Amendments to obviate an objection to the introduction of evidence,[4] or to conform the pleadings to the facts proved, may be allowed.[5]

Making a New Cause of Action.—But amendments upon the trial intro-

unless for manifest abuse. Obert *v.* Landa, 59 Tex. 475.

1. De Witt *v.* Jones, 17 Tex. 620; Croft *v.* Rains, 10 Tex. 520; Jennings *v.* Moss, 4 Tex. 452.

After Exceptions Sustained.—After exceptions are sustained the right to amend extends only to the defect to be cured, although it is within the discretion of the court to allow an amendment of other defects. Glasscock *v.* Hamilton, 62 Tex. 143; Ann Berta Lodge *v.* Leverton, 42 Tex. 18; Hays *v.* Houston, etc., R. Co., 46 Tex. 272.

2. Union Pac. R. Co. *v.* Broderick, 30 Neb. 739; Richardson *v.* Wallace, 39 S. Car. 216.

On the other hand, it is not an abuse of discretion to refuse to allow additional pleas to be filed just before trial, where a long time has elapsed after the issues were made up, Fisher *v.* Greene, 95 Ill. 94; or where the case is afterwards tried as if all the matters set forth in the proposed amendment were pleaded, Shadburne *v.* Daly, 76 Cal. 355. See also Howard *v.* McKowen, 2 Browne (Pa.) 150.

In *Louisiana*, by rule of court all amendments must be filed "previous to the time when the case is set for trial." Duval *v.* Kellam, 1 Rob. (La.) 58; Laudry *v.* Gamet, 1 Rob. (La.) 362.

An application comes too late on the day the cause is set for trial. Chalmers *v.* Stow, 3 Martin N. S. (La.) 307.

3. Hitchcock *v.* Merrick, 15 Wis. 522; Stroebe *v.* Fehl, 22 Wis. 337; Pellage *v.* Pellage, 32 Wis. 136; Monaghan *v.* School Dist. No. 1, 38 Wis. 100; Winn *v.* Peckham, 42 Wis. 493; Hall *v.* Rice, 64 Cal. 443; Burch *v.* Taylor, 32 Ala. 26; Hartford City Natural, etc., Gas Co. *v.* Love, 125 Ind. 275; Reed *v.* Cheney, 111 Ind. 387; Green *v.* Jackson, 15 Me. 136; Brown *v.* McHugh, 35 Mich. 50; Sutton *v.* Van Akin, 51 Mich. 463; Ludeman *v.* Hirth, 96 Mich. 17; Hulbert *v.* Brackett, 8 Wash. 438; Havana Bank *v.* Magee, 20 N. Y. 353; Hagins *v.* De Hart, 12 How. Pr. (N. Y. Supreme Ct.) 322; Smith *v.* Nash, 5 La. Ann. 575.

In Chandos *v.* Edwards, 86 Wis. 493, it was held reversible error to refuse leave to amend the complaint so as to correct a "mere slip of the pen."

Technical Defect.—Where the defendant in replevin was defeated on the trial for a technical defect in his avowry, he was allowed to amend on payment of costs. Wright *v.* Williams, 5 Cow. (N. Y.) 501.

Striking out Superfluous Party.—After the evidence closed and argument concluded, the plaintiff was permitted to strike out the names of defendants against whom a judgment would have been a nullity. Trees *v.* Eakin, 9 Ind. 554.

Reduction of Demand.—A plaintiff should be allowed to reduce his claim on the trial, Dougherty *v.* Purdy, 18 Ill. 206; Towle *v.* Blake, 38 Me. 528. See also Hall *v.* Briggs, 18 Pick. (Mass.) 503; but not so as to deprive the defendant of the benefit of credits. Dodge *v.* Tileston, 12 Pick. (Mass.) 328.

The *Tennessee* Code, sec. 2869, permits a change "in the form of action" upon terms as to continuances, etc., and this was held to imply that it could be allowed only before trial, Smith *v.* Large, 1 Heisk. (Tenn.) 5.

4. See *supra*, III, 9, *a*.

5. See *supra*, III, 9, *b*.

ducing an entirely new cause of action are usually held to exceed the power of the court.[1]

Liberally Allowed.—In some jurisdictions it is the declared policy of the court always to allow amendments of the pleadings on the trial upon just terms when they are found to be so defective that the real subject of dispute cannot otherwise be determined.[2] And the exercise of discretion by the trial court is rarely disturbed where the application to amend is granted.[3]

1. See *supra*, III, 6, *a*.

In *New York* "the only limitation upon the power of the court to amend at the trial is that a new cause of action shall not be substituted for the old one." Richmond *v.* Second Ave. R. Co. (Super. Ct.), 29 N. Y. Supp. 588.

Changing Theory of Case.—After all the evidence is in, the court may refuse to allow an amendment of the complaint which involves an entire change in the theory of the plaintiff's case. Lewark *v.* Carter, 117 Ind. 206.

2. Stringer *v.* Davis, 30 Cal. 318, where a denial of leave to amend was held reversible error; Walsh *v.* McKeen, 75 Cal. 519; Link *v.* Jarvis (Cal., 1893), 33 Pac. Rep. 206; Miller *v.* Metzger, 16 Ill. 390; Swift *v.* Mulkey, 14 Oregon 59. See also Wright *v.* Bacheller, 16 Kan. 259; Robinson *v.* Darden, 50 Ala. 71; Pride *v.* Wormwood, 27 Iowa 257.

In Tennessee, a refusal to allow new pleas to be filed on the trial will not be disturbed unless in an extraordinary case. Clark *v.* Thomas, 4 Heisk. (Tenn.) 419.

So in Louisiana, Dabbs *v.* Hemken, 3 Rob. (La.) 123.

3. *South Carolina.*—Suber *v.* Chandler, 28 S. Car. 382.

Colorado.—Cooper *v.* McKeen, 11 Colo. 41.

California.—Coudrough *v.* Adams, 70 Cal. 374, where defendant was permitted to amend his answer at the close of the trial by setting up the pendency of another action; McPherson *v.* Weston, 85 Cal. 90; Robinson *v.* Smith, 14 Cal. 254; Beronio *v.* Southern Pac. R. Co. 86 Cal. 415; Irwin *v.* McDowell (Cal., 1893), 34 Pac. Rep. 708; Riverside Land, etc., Co. *v.* Jensen, 73 Cal. 550; Gavitt *v.* Doub, 23 Cal. 79.

Michigan.—Lester *v.* Thompson, 91 Mich. 245; Mead *v.* Glidden, 79 Mich. 209.

Iowa.—Aultman *v.* Shelton (Iowa, 1894), 57 N. W. Rep. 857; Eslich *v.* Mason City, etc., R. Co., 75 Iowa 443; Hall *v.* Chicago, etc., R. Co. (Iowa, 1892), 51 N. W. Rep. 150.

Kansas.—Leavenworth First Nat. Bank *v.* Tappan, 6 Kan. 456.

Wisconsin.—Bonner *v.* Home Ins. Co., 13 Wis. 677; Kretser *v.* Cary, 52 Wis. 374.

Massachusetts.—Harrington *v.* Harrington, 107 Mass. 329.

Missouri.—State *v.* Sandusky, 46 Mo. 377.

Indiana.—Burns *v.* Fox, 113 Ind. 205; Judd *v.* Small, 107 Ind. 398; Grand Rapids, etc., R. Co. *v.* Ellison (Ind., 1888), 18 N. E. Rep. 507; Martinsville *v.* Shirley, 84 Ind. 546; Wayne County Turnpike Co. *v.* Berry, 5 Ind. 286.

Minnesota.—Morrison *v.* Lovejoy, 6 Minn. 319; Osborne *v.* Williams, 37 Minn. 507; McEvoy *v.* Bock, 37 Minn. 402.

Pennsylvania.—Melvin *v.* Melvin, 130 Pa. St. 6; Hellings *v.* Wright; 14 Pa. St. 373.

Nebraska.—Ward *v.* Parlin, 30 Neb. 376; Brown *v.* Rogers, 20 Neb. 547; Singer Mfg. Co. *v.* Doggett, 16 Neb. 609.

Oregon.—Wild *v.* Oregon, etc., Short Line R. Co., 21 Oregon 159.

Georgia.—Vance *v.* Crawford, 4 Ga. 445.

Mississippi.—Mississippi Cent. R. Co. *v.* Whitehead, 41 Miss. 225.

Maryland.—Scarlett *v.* Academy of Music, 43 Md. 203.

New Jersey.—Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141.

Maine.—Soule *v.* Bruce, 67 Me. 584.

In Miller *v.* Garling, 12 How. Pr. (N. Y. Supreme Ct.) 203, the complaint was amended at the trial so as to claim special damages.

No Prejudice.—The allowance of amendments, the evidence in support of which would be admissible under the original pleading, cannot be prejudicial to the adverse party. Blewett *v.* Front St. Cable R. Co., 51 Fed.

Where Plaintiff's Claim Would Be Barred.—The fact that if driven to a new action the plaintiff's claim will be barred by the statute of limitations is a strong reason for allowing him to amend so as to enable him to maintain his suit.[1]

In Case of Mistake.—Where reasonable diligence has been shown, and a party for the first time discovers on the trial that the cause of action or defense has been misunderstood, and for that reason improperly alleged in his pleading, an amendment should be allowed when applied for without unnecessary delay.[2]

Question First Raised on the Trial.—It is the positive duty of the court to allow a defect in a declaration to be cured by amendment on the trial when the question was then raised for the first time and could have been determined at an earlier stage of the proceedings by special demurrer.[3] So a defendant should be permitted to amend his answer or plea where the plaintiff has failed to point out the defect until the trial.[4]

Laches of Applicant.—On the other hand, where a party has had

Rep. 625; Maish *v.* Crangle, 80 Iowa 650.

Presumption of Propriety.—Where an amendment is allowed, the omission of the other party to ask for delay or a continuance has been noted as a circumstance rebutting a presumption of prejudice. Bunyan *v.* Loftus (Iowa, 1894), 57 N. W. Rep. 685; Powers *v.* Fox (City Ct.), 11 N. Y. St. Rep. 651; Lester *v.* Thompson, 91 Mich. 245; Walsh *v.* McKeen, 75 Cal. 519; Cheney *v.* O'Brien, 69 Cal. 199; Klemm *v.* New York Cent., etc., R. Co. (Supreme Ct.), 28 N. Y. Supp. 861; Frankfurter *v.* Home Ins. Cc. (City Ct.), 26 N. Y. Supp. 81; Meyer *v.* State, 125 Ind. 335; Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202. See also Baldwin *v.* New York, etc., Nav. Co., 9 Daly (N. Y.) 314.

1. Shieffelin *v.* Whipple, 10 Wis. 81; Miller *v.* Watson, 6 Wend. (N. Y.) 506; Thornton *v.* Herring, 5 Houst. (Del.) 154.

2. Hauck *v.* Craighead, 4 Hun (N. Y.) 561; Marie *v.* Garrison, 13 Abb. N. Cas. (N. Y. Super. Ct.) 210; Jackson *v.* Sanders, 2 Edm. Sel. Cas. (N. Y.) 12; Bailey *v.* Kay, 50 Barb. (N. Y.) 110; Cooper *v.* Wood, 1 Colo. App. 101. See also Robinson *v.* Hartridge, 13 Fla. 501; Vilas *v.* Mason, 25 Wis. 310; Northwestern Iron Co. *v.* Ætna Ins. Co., 26 Wis. 78.

Changing Parties.—Misdescription of the parties may be corrected. McDuffie *v.* Irvine, 91 Ga. 748.

New plaintiffs may be added on the trial. Boyd *v.* Steamboat Falcon, 1 Handy (Ohio) 362; Polk *v.* Coffin, 9 Cal. 56. But the amendment may be denied on the ground of laches. Burrus *v.* Fisher, 27 Miss. 418.

Some of the plaintiffs may be struck out, Wilson *v.* King, 6 Yerg. (Tenn.) 493; Hinkle *v.* Davenport, 38 Iowa 355; and new ones added, Tayon *v.* Ladew, 33 Mo. 205. But the court may deny such an amendment. Gwynn *v.* Globe Locomotive Works, 5 Allen (Mass.) 317.

Construction of Stipulation.—A stipulation that "no other or further or amended answer shall be allowed to be served and no delay shall ensue," was held not to limit the power of the court to grant an amendment on the trial. Hennequin *v.* Clews, 46 N. Y. Super. Ct. 330.

3. Fletcher *v.* Forler, 83 Mich. 52, an action for selling liquor to a person intoxicated, where the plaintiff had failed to allege that the saloonkeeper knew that the person was intoxicated, the refusal of leave to amend being held reversible error. Buck *v.* Barker (Super. Ct.), 5 N. Y. St. Rep. 826. See also Tooker *v.* Arnoux, 76 N. Y. 397.

4. Hirsh *v.* Shafer, 66 Miss. 439, where defendant was allowed to verify the denial in his answer so as to comply with the statute. Arrington *v.* Tupper, 10 Cal. 465; Lattimer *v.* Ryan, 20 Cal. 628, and Gaylord *v.* Stebbins, 4 Kan. 42, cases practically identical with the foregoing.

his attention called to defects in his pleading and ample time to correct them before trial, leave to amend may be denied on the ground of laches.[1]

Only in Furtherance of Justice.—Ordinarily amendments will not be allowed so as to give one of the parties a purely technical advantage over the other.[2] Thus the court will not grant leave to the defendant to plead in abatement during the progress of the trial;[3] nor will amendments be allowed where the court, in view of all the circumstances, is not satisfied that the ends of justice will be promoted thereby.[4]

1. Johnson *v.* American Writing-Mach. Co. (Super. Ct.), 4 N. Y. Supp. 391; Eggleston *v.* Beach (Supreme Ct.), 33 N. Y. St. Rep. 835; Bowen *v.* Sweeney, 63 Hun (N. Y.) 224, 17 N. Y. Supp. 752; Heyler *v.* New York News Pub. Co. (Supreme Ct.), 24 N. Y. Supp. 499; Butler *v.* Farley (Supreme Ct.), 17 N. Y. St. Rep. 109; Sharpe *v.* Dillman, 77 Ind. 281; Hancock *v.* Hubbell, 71 Cal. 537; Page *v.* Williams, 54 Cal. 562; Baughman *v.* Hale, 45 Kan. 453; Kelly *v.* Kershaw, 5 Utah 295; Minnock *v.* Fire, etc., Ins. Co., 90 Mich. 237; Phenix Ins. Co. *v.* Stocks, 149 Ill. 319. See also Owensboro, etc., R. Co. *v.* Harrison (Ky., 1893), 22 S. W. Rep. 545; Stone *v.* Mattingly (Ky., 1892), 19 S. W. Rep. 402.

Knowledge of Defense.—Some cases hold that a defense known to the defendant when he filed his original answer ought not to be set up by amendment on the trial. Lewin *v.* Houston, 8 Tex. 94; Cotten *v.* Fidelity Casualty Co., 41 Fed. Rep. 506; Gwinn *v.* O'Daniel, 5 Tex. Civ. App. 112; Case *v.* Watson, 22 La. Ann. 350; Spyker *v.* Hart, 22 La. Ann. 534; Louisville Underwriters *v.* Pence (Ky., 1892), 19 S. W. Rep. 10. See also Chlein *v.* Kabat, 72 Iowa 291; Thoman *v.* Chicago, etc., R. Co. (Iowa, 1894), 60 N. W. Rep. 612); *Compare* Farmers' Nat. Gold Bank *v.* Stover, 60 Cal. 387.

2. Hexter *v.* Schneider, 14 Oregon 184.

3. Hexter *v.* Schneider, 14 Oregon 184.

In O'Toole *v.* Garvin, 1 Hun (N. Y.) 313, the defendant was not permitted to amend so as to set up a technical defense.

Pleading Sunday Law.—A refusal to allow an answer to be amended after the evidence was all in, by setting up that the contract was made on Sunday, was not an abuse of discretion. Chlein *v.* Kabat, 72 Iowa 291.

Statute of Limitations.—The court may well refuse to allow the defendant to amend on the trial by setting up the statute of limitations. Marx *v.* Hilsendegen, 46 Mich. 336; Garlington *v.* Copeland, 32 S. Car. 57; Seegers *v.* McCreery (S. Car., 1894), 19 S. E. Rep. 696.

And where the statute of limitations was pleaded in due time, the court refused to allow the plaintiff to amend on the trial by averring that he discovered the fraud which constituted the ground of action within the statutory period. Hiatt *v.* Auld, 11 Kan. 176; Riggs *v.* Chapin (Supreme Ct.), 7 N. Y. Supp. 765.

4. **Useless Amendments.**—It is not error to refuse an amendment to which a demurrer would be sustained, Beavers *v.* Hardie, 59 Ala. 570; or an amendment which is immaterial, Steinhauser *v.* Spraul, 114 Mo. 551; or unavailing, Peck *v.* Rees, 7 Utah 467; Aultman *v.* Shelton (Iowa, 1894), 57 N. W. Rep. 857. See also Wilson *v.* Bailey, 1 Handy (Ohio) 177; Shaw *v.* Alexander, 32 Miss. 229; or irrelevant, Iverson *v.* Dubay, 39 Minn. 325; Livingston *v.* Anderson, 30 Fla. 117.

Amendment of Complaint Denied.—The plaintiff may properly be refused permission to amend his complaint in replevin on the trial by reducing the alleged value of the property to subserve a questionable purpose, and without any averment of mistake. Schoenhofen Brewing Co. *v.* Armstrong (Iowa, 1894), 57 N. W. Rep. 436.

It is not an abuse of discretion to refuse to permit an amendment of the complaint after the trial which will raise new issues and probably require a new trial. Bradley *v.* Parker (Cal., 1893), 34 Pac. Rep. 234.

(2) *At What Stage of the Trial*—**After Jury Sworn.**—A party may be allowed to amend his pleading after the jury are sworn.[1]

Reswearing the Jury.—But if the issues are changed thereby, the practice in some jurisdictions requires that the jury be resworn.[2]

After plaintiff had closed his case he was denied leave to amend so as to enable him to take advantage of evidence offered by the defendant. Woolman *v.* Zebley, 1 Houst. (Del.) 459.

In Renfro *v.* Prior, 22 Mo. App. 403, it was held to be an abuse of discretion to allow the plaintiff to amend a count in his complaint at the close of his case which had been virtually stricken out by excluding evidence in support of it.

Amendments of Answer Denied.—After plaintiff has closed his case the court may properly refuse to allow an amendment of the answer changing the issues and requiring a continuance to enable plaintiff to procure witnesses. Skagit R., etc., Co. *v.* Cole, 2 Wash. 57.

Amendment of the answer tendering a new issue which the plaintiff is not prepared to meet may be refused. Ferguson *v.* Hannibal, etc., R. Co. 35 Mo. 452; Garton *v.* Cannada, 39 Mo. 357. See also Sevin *v.* Caillouet, 30 La. Ann. (Pt. I.) 528; Cohn *v.* Levy, 14 La. Ann. 355; Case *v.* Watson, 22 La. Ann. 351; Spyker *v.* Hart, 22 La. Ann. 534.

After plaintiff has closed his case it is not error to refuse to allow the defendant to strike out an admission of an allegation in the complaint. Miner *v.* Baron (Supreme Ct.), 39 N. Y. St. Rep. 893; Rice *v.* Ege, 42 Fed. Rep. 658. And leave to withdraw an admission in the answer and assert a contrary fact may be denied. Iltis *v.* Chicago, etc., R. Co. 40 Minn. 273; or leave to withdraw a denial and plead payment, Garrison *v.* Goodale, 23 Oregon 307.

In Durkee *v.* Felton, 54 Wis. 405, it was held no error to allow the defendant to amend by denying a material fact admitted in the original answer.

In Glazer *v.* Lowrie, 8 S. & R. (Pa.) 498, after plaintiff had closed his evidence the court refused to allow the defendant to introduce a plea of set-off.

In Lanphere *v.* Clark (Supreme Ct.), 29 N. Y. Supp. 107, refusal to allow defendant in a slander suit to amend an insufficient justification was held not an abuse of discretion.

Striking out Admission in Complaint.—And in Conwacey *v.* New York, 8 Daly (N. Y.) 306, the plaintiff was allowed to strike out an admission in the complaint. See also Hepp *v.* Huefner, 61 Wis. 148. But see Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739.

1. Brazelton *v.* Turney, 7 Coldw. (Tenn.) 267; Garrett *v.* Dickerson, 19 Md. 418; Syme *v.* Jude, 3 Call. (Va.) 522; Tabb *v.* Gregory, 4 Call. (Va.) 225; Crassen *v.* Swoveland, 22 Ind. 427; Adams *v.* Main, 3 Ind. App. 232; Record *v.* Ketcham, 76 Ind. 482; Smith *v.* Rutherford, 2 S. & R. (Pa.) 358; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409; Beronio *v.* Southern Pac. R. Co., 86 Cal. 415; Coleman *v.* Drane, 116 Mo. 387.

Refused in Wilmington Bank *v.* Cooper, 1 Harr. (Del.) 10; Dulany *v.* Norwood, 4 Har. & M. (Md.) 497; State *v.* Vandever, 3 Harr. (Del.) 29; State *v.* Magee, 2 Harr. (Del.) 46; Atkinson *v.* Cox, 54 Ark. 444; Bean *v.* Moore, 2 Chand. (Wis.) 392; Diehl *v.* McGlue, 2 Rawle (Pa.) 337; Shannon *v.* Com., 8 S. & R. (Pa.) 444; Smith *v.* Rutherford, 2 S. & R. (Pa.) 358; Keasby *v.* Donaldson, 2 Browne (Pa.) 103; Thackara *v.* Curren, 2 Browne (Pa.) 246; Gordon *v.* Kennedy, 2 Binn. (Pa.) 291; Ridgely *v.* Dobson, 3 W. & S. (Pa.), 118; McKown *v.* Mathes, 19 La. 542. *Compare* Austin *v.* Ingham, 4 Yeates (Pa.) 347.

2. Ostrander *v.* Clark, 8 Ind. 211; Kerstetter *v.* Raymond, 10 Ind. 199; Hoot *v.* Spade, 20 Ind. 326; Kerschbaugher *v.* Slusser, 12 Ind. 453; Record *v.* Ketcham, 76 Ind. 482; Brown *v.* Shearon, 17 Ind. 239, where the evidence was reheard. See also Williams *v.* Miller, 10 Iowa 344; Maffitt *v.* Rynd, 69 Pa. St. 380, where the jury were resworn after an amendment in the names of the parties.

Otherwise where the amendment does not change the issue, Record *v.* Ketcham, 76 Ind. 482; Sandford Tool; etc., Co. *v.* Mullen, 1 Ind. App. 204; Knowles *v.* Rexroth, 67 Ind. 59; Rogers *v.* State, 99 Ind. 218; or where

During the Argument.—It is not error to allow an amendment otherwise proper while the case is being argued to the jury.[1]

After Jury Instructed.—The court may allow an amendment after the jury have been instructed.[2]

After Submission to Jury.—It is generally too late to allow a material amendment after the cause has been actually submitted to the jury.[3]

After Motion for Nonsuit.—A motion to amend does not come too late after the plaintiff has closed his testimony and the defendant has moved for a nonsuit,[4] or after a nonsuit has been entered, but before judgment rendered thereon.[5]

After Mistrial.—Amendments may be allowed after a mistrial.[6]

c. AFTER REPORT OF REFEREE.—After the report of a referee the court may allow an amendment of the pleadings.[7] But an amendment introducing a new and distinct claim will not be allowed without setting aside the report.[8]

Amendments may be made to conform to the proof.[9] Where the finding of the referee has the effect of a judgment the court

the record does not show that the court was asked to have the jury resworn, Arnold *v.* Arnold, 20 Iowa 273.

1. Sanders *v.* Knox, 57 Ala. 80; Burch *v.* Taylor, 32 Ala. 26; Baldwin *v.* Soule, 6 Gray (Mass.) 321; Hall *v.* Rice, 64 Cal. 443.

Or after the argument. Yohe *v.* Robertson, 2 Whart. (Pa.) 155; Trees *v.* Eakin, 9 Ind. 554; Burke *v.* Snell, 42 Ark. 57.

2. Prater *v.* Miller, 25 Ala. 320.

But the court may properly refuse to allow an amendment of the complaint after the jury have been instructed to find for the defendant. Staley *v.* Thomas, 68 Md. 439.

3. Wilbanks *v.* Willis, 2 Rich. (S. Car.) 108; Reynolds *v.* Quattlebum, 2 Rich. (S. Car.) 140; Law *v.* Franks, Cheves (S. Car.) 9; Watkins *v.* Canterberry, 4 Port. (Ala.) 415; Ashley *v.* Robinson, 29 Ala. 112; Davis *v.* Chester, Minor (Ala.) 385; Hatfield *v.* Gano, 15 Iowa 177; Phillips *v.* Dodge, 8 Ga. 51; Maxwell *v.* Day, 45 Ind. 509. See also Smith *v.* Barker, 3 Day (Conn.) 280; Goldsmith *v.* Picard, 27 Ala. 142; Gluckauf *v.* Bliven, 23 Cal. 314.

After Return of Findings.—After the return of the findings of a jury, it is a questionable exercise of discretion to allow an answer to be amended upon a point submitted and already covered by the answer. Sears *v.* Collins, 5 Colo. 492. See also, in respect of amending a complaint, Hays *v.* Turner, 23 Iowa 214.

4. Valencia *v.* Couch, 32 Cal. 339; Farmer *v.* Cram, 7 Cal. 135; Acquital *v.* Crowell, 1 Cal. 191; Kamm *v.* California Bank, 74 Cal. 191; Farrier *v.* Schroeder, 40 N. J. L. 601; Hasbrouck *v.* Winkler, 48 N. J. L. 431; Kelly *v.* Bragg, 76 Me. 207. See also Medbury *v.* Watson, 6 Met. (Mass.) 246.

5. Sibley *v.* Young, 26 S. Car. 415; Phillips *v.* Brigham, 26 Ga. 617.

In Morris *v.* Burton, 1 Houst. (Del.) 213, leave to amend was refused after the court had announced its opinion on a motion for nonsuit.

As to amendments after judgment of nonsuit, see *infra*, III, *e*, note.

6. Hester *v.* Hagood, 3 Hill (S. Car.) 195, where it is said that they are almost universally allowed where they do not hinder or delay the opposite party.

7. Proctor *v.* Andrew, 1 Sandf. (N. Y.) 70; Smith *v.* Proctor, 1 Sandf. (N. Y.) 72; Merrill *v.* Mellen, 24 N. H. 258; Buno *v.* Gomer, 3 Colo App. 456, where, however, the application was denied on the ground of laches. See also Bowman *v.* Earle, 3 Duer (N. Y.) 691; Newell *v.* Mahasko County Sav. Bank, 51 Iowa 178, holding that a reasonable excuse must be shown.

8. Joy *v.* Walker, 28 Vt. 442; Allaben *v.* Wakeman, 10 Abb. Pr. (N. Y. Supreme Ct.) 162; Pardee *v.* Foote, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 77.

9. See *supra*, III, 9, *b*, (2).

will not allow an amendment that will make the referee's judgment irregular.[1]

d. AFTER VERDICT.—At common law the court has power to allow amendments after verdict, in furtherance of justice;[2] and in most of the states this power is enlarged rather than restricted by statute.[3]

When the statute provides for amendments "at any time,"[4] or "at all times," they may be allowed after verdict.[5]

1. Brady *v.* Nally, 26 Abb. N. Cas. (N. Y. Super. Ct.) 367.

2. Betts *v.* Hoyt, 13 Conn. 469; Bailey *v.* Musgrave, 2 S. & R. (Pa.) 219; Kendall *v.* White, 13 Me. 245. See also Hill *v.* Stocking, 6 Hill (N. Y.) 291; Richardson *v.* Johnson, 2 Call (Va.) 527; Valentine *v.* Farnsworth, 21 Pick. (Mass.) 176; Stanwood *v.* Scovel, 4 Pick. (Mass.) 422; Soper *v.* Soper, 5 Wend. (N. Y.) 112.

Amending Oyer.—In Daley *v.* Atwood, 7 Cow. (N. Y.) 483, amendment of plaintiff's oyer was allowed after verdict in his favor.

Altering a Date.—A declaration in assumpsit may be amended after verdict by altering the date on which the promise was laid. Bailey *v.* Musgrave, 2 S. & R. (Pa.) 219.

Entering Nol. Pros.—A demandant in a real action for the recovery of several parcels of land may by leave of court discontinue or enter a *nol. pros.* as to one or more of the parcels after verdict. Somes *v.* Skinner, 16 Mass. 348.

Striking out Counts.—The court may allow an amendment of the declaration by striking out a count upon which the jury could not agree. Soule *v.* Russell, 13 Met. (Mass.) 436.

A Clerical Mistake by which the cause of action was laid after the commencement of the suit was amended after verdict, although it was made a ground of objection at the trial. Sargent *v.* Dennison, 2 Cow. (N. Y.) 515.

Adding Material Allegations. — In Rowell *v.* Bruce, 5 N. H. 381, it was held that the omission of a material allegation in a declaration cannot be supplied by amendment after verdict. See Betts *v.* Hoyt, 13 Conn. 469.

In *Indiana* it has been held too late after verdict to allow a material amendment of the pleadings. Aiken *v.* Bruen, 21 Ind. 137; Redman *v.* Taylor, 3 Ind. 144; Heddens *v.* Younglove, 46 Ind. 212.

Filing Plea in Bar.—An application to amend by filing a plea in bar comes too late when made after verdict and without a showing of merits by affidavit. Gillespie *v.* Davis, 5 Yerg. (Tenn.) 319.

Defects Cured by Verdict.—Where the issues joined necessarily require, on the trial, proof of facts defectively or imperfectly stated, or omitted, or without which it is not to be presumed that either the judge would direct or the jury have given the verdict, such defect, imperfection, or omission, though fatal if it had been demurred to, is cured by the verdict at common law. Pangburn *v.* Ramsay, 11 Johns. (N. Y.) 141. See also Bayard *v.* Malcolm, 2 Johns. (N. Y.) 550, *infra*, III, 11, *f*, (1).

3. In Lemon *v.* Dryden, 43 Kan. 477, an answer was amended after verdict.

Adding New Counts.—Under the *Illinois* Practice Act it is proper to allow an amendment of the declaration after verdict and pending a motion for a new trial by the filing of additional counts upon the same cause of action. Independent Order, etc., *v.* Paine, 122 Ill. 625.

Striking Out Party.—In Cogshall *v.* Beesley, 76 Ill. 445, it was held that under the *Illinois* Practice Act of 1874 the court may allow the plaintiff after verdict against two defendants to amend by discontinuing as to one of them. So in Ridley *v.* Knox, 138 Mass. 83.

Where one sues for the use of another the name of the nominal plaintiff may be struck out after verdict. Whitaker *v.* Pope, 2 Woods (U. S.) 463, decided under the *Georgia* Code.

Reviving Old Issue.—There is no error in refusing leave to amend the answer where the question proposed to be raised has been virtually decided against the defendant by special verdict. Ault *v.* Wheeler, etc., Mfg. Co., 54 Wis. 300. See also Eddy *v.* Stantons, 21 Wend. (N. Y.) 255.

4. Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306.

5. Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229.

Amendments after verdict, so as to conform the pleadings to the proofs, are almost a matter of course.[1] The prayer of the complaint cannot be amended after verdict where the effect will be to create a verdict which was not rendered in fact.[2]

Terms of Amendment.—Where amendments of substance are allowed after verdict it is usually required that the applicant pay the costs and consent to a new trial.[3] But an amendment may be allowed without a new trial where the verdict would not have been affected by the amendment if it had been made before trial.[4]

After Judgment Arrested.—Where judgment was arrested for want of jurisdiction, the declaration omitting to state the value of the property in controversy, the plaintiff was permitted to amend by adding the averment.[5]

e. AFTER JUDGMENT.—At common law the court has power to allow an amendment of the pleadings in a case until final judgment;[6] and authority is given by statute in most of the states to allow amendments after as well as before judgment by the insertion of new allegations material to the case. Although this is an extraordinary power and should be sparingly exercised,[7] amend-

1. See *supra*, III, 9, *b*, (2).
It is intimated in Joy *v.* Walker, 28 Vt. 442, that such amendments can be made only by express statutory authority.

2. Bradley *v.* Shafer, 65 Hun (N. Y.) 622.

3. Floyd *v.* Woods, 4 Yerg. (Tenn.) 165; Richardson *v.* Johnson, 2 Call (Va.) 527. See *supra*, III, 10, *d*, as to amending the *ad damnum*, and *infra*, III. 16, *c*.

Error Cured.—Where the trial judge allowed an amendment after verdict, but stated to opposing counsel that if they would show by affidavit that the defendant had any defense to offer to the complaint as amended which had not been already offered, he would either refuse to allow the amendment or would set aside the verdict, it was held that any possible error was cured. Morgan *v.* Smith, 95 N. Car. 396.

4. Morse *v.* Whitcher, 64 N. H. 591; Merrill *v.* Perkins, 59 N. H. 343, an amendment changing the form of the action; Buckminster *v.* Wright, 59 N. H. 153; Peaslee *v.* Dudley, 63 N. H. 220; Boudreau *v.* Eastman, 59 N. H. 407; Roulo *v.* Valcour, 58 N. H. 347; Janvrin *v.* Fogg, 49 N. H. 340.

5. Lanning *v.* Dolph, 4 Wash. (U. S.) 629.
In Thomas *v.* Leonard, 11 Wend. (N. Y.) 53, an amendment was allowed after motion in arrest of judgment; and in Williams *v.* Hingham, etc., Turnpike Co., 4 Pick. (Mass.) 341, after arrest of judgment, the court thereupon granting a new trial.

6. Tidd Pr. 697; Bacon's Abr., tit. Amendment and Jeofail; Heard's Civil Pl. 69; Chouteau *v.* Hewitt, 10 Mo. 131; Van Dyke *v.* Van Dyke, 19 N. J. L. 1; State Bank *v.* Simpson, 2 Spears (S. Car.) 41; Travis *v.* Peabody Ins. Co., 28 W. Va. 583; Tabb *v.* Gregory, 4 Call (Va.), 225; Shugart *v.* Orr, 5 Yerg. (Tenn.) 192.
The court may set aside its judgment during the term and allow an amendment. Herdic *v.* Woodward, 75 Pa. St. 479.

7. North *v.* Webster, 36 Minn. 99; Deere *v.* Nelson, 73 Iowa 186; Field *v.* Hawxhurst, 9 How. Pr. (N. Y. Supreme Ct.) 75; Egert *v* Wicker, 10 How. Pr. (N. Y. Supreme Ct.) 193; Cunliff *v.* Delaware, etc., Canal Co. (Supreme Ct.), 4 N. Y. St. Rep. 775, where, however, the defendant was allowed to amend by setting up the statute of limitations. But see Clinton *v.* Eddy, 54 Barb. (N. Y.) 54; Englis *v.* Furniss, 3 Abb. Pr. (N. Y. C. Pl.) 82.
In O'Connell *v.* Cotter, 44 Iowa 48, and Davis *v.* Chicago, etc., R. Co., 83 Iowa 744, an amendment was allowed after judgment.
See also Spink *v.* McCall, 52 Iowa 432.
In O'Connell *v.* Cotter, 44 Iowa 48,

ments have been allowed under special circumstances even after satisfaction of the judgment.[1] If the amendment is allowed,

refusal of leave to amend after judgment was held under the circumstances to be reversible error.

In Bicklin *v.* Kendall, 72 Iowa 490, leave to amend was denied.

In Felch *v.* Beaudry, 40 Cal. 439, leave was refused on the ground of laches.

In Respect of Parties.—In Sherman *v.* Fream, 8 Abb. Pr. (N. Y. Supreme Ct.) 33, the plaintiff was allowed to strike out some of the defendants after judgment.

In Tasker *v.* Wallace, 6 Daly (N. Y.) 364, a mistake in the name of a party was amended after judgment and return of execution.

Inserting Demand for Return of Property.—In Jaggar *v.* Cunningham, 8 Daly (N. Y.), 511, the plaintiff, in an action claiming the delivery of personal property from defendant, was allowed to amend after judgment by inserting a demand for the return of the property, which had been inadvertently omitted, the court setting aside the judgment and granting a new trial.

To Conform to Judgment.—In Martin *v.* Lott, 4 Abb. Pr. (N. Y. Supreme Ct.) 365, an amendment of the answer was allowed after judgment so as to conform thereto in respect of the relief sought.

Further Defense to Counterclaim.—In Brady *v.* Nally, 26 Abb. N. Cas. (N. Y. Super. Ct.) 367, it was held too late, after judgment of a referee, to amend the reply by setting up a further defense to the counterclaim.

To Conform to Record Produced.—Where judgment has passed in favor of the defendant on a plea of *nul tiel record*, the court will not allow the plaintiff to amend so as to make his declaration conform to the record produced. Gulick *v.* Loder, 15 N. J. L. 416.

Substituting Proper Plaintiff.—In Perine *v.* Grand Lodge, 48 Minn. 82, where a suit was brought on behalf of an infant but in the name of the guardian, an amendment was allowed after judgment by inserting the name of the ward as plaintiff.

New Allegations, When Not Allowed.—In North *v.* Webster, 3 Minn. 99, it was held that an amendment by inserting new allegations in complaint, not for the purpose of conforming to the proof nor to correct a mistake or error, could not be allowed.

Imperfect Description.—In Frey *v.* Owens, 27 Neb. 862, an imperfect description of the land in controversy was corrected by amendment after judgment.

Laches of Applicant.—In Mills *v.* Miller,, 3 Neb. 87, there was no error in refusing leave to file an amended answer after judgment and order for partition and actual partition made and reported and no reason assigned for the delay.

After Nonsuit.—Where the plaintiff has been nonsuited the court may set aside the nonsuit and allow the plaintiff to amend even where he made no application to amend on the trial. Balcom *v.* Woodruff, 7 Barb. (N. Y.) 13; Bennett *v.* New York, 1 Sandf. (N. Y.) 658; Medbury *v.* Watson, 6 Met. (Mass.) 246; Meadow Co. *v.* Christ Church, 15 N. J. L. 52; Nelson *v.* Ayres, 12 N. J. L. 62; Trask *v.* Duval, 4 Wash. (U. S.) 97.

But leave may be refused on the ground of laches, or where for other reasons its allowance would not be in furtherance of justice. Bitterling *v.* Deshler, 160 Pa. St. 1.

Additional Counts.—The plaintiff may by leave of the court after verdict and judgment in his favor on one count amend his declaration by inserting other counts for the same cause of action and take a general verdict on all the counts. Rendall *v.* Carland, 5 Cush. (Mass.) 74.

After Default.—In Bash *v.* Van Osdol, 75 Ind. 186, after judgment against the defendant by default and the close of the term, it was held error to permit the plaintiff to amend so as to affect the damages.

That an amendment may be allowed after default, see Bondur *v.* Le Bourne, 79 Me. 21.

1. In Hatch *v.* Central Nat. Bank, 78 N. Y. 487, it was held that after satisfaction of a judgment it is within the discretion of the court to vacate it and allow an amendment of the complaint by adding a new cause of action, although by so doing the statute of limitations is avoided.

In Brown *v.* Van Cleave, 86 Ky. 381, it was held that an amendment

the judgment should be vacated in order to give the opposite party an opportunity to controvert the new allegations;[1] or a separate trial should be had upon the new issues.[2]

Amendments may be allowed after judgment in order to conform the pleading to the facts proved.[3]

Pending Appeal or Writ of Error.—Whether after appeal or writ of error the court in which the judgment was rendered has jurisdiction to allow an amendment of the pleadings, is a question upon which the decisions are not uniform.[4]

f. IN APPELLATE COURTS—(1) *Where the Cause is Tried upon the Record.*—Although there is nothing in the nature of an appellate jurisdiction proceeding according to the common law which forbids the granting of amendments,[5] yet, except where amendments are made or considered as made under statutes of jeofails presently to be noticed, it is the practice of appellate courts reviewing a judgment of the court below on the record not to entertain original motions to amend, but to remand the cause for the purpose of making amendments which are found to be necessary.[6] Amendments of such a nature as would give the

after judgment discharged was a nullity, as there was nothing to amend. See also Bicklin *v.* Kendall, 72 Iowa 490.

1. Field *v.* Hawxhurst, 9 How. Pr. (N. Y. Supreme Ct.) 75; Hatch *v.* Central Nat. Bank, 78 N. Y. 487; Cunliff *v.* Delaware, etc., Canal Co. (Supreme Ct.), 4 N. Y. St. Rep. 775; Roome *v.* Jennings (Super. Ct.), 25 N. Y. Supp. 461; Boudinot *v.* Lewis, 3 N. J. L. 104; Neidenberger *v.* Campbell, 11 Mo. 359, after judgment by default; Burbank *v.* Harris, 32 La. Ann. 395.

2. Field *v.* Hawxhurst, 9 How. Pr. (N. Y. Supreme Ct.) 75.

3. Thomas *v.* Nelson, 69 N. Y. 118; Egert *v.* Wickes, 10 How. Pr. (N. Y. Supreme Ct.) 193; Hodge *v.* Sawyer, 34 Wis. 397; Davis *v.* Chicago, etc., R. Co., 83 Iowa 744. See *supra*, III, 9, *b*, (2).

4. In Goodnow *v.* Griswold, 68 Cal. 599, it was held that the court had no further jurisdiction after an appeal. So in Ladd *v.* Couzins, 35 Mo. 513. See also Clelland *v.* People, 4 Colo. 244. *Contra*, Judson *v.* Gray, 17 How. Pr. (N. Y. Ct. of App.) 289; Wampler *v.* Shissler, 1 W. & S. (Pa.) 365.

5. Kennedy *v.* Georgia State Bank, 8 How. (U. S.) 610, where the court also said that the thirty-second section of the judiciary act of 1789, by which it is enacted that all the courts of the United States may permit the parties to amend any defect, etc., is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction. See also Anonymous, 1 Gall. (U. S.) 22; Warren *v.* Moody, 9 Fed. Rep. 673; Jackson *v.* Ashton, 10 Pet. (U. S.) 480; Rex *v.* Ponsonby, 1 Wils. 303; Pease *v.* Morgan, 7 Johns. (N. Y.) 468.

6. Brown *v.* Colie, 1 E. D. Smith (N. Y.) 265; Manatt *v.* Starr, 72 Iowa 677; Crocker *v.* Craig, 46 Me. 327; Thompson *v.* McIntire, 48 Me. 34; Bamford *v.* Bamford, 4 Oregon 30; Stevens *v.* Brooks, 22 Wis. 695. See also Rowell *v.* Bruce, 5 N. H. 381.

In the Federal Courts.—This is the uniform practice in the United States Supreme Court, unless the parties consent to the amendment. Garland *v.* Davis, 4 How. (U. S.) 131; Pacific R. Co. *v.* Ketchum, 95 U. S. 1; Continental Ins. Co. *v.* Rhoads, 119 U. S 237; Halsted *v.* Buster, 119 U. S. 341. See also *infra*, III, 11, *g*.

Substantial Amendments.—It was held in Grist *v.* Hodges, 3 Dev. (N. Car.) 203, and Matlock *v.* Gray, 4 Hawks (N. Car.) 1, that although the statute expressly authorized and directed the Supreme Court to allow amendments in the same manner as they could have been made at *nisi prius* "from time to time" and "at any time, in anything," the statute also contemplating actual amendments and not amendments by

opposite party a right to amend his pleadings and thus raise new issues cannot be allowed.[1]

By Consent of Parties.—Amendments of pleadings may be allowed in the appellate court by consent of both parties in cases where it would otherwise be contrary to the practice of the court.[2]

The Statute of Jeofails usually declares that the court in every stage of the action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect.[3] By virtue

merely disregarding defects, yet the discretion of the court was limited by the nature of appellate jurisdiction, and amendments of substance could not be allowed when the result, either necessarily or by the equity of the court, would be to let in a new plea or replication. In the case last cited the court was "wholly at a loss to conceive a case where it would be proper to exercise this power, for every amendment in substance presents a different statement of facts which the adverse party should have an opportunity of controverting." See also Williamson *v.* Canaday, 3 Ired. (N. Car.) 349; State *v.* Broughton, 7 Ired. (N. Car.) 96; Justices *v.* Simmons, 3 Jones (N. Car.) 187.

Where the Record is Removed.—Where the record itself is removed to the appellate court the latter may allow amendments. Van Dyke *v.* Van Dyke, 19 N. J. L. 1. See also Pease *v.* Morgan, 7 Johns. (N. Y.) 468; Miller *v.* Weeks, 22 Pa. St. 89.

In Rhode Island.—Under the Rhode Island statute which provides that where a case has been brought to the Supreme Court by bill of exceptions, that court "may take such order therein as the Court of Common Pleas ought to have done, and shall cause such other proceedings to be had in the cause as to law and justice shall appertain," where the Supreme Court overrules a plea for technical insufficiency, it may defer final judgment and give the defendant opportunity to move for leave to amend. Wright *v.* Card, 16 R. I. 719.

Making New Issues.—After a case is reserved to the Supreme Court upon issues joined and an agreed statement of facts, no change of the pleadings making new issues and requiring further evidence will be allowed unless it is made clear that without it the rights of a party may be sacrificed or plain injustice done. Wiswell *v.* First Congregational Church, 14 Ohio St. 31.

1. Matlock *v.* Gray, 4 Hawks (N. Car.) 1; Justices *v.* Simmons, 3 Jones (N. Car.) 187.

2. In Fletcher *v.* Peck, 6 Cranch (U. S.) 87, by consent the pleadings were amended by giving substance to a plea otherwise bad. And in Kennedy *v.* Georgia State Bank, 8 How. (U. S.) 610, by consent of both parties the record was amended so as to show the requisite diversity of citizenship of the parties.

3. Under the federal judiciary act of 1789 only defects of form are cured by judgment. Smith *v.* Jackson, 1 Paine (U. S.) 486; Garland *v.* Davis, 4 How. (U. S.) 131. See further Hill *v.* Stocking, 6 Hill (N. Y.) 277.

Changing Form of Action.—In Strock *v.* Little, 33 Pa. St. 409, it was held that no statute of jeofails could cure an error in allowing an amendment changing the form of action from assumpsit to account render.

Defects Cured by Verdict.—With respect to such imperfections as are cured by a verdict by the common law, "it is to be observed that where there is any defect, imperfection, or omission in any pleadings, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." Bac. Abr. Amendment and Jeofail, B. Emerson *v.* Lakin, 23 Me. 384.

of these provisions defects in the pleadings or proceedings which the trial court would have given leave to amend, had application been made, will be considered as amended in the appellate court[1]

1. *Michigan.*—Warder *v.* Gibbs, 92 Mich. 29; Enright *v.* Standard L., etc., Ins. Co., 91 Mich. 238; Smith *v.* Pinney, 86 Mich. 484; Bole *v.* Sands, etc., Lumber Co., 77 Mich. 239; Johnson *v.* Spear, 82 Mich. 453; Wright *v.* Treat, 83 Mich. 110.

New York.—Rowland *v.* Sprauls Co. (Supreme Ct.), 21 N. Y. Supp. 895; Cady *v.* Allen, 22 Barb. (N. Y.) 388, *affirmed* in 66 Hun (N. Y.) 635; Ackley *v.* Tarbox, 31 N. Y. 564, where an unnecessary party was struck out; Reeder *v.* Sayre, 70 N. Y. 181; Schultz *v.* Third Ave. R. Co., 89 N. Y. 242; Rockfeller *v.* Donnely, 8 Cow. (N. Y.) 623; Coates *v.* Donnell, 48 N. Y. Super. Ct. 46; Sharp *v.* New York, 25 How. Pr. (N. Y. Supreme Ct.) 389; Bate *v.* Graham, 11 N. Y. 237; Havana Bank *v.* Magee, 20 N. Y. 355.

Florida.—McKay *v.* Triebele, 8 Fla. 21.

Nebraska.—Humphries *v.* Spafford, 14 Neb. 488.

North Carolina.—Baxter *v.* Baxter, 3 Jones (N. Car.) 303; Wilson *v.* Pearson, 102 N. Car. 290; Weed *v.* Richardson, 2 Dev. & B. (N. Car.) 535.

Virginia.—Hook *v.* Turnbull, 6 Call. (Va.) 85.

Kansas.—Missouri Valley R. Co. *v.* Caldwell, 8 Kan. 244; Sandford *v.* Willetts, 29 Kan. 647; Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202; Wilcox, etc., Organ Co. *v.* Lasley, 40 Kan. 521.

Indiana.—Numbers *v.* Bowser, 29 Ind. 491; Hamilton *v.* Winterrowd, 43 Ind. 393; Elmore *v.* McCrary, 80 Ind. 544; Alden *v.* Barbour, 3 Ind. 414; Lawrenceburgh Ferry Boat *v.* Smith, 7 Ind. 520; Key *v.* Robinson, 8 Ind. 368; Langdon *v.* Bullock, 8 Ind. 341; Alvord *v.* Moffatt, 10 Ind. 366; Ebersole *v.* Redding, 22 Ind. 232; Lowry *v.* Dutton, 28 Ind. 473; First Presbyterian Church *v.* Lafayette, 42 Ind. 115; Voris *v.* State, 47 Ind. 345; Rundles *v.* Rundles, 63 Ind. 93; Schieble *v.* Law, 65 Ind. 332; Singer Mfg. Co. *v.* Doxey, 65 Ind. 65; Bauman *v.* Grubbs, 26 Ind. 419, a mistake in the name of a party; Billingsley *v.* Dean, 11 Ind. 331; Shaw *v.* Binkard, 10 Ind. 227; Lemen *v.* Young, 14 Ind. 3; Ke-tuc-e-mun-guah *v.* McClure, 122 Ind. 541.

Washington Territory.—Tolmie *v.* Dean, 1 Wash. Ter. 46.

Missouri.—Young *v.* Glascock, 79 Mo. 574; Zarbec *v.* Steamboat, 19 Mo. 141.

Pennsylvania.—Waite *v.* Palmer, 78 Pa. St. 192; Morris *v.* McNamee, 17 Pa. St. 173; Shaffer *v.* Eichert, 132 Pa. St. 285; Thornton *v.* Britton, 144 Pa. St. 126; Westcott *v.* Edmunds, 68 Pa. St. 34; Loew *v.* Stocker, 61 Pa. St. 347; Barnhill *v.* Haigh, 53 Pa. St. 165; Quinn *v.* Woodhouse, 26 Pa. St. 332; Bailey *v.* Fairplay, 6 Binn. (Pa.) 450; Cummings *v.* Lebo, 2 Rawle (Pa.) 23; Fritz *v.* Heyl, 8 W. N. C. (Pa.) 374.

Kentucky.—Kennedy *v.* Woods, 3 Bibb (Ky.) 322.

New Jersey.—Hasbrouck *v.* Winkler, 48 N. J. L. 431.

Nevada.—McManus *v.* Ophir Silver Min. Co., 4 Nev. 15.

Maine.—Page *v.* Danforth, 53 Me. 174; Conway Fire Ins. Co. *v.* Sewall, 54 Me. 352.

Alabama.—Thompson *v.* Pierce, 3 Stew. (Ala.) 427; Boddie *v.* Ely, 3 Stew. (Ala.) 182; Galliard *v.* Dubose, 34 Ala. 207; Alabama C. M. E. Church *v.* Price, 42 Ala. 39.

Georgia.—Artope *v.* Barker, 74 Ga. 462.

Stipulation for Amendment.—If there is an agreement to amend by the attorneys in the court below, the Supreme Court will give leave to amend after error brought and without costs. Johnson *v.* Chaffant, 1 Binn. (Pa.) 75.

Striking Out Surplusage.—A declaration containing two considerations for a contract may be amended in the Supreme Judicial Court after verdict taken in the Court of Common Pleas on proof of one only, and exceptions on that ground, by striking out the consideration not proved, the plaintiff taking no costs since the trial. Stone *v.* White, 8 Gray (Mass.) 589.

Prayer for Relief.—Where the prayer for relief exceeds the amount of damages claimed in either count and the verdict is for a sum larger than in either count but less than the amount prayed for, the complaint may be amended in the appellate court.

in order to support the judgment[1] where the merits of the case have been fully tried.[2]

Schultz *v.* Third Ave. R. Co., 89 N. Y. 242.

Defective Denial.—A defective denial may be amended so as to support the judgment in favor of the defendant. Hoffman *v.* New York, etc., R. Co., 50 N. Y. Super. Ct. 403.

Changing Character of Plaintiff.—An amendment may be allowed in the appellate court changing the character or right in which the plaintiff sued, where it would have been allowed at the trial. Reeder *v.* Sayre, 70 N. Y. 181; Risley *v.* Wightman, 13 Hun (N. Y.) 163.

Changing Party.—But not by substituting another party as defendant. Bassett *v.* Fish, 75 N. Y. 303.

In Cutshaw *v.* Fargo (Ind., 1894), 36 N. E. Rep. 650, an amendment making a radical change of one of the parties was not allowed.

Misnomer.—A variance between the declaration and summons in stating the name of the defendant may be considered as cured by amendment. Bole *v.* Sands, etc., Lumber Co., 77 Mich. 239.

Formal Defect of Party.—So a defect in declaring in the name of the board of directors instead of in the name of the county. John *v.* St. Clair County, 38 Mich. 532.

Where an action on an administration bond was brought in the name of the administrator *de bonis non*, instead of in the name of the state on his relation, an amendment making the proper plaintiff will be allowed in the Supreme Court without terms where the objection was taken for the first time in the appellate court. Grant *v.* Rogers, 94 N. Car. 755.

Error in Entitling Cause.—A formal error in entitling the case is regarded as amended. Browner *v.* Davis, 15 Cal. 9.

Suit on Defective Recognisance.—Where by statute the plaintiff or relator in a suit on a defective recognizance may suggest the defect in his complaint and recover to the same extent as if the recognizance were perfect, the failure to make such suggestion will be considered as supplied by amendment. Patterson *v.* State, 10 Ind. 296.

Misjoinder of Causes of Action.—Error, if any, in joining with a petition to enforce a lien for a certain sum a count in assumpsit for another sum for which no lien was claimed is cured after verdict by the statute of jeofails. Noble *v.* Terrell, 64 Miss. 830.

Omission of Ad Damnum.—The omission of an *ad damnum* in the declaration will be considered as amended. Hook *v.* Turnball, 6 Call (Va.) 85. See Stephens *v.* White, 2 Wash. (Va.) 203; Eaton *v.* Case, 17 R. I. 429.

Amendment of Ad Damnum.—Where the damages laid in the writ were sufficient, but in the declaration insufficient to cover the verdict, the defect was cured by judgment. Kennedy *v.* Woods, 3 Bibb (Ky.) 322. See also Miller *v.* Weeks, 22 Pa. St. 89. *Compare* Dunbar *v.* Bittle, 7 Wis. 143, where there was nothing to amend by.

To Conform to Findings.—When the value of plaintiff's services is found to be more than the amount alleged in the complaint, the latter cannot be amended to conform to the findings of the court. Perkins *v.* West Coast Lumber Co. (Cal., 1893), 33 Pac. Rep. 1118.

To Conform to Verdict.—Hooper *v.* Wells, 27 Cal. 11, holds that the complaint cannot be amended in the Supreme Court to correspond with the verdict.

1. Such amendments in the appellate court are allowed only in support of the judgment, Johnston *v.* Hubbell, Wright (Ohio) 69; Grist *v.* Hodges, 3 Dev. (N. Car.) 198; Longrill *v.* Downey (Super Ct.), 27 N. Y. St. Rep. 51; and cannot be allowed for the purpose of reversing it. Volkening *v.* DeGraaf, 81 N. Y. 268.

Where the effect of an amendment would be to reverse a judgment of the court below rightly given and to enter judgment for a different party plaintiff, such amendment will not be allowed. Justices *v.* Simmons, 3 Jones (N. Car.) 187.

When a petition shows a cause of action in one plaintiff only and a judgment is rendered in favor of both, such judgment is not merely irregular but is erroneous; and it cannot be amended in the appellate court by striking out the name of the party in whose favor the judgment was erroneously entered, as such a change would not be in furtherance of justice. Megher *v.* Stewart, 6 Mo. App. 498.

2. **Omission of Necessary Allegation.**—Where a complaint omits a necessary

Complaint Bad on Demurrer.—In no case will a complaint be deemed amended on appeal which is so defective that a demurrer for want of sufficient facts to constitute a cause of action should be sustained where the question in the appellate court arises upon the correctness of the ruling of court below upon the demurrer.[1]

Neglect to Apply for Leave.—Nor will the appellate court consider an amendment as made where a party declined to ask for leave to amend after his attention was called to a defect by an objection thereto.[2]

To Conform to Proof.—In this manner amendments may be made in order to conform to the proof.[3]

Amendments Considered as Made.—The general rule is that these amendments need not in fact be made, and that the benefit is obtained by overlooking the exception, or considering the amendment as made.[4]

(2) *Where the Trial is De Novo.*—In cases brought to intermediate appellate courts for trial *de novo* on appeal from inferior courts, the power to allow amendments is either regulated by express statute,[5] or is deduced from the general provisions which

allegation, but the course of the trial is the same as if such allegation had not been omitted, the complaint may on appeal be amended and will not be remanded for that purpose. Rowland *v.* Sprauls (Supreme Ct.), 21 N. Y. Supp. 895, *aff'd* 66 Hun (N. Y.) 635.

Making a Different Case.—An amendment will not be allowed where a different case might have been presented had the amendment been made in the court below. Fitch *v.* New York, 88 N. Y. 500.

1. Sinker *v.* Fletcher, 61 Ind. 276; Utica Township *v.* Miller, 62 Ind. 230; Friddle *v.* Crane, 68 Ind. 583; Johnson *v.* Breedlove, 72 Ind. 368.

2. Davidson *v.* Weems, 58 Ala. 187.

3. See *supra*, III, 9, *b*, (2).

4. Eakin *v.* Burger, 1 Sneed (Tenn.) 417; McBee *v.* Petty, 3 Coldw. (Tenn.) 178; Beeler *v.* Huddleston, 3 Coldw. (Tenn.) 201; Rowell *v.* Bruce, 5 N. H. 381.

5. **Missouri.**—In all cases of appeals, the bill of items of the account sued on or filed as a counterclaim or set-off, or of defendant's counterclaim or set-off, or other grounds of defense filed before the justice, may be amended upon appeal in the appellate court to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted; but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment. Rev. Stat. Mo. 1889, § 6347.

Insufficient Statement.—That an insufficiency in the statement may be amended after a case has reached the Circuit Court, see Schulte *v.* St. Louis, etc., R. Co., 76 Mo. 324; Allen *v.* McMonalge, 77 Mo. 478; Dryden *v.* Smith, 79 Mo. 525; Minter *v.* Hannibal, etc., R. Co., 82 Mo. 128; Eubank *v.* Pope, 27 Mo. App. 463; South Missouri Land Co. *v.* Jaffries, 40 Mo. App. 360; Crum *v.* Elliston, 33 Mo. App. 591.

In Webb *v.* Robertson, 74 Mo. 380, it was held reversible error to refuse leave to the plaintiff to file an amended statement which did not state a new cause of action, but only perfected an imperfect statement which had already been filed before the justice.

An omission to state that the land was situated in the county in which the suit was brought may be supplied by amendment by the Circuit Court. McKinney *v.* Harral, 36 Mo. App. 337.

Where the account filed before a justice did not set out the specific items of goods sold for which the action is brought, an amendment setting them out in detail was properly allowed in the Circuit Court on appeal. Rathburn *v.* Teeter, 25 Mo. App. 283.

After Remand from Court of Last Resort.—A statement before a justice which is held insufficient by the Su-

preme Court may be amended in a Circuit Court, after the cause has been remanded thereto, if warranted by the facts. Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278.

Enlarging Claim for Damages.—A complaint in an action of unlawful detainer may be amended in the Circuit Court on appeal from a justice by enlarging the claim for damages. Lucas *v.* Fallon, 40 Mo. App. 551.

Where the recovery before the justice was for the amount claimed, the plaintiff cannot amend in a Circuit Court on appeal so as to enable him to recover double that amount. Boughton *v.* St. Louis, etc., R. Co., 25 Mo. App. 10.

Adding Item to Account.—On an appeal from a justice in an action upon an account, the plaintiff may amend his statement after the evidence is all in by the addition of another item. Sprague *v.* Follett, 90 Mo. 547.

Names of Parties.—Where the suit before the justice is brought in the name of a firm, an amendment may be allowed on appeal in the Circuit Court by inserting the names in full of all the members of the firm. Beattie *v.* Hill, 60 Mo. 72.

A mistake in the name of a party may be rectified in like manner. House *v.* Duncan, 50 Mo. 453.

New Cause of Action.—That a new cause of action cannot be introduced, see Sturges *v.* Botts, 24 Mo. App. 283; Clark *v.* Smith, 39 Mo. 498; Gregory *v.* Wabash, etc., R. Co., 20 Mo. App. 448; Kitchen *v.* Missouri Pac. R. Co., 82 Mo. 686; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; and Shaffner *v.* Leahy, 21 Mo. App. 110, where the proposed amendment was held not objectionable on that ground; Hansberger *v.* Missouri Pac. R. Co., 43 Mo. 196; Webb *v.* Robertson, 74 Mo. 380; Smith *v.* Anthony, 5 Mo. 504.

An amendment on appeal from a justice, changing the action from one on an open account to one on an action stated, does not change the cause of action. Newberger *v.* Friede, 23 Mo. App. 631.

What was "intended to be included" in the original statement, within the meaning of the statute, must be gleaned from the face of the statement. Gregory *v.* Wabash, etc., R. Co. 20 Mo. App. 448.

Where the statement before the justice wholly fails to set forth a cause of action, it cannot be amended on appeal. Brashears *v.* Strock, 46 Mo. 221; Gist *v.* Loring, 60 Mo. 487.

On Appeal from Probate Court.—Amendments not changing the cause of action may be made in the Circuit Court on appeal from the Probate Court. Hunt *v.* Bouton, 63 Mo. 187.

Such amendments are favored, in furtherance of justice, where a new cause of action is not introduced. Goddard *v.* Williamson, 72 Mo. 131, where plaintiff was permitted to amend by adding certain credits, thereby avoiding the plea of the statute of limitations.

Connecticut—*Appeals from Justices.*—The Practice Act provides that either party in actions appealed from a justice of the peace may amend during the first term of the appellate court by introducing any equitable right, cause of action, defense, set-off, or counterclaim, subject to the rules as to joinder of causes of action. This provision was construed to give an absolute right to amend during the first term, but not to deprive the court of a discretionary power to permit such amendments upon proper terms at a later period. Bennett *v.* Collins, 52 Conn. 1.

The plaintiff cannot be allowed to abandon his cause of action for another within the original jurisdiction of the appellate court. Colvin *v.* Peck, 62 Conn. 155.

Appeals from Commissioners.—Conn. Gen. Stat., 1888, § 1029, provides that in the Superior Court, on appeals from commissioners "the claimant shall have leave to amend any defect, mistake, or informality in the statement of the claim not changing the ground of the action." The term "ground of action" refers to what was the real object of the claimant in making his claim. Donahue's Appeal, 62 Conn. 370.

Kansas.—Sec. 74 of the Justice's Code provides that "the bill of particulars may be amended at any time before the trial or during the trial, or upon appeal, to supply any deficiency or omission in the items, when by such amendment substantial justice will be promoted."

An amendment was sustained as a proper exercise of discretion in Missouri Pac. R. Co. *v.* Piper, 26 Kan. 58, and Kansas City, etc., R. Co. *v.* Hays, 29 Kan. 193, the court holding in both

prescribe the jurisdiction of or procedure in the appellate court.[1]

cases that the amendment did not introduce a new cause of action.

Tennessee—*On Appeal from Justice of the Peace.*—By § 4177 of the Code, the Circuit Court has the power to permit an original motion against an officer brought into court by appeal from a justice to be so amended as to make the suit one as well for the delinquency for which it was brought before the justice as for all insufficient returns of the same execution. King *v.* Breeden, 2 Coldw. (Tenn.) 455.

An appeal by the original debtor from a justice's judgment on garnishment does not bring up the case as to the garnishee, and he cannot amend his answer in the Circuit Court. The judgment of the justice is conclusive as to him. Bryant *v.* Bigelow, 9 Lea (Tenn.) 135.

In a case coming by appeal from a justice of the peace, it is error to allow an amendment changing the form of the action from debt on account to trespass after the court has commenced charging the jury. Sec. 2869 of the Code permits a change in the form of action upon terms as to continuance, etc., which implies that such amendment must be made before trial. Smith *v.* Large, 1 Heisk. (Tenn.) 5.

Michigan—*On Appeal from Justice of the Peace.*—The issue before the justice cannot be substantially changed in the Circuit Court on appeal. Hatzenbuhler *v.* Lewis, 51 Mich. 585; Graham *v.* Langston, 65 Mich. 45; Bureau *v.* Marshall, 55 Mich. 234, holding that a plea of title in trespass *quare clausum* must be entered when issue is joined and cannot be introduced on appeal.

The claim of neither party can be enlarged on appeal. Cross *v.* Eaton, 18 Mich. 184. See also Evers *v.* Sager, 28 Mich. 47.

The allowance of an amendment which tenders no new issue and is not then objected to will not be deemed prejudicial. Kennedy *v.* Brown, 50 Mich. 336.

A declaration in assumpsit may be amended on appeal from a justice so as to show that the plaintiff claims as assignee. Donovan *v.* Halsey Fire Engine Co., 58 Mich. 38.

A declaration in the name of several plaintiffs as copartners after the death of one of them may be amended by allowing the remaining plaintiffs to declare as surviving partners. O'Connel *v.* Schwanabeck, 76 Mich. 517; Cragin *v.* Gardner, 64 Mich. 399.

Where, upon appeal from a justice, there was no declaration in the justice's return, it having been lost, it was proper to permit the plaintiff to file a copy of the declaration and thus complete the record. Bauer *v.* Wasson, 60 Mich. 194.

An amendment setting out the time or circumstances in an action to recover a penalty may be made in the Circuit Court on appeal. Canal St. Gravel Road Co. *v.* Paas, 95 Mich. 372.

Wisconsin.—On appeal from a justice court, the circuit court may permit the pleadings to be amended so as to present issues which could not have been tried before the justice. State *v.* Preston, 34 Wis. 675.

Oregon.—The Oregon statute provides that in cases appealed to the Circuit Court the case shall stand for trial on the papers and pleadings in the court below, but that either party may amend on terms, etc. Upon an appeal from an inferior court to the Circuit Court, no amendment which substantially changes the issues tried in the court below can be allowed. Moser *v.* Jenkins, 5 Oregon 447; Cain *v.* Harden, 1 Oregon 360; Monroe *v.* N. P. Coal Mine Co., 5 Oregon 509; Rohr *v.* Isaacs, 8 Oregon 451.

Federal Courts.—As to the power of the federal Circuit Courts on appeal from District Courts, see Smith *v.* Jackson, 1 Paine (U. S.) 486; Anonymous, 1 Gall. (U. S.) 22.

1. **New York**—*Appeals from Justices.*—Under the former New York Code it was held that neither the Supreme Court nor the County Court had power to amend the pleadings in a case originating in a justice court. Gould *v.* Glass, 19 Barb. (N. Y.) 179; Bellinger *v.* Ford, 14 Barb. (N. Y.) 250. See also Reno *v.* Millspaugh, 14 Hun (N. Y.) 229; Burch *v.* Spencer, 15 Hun (N. Y.) 508.

Under the present Code, although it was said in Cook *v.* Waterford (Supreme Ct., (25 N. Y. St. Rep. 90, 6 N. Y. Supp. 616, that "in causes which arise in justices' courts and are appealed to the County Court, where a new trial is demanded, the pleadings

Where the statute requires the action to be tried in the appellate court as if it were originally commenced there, the complaint should not be changed in the appellate court unless it is made very clearly to appear that the attainment of substantial justice requires such an amendment;" the power of the County Court to allow amendments in cases appealed from justices is the same as that possessed by the Supreme Court in actions pending before it. Simpson *v.* Rome, etc., R. Co. (Supreme Ct.), 15 N. Y. St. Rep. 539, 48 Hun (N. Y.) 113; Cramer *v.* Lovejoy (Supreme Ct.), 5 N. Y. St. Rep. 190; Argersinger *v.* Levor (Supreme Ct.), 28 N. Y. St. Rep. 212, 54 Hun (N. Y.) 613; Button *v.* Lusk (Supreme Ct.), 32 N. Y. St. Rep. 531. See also Reilley *v.* Delaware, etc., Co., 102 N. Y. 383.

Case Removed from District Court to Common Pleas. — And the Court of Common Pleas has power to allow an amendment of pleadings in actions removed to it from a District Court of the city of New York to the same extent and within the same limits as the District Court would have had if the case had not been removed. Lalleman *v.* Fere, 18 Abb. N. Cas. (N. Y. C. Pl.) 56, 11 Civ. Pro. Rep. (N. Y.) 217. See, however, Salter *v.* Parkhurst, 2 Daly (N. Y.) 240; Druckenmiller *v.* Shoninger (C. Pl.), 8 N. Y. Supp. 482.

In Minnesota the District Courts have concurrent jurisdiction with justices of the peace in all cases, and Minnesota Laws, 1868, c. 93, provides that "upon an appeal taken upon questions of fact alone, or upon questions of both law and fact, the action shall be tried in the same manner as actions originally commenced in the District Court." This provision is interpreted to allow amendments of the pleadings. Bingham *v.* Stewart, 14 Minn. 214. And the complaint may be amended in the District Court by increasing the amount of damages claimed to a sum exceeding the jurisdiction of the justice. McOmber *v.* Balow, 40 Minn. 388, following the construction of similar statutes in Dressler *v.* Davis, 12 Wis. 58; Jackson *v.* Covert, 5 Wend. (N. Y.) 139; Palmer *v.* Wylie, 19 Johns. (N. Y.) 276.

North Carolina.—*Appeals from Justices.*—On appeal to the Superior Court from a justice's judgment, it is in the discretion of the judge to allow or disallow an amendment of any plea made before the justice upon such terms as may be just. Hinton *v.* Deans, 75 N. Car. 18.

If a justice of the peace has no jurisdiction, the Superior Court on appeal can derive none by amendment. Ijames *v.* McClamroch, 92 N. Car. 362.

On Appeal from the Probate Court on matters properly triable therein, new matter cannot be engrafted in the Superior Court if it be cognizable only in the latter court. Capps *v.* Capps, 85 N. Car. 408; Robeson *v.* Hodges, 105 N. Car. 49.

New Mexico.—Under Comp. Laws, New Mex., 1884, sec. 1848, which provides that "all appeals from inferior tribunals to the District Courts shall be tried anew in said courts on their merits, as if no trial had been had below," amendments may be allowed. Sanchez *v.* Candelaria (N. Mex., 1890), 23 Pac. Rep. 239.

Comp. Laws, New Mex., 1884, sec. 2443, requiring a trial *de novo* in cases originating before a justice of the peace and removed into the District Court, and that such court shall allow all amendments necessary, etc., includes an action of replevin, and it was error to refuse an application to amend an affidavit which did not state the value of the property. Romero *v.* Luna (N. Mex., 1892), 30 Pac. Rep. 855.

Ohio.—In a case appealed from a justice of the peace to the Court of Common Pleas, no amendments are authorized without the consent of the parties except such as might have been allowed by the justice. Bickett *v.* Garner, 21 Ohio St. 659.

Another plaintiff cannot be substituted by amendment. Moore *v.* Lancaster, Wright (Ohio) 35.

In an action on the case before a justice, the plaintiff may declare in trespass in the common pleas. Austin *v.* Hayden, 6 Ohio 388.

Vermont—*Appeals from Justices.*—The power to allow a new declaration to be filed in cases appealed from justices of the peace is derived from the general power to allow amendments of the process and proceedings in the court. Stevens *v.* Hewitt, 30 Vt. 263.

may be amended by increasing the *ad damnum* to an amount exceeding the jurisdiction of the inferior court.[1] But in the absence of such a comprehensive provision, the amendment would not be allowed,[2] nor an amendment introducing a new cause of action,[3] or presenting new matter which the court below had no jurisdic-

New counts may be added provided they are for the same cause of action. Keyes *v.* Tinroop, 2 Aik. (Vt.) 276.

If a new declaration be filed in the County Court on appeal from a justice of the peace for a different cause of action, and the defendant pleads to it, the objection is waived. Blodget *v.* Skinner, 15 Vt. 716.

The declaration cannot be amended in order to give the court jurisdiction. Thompson *v.* Colony, 6 Vt. 91.

But where the *ad damnum* was amended in the County Court so as to claim a sum exceeding the jurisdiction of the justice, it was held that the court had jurisdiction to allow an amendment reducing it to the original amount. Whitney *v.* Sears, 16 Vt. 587.

On Appeal from Probate Court.—The County Court may permit additional plaintiffs to be added by amendment in a case appealed from the Probate Court. Wyman *v.* Wilcox's Estate, 63 Vt. 487.

Texas.—Upon appeals from a justice the petition cannot be amended so as to set up a new cause of action. Ballard *v.* Murphy (Tex. App., 1890), 15 S. W. Rep. 42; Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444; Roe *v.* Holbert (Tex. App., 1892), 18 S. W. Rep. 417.

Otherwise, amendments are allowed the same as if the cause had originated in the appellate court; and any new matter may be pleaded which would defeat the plaintiff's action. McLane *v.* Paschal, 62 Tex. 102.

Alabama.—On appeal from a justice, an amendment inserting the full Christian name of the plaintiff instead of the initials thereof may be allowed. South & N. Ala. R. Co. *v.* Small, 70 Ala. 499. But the striking out of a sole party and substituting another cannot be allowed. Davis Ave. R. Co. *v.* Mallon, 57 Ala. 168.

Georgia.—Upon appeal from a justice court to the Superior Court, it is not allowable to add new parties so as to totally change the issues tried. Cobb *v.* Lowry, 60 Ga. 637.

Arkansas.—Upon appeal from the County Court in proceedings for annexation to a city, the Circuit Court hears the petition *de novo*, and may permit it to be amended so as to exclude lands embraced within it. Vestal *v.* Little Rock, 54 Ark. 321.

Illinois—*Appeal from County Court.*—Where there was a mistake in a claim filed in the County Court against the estate of a deceased guardian by the wards, in respect to the name of one of the wards, it was held that the name might properly be corrected on appeal in the Circuit Court, under the Practice Act of 1872. Scheel *v.* Eidman, 77 Ill. 301.

On Appeal from a Justice the Circuit Court may allow either party to file additional counts. Waterman *v.* Bristol, 1 Gilm. (6 Ill.) 593.

And a coplaintiff may be added by amendment. Zipp *v.* Uhland Hain, 30 Ill. App. 280; Smith *v.* Martin, 28 Ill. App. 224; McDowell *v.* Town, 90 Ill. 359.

1. Appeals from Justice to County Court.—Simpson *v.* Rome, etc., R. Co. (Supreme Ct.), 15 N. Y. St. Rep. 539, 48 Hun (N. Y.) 113; Dressler *v.* Davis, 12 Wis. 58, *followed* in Felt *v.* Felt, 19 Wis. 193, and in McOmber *v.* Balow, 40 Minn. 388, construing a similar statute.

2. Bickett *v.* Garner, 21 Ohio St. 659.

3. Clark *v.* Smith, 39 Mo. 498; Gregory *v.* Wabash, etc., R. Co., 20 Mo. App. 448; Kitchen *v.* Missouri Pac. R. Co., 82 Mo. 686; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; Shaffner *v.* Leahy, 21 Mo. App. 110; Hansberger *v.* Missouri Pac. R. Co., 43 Mo. 196; Webb *v.* Robertson, 74 Mo. 380; Brashears *v.* Strock, 46 Mo. 221; Sturges *v.* Botts, 24 Mo. App. 283; Smith *v.* Anthony, 5 Mo. 504; Gist *v.* Loring, 60 Mo. 487; Moser *v.* Jenkins, 5 Oregon 447; Cain *v.* Harden, 1 Oregon 360; Ballard *v.* Murphy (Tex. App. 1890), 15 S. W. Rep. 42; Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444; Roe *v.* Holbert (Tex. App., 1892), 18 S. W. Rep. 417; Cobb *v.* Lowry, 60 Ga. 637; Evers *v.* Sager, 28 Mich. 47; Donahue's Appeal, 62 Conn. 370.

tion to determine.[1] But if the amendment be such as not to affect the jurisdiction either of the appellate court or the court below, it is in general allowable.[2]

1. Evers *v.* Sager, 28 Mich. 47; Osgood *v.* Green, 30 N. H. 210; Colvin *v.* Peck, 62 Conn. 155; Capps *v.* Capps, 85 N. Car. 408; Robeson *v.* Hodges, 105 N. Car. 49; Ijames *v.* McClamroch, 92 N. Car. 362.

Where the plaintiff declares in the justice court for a cause of action of which the justice has no jurisdiction, no amendment of the declaration in the Circuit Court on appeal can save the case. Fowler *v.* Hyland, 48 Mich. 179.

In a case brought by appeal from county commissioners to the Circuit Court an amendment will not be allowed in those particulars upon which the original jurisdiction of the commissioners depends. Shneey *v.* Stoner, 47 Md. 167.

If the justice has no jurisdiction because the damages claimed for injuries to personal property exceeded fifty dollars, the plaintiff would not be entitled in a Circuit Court to amend by changing the sum claimed to fifty dollars. Webb *v.* Tweedie, 30 Mo. 488.

The Circuit Court on appeal from a justice may properly refuse to allow an unnecessary defendant to be added by amendment, especially where the allowance of the amendment would oust the jurisdiction of the justice. Ingalls *v.* Averitt, 34 Mo. App. 371.

An averment which is necessary to show jurisdiction of the subject-matter in the justice may be supplied by amendment in the Circuit Court. Fathman, etc., Planing Mill Co. *v.* Ritter, 33 Mo. App. 404; Lindsay *v.* Kansas City, etc., R. Co., 36 Mo. App. 51. *Compare* Dowdy *v.* Womble, 41 Mo. App. 573.

2. New Hampshire. — Osgood *v.* Green, 30 N. H. 210. See also Boggs *v.* Near, 20 Ind. 395.

A declaration filed in the probate court upon appeal from commissioner's report rejecting a claim against an insolvent estate may be amended in the common pleas. Parker *v.* Gregg, 23 N. H. 416.

Indiana.—*A Petition in a Drainage Case* may be amended on appeal in the Circuit Court, Metty *v.* Marsh, 124 Ind. 18; even in a jurisdictional matter, Coolman *v.* Fleming, 82 Ind. 117. And the petition in a highway case may be amended by changing in a slight degree the line of the proposed highway. Burns *v.* Simmons, 101 Ind. 557.

In Proceedings by Eminent Domain. —On an appeal to the Circuit Court in proceedings to assess damages to property taken by eminent domain, at any time pending a motion to strike out exceptions to the assessment, the exceptions may be amended by filing an additional exception presenting a question proper to be tried relating to the adequacy of the damages assessed. Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100.

On Appeals from Justices.—The Circuit Court may allow the addition of a new paragraph to the complaint, Hampton *v.* Warren, 51 Ind. 288; or the addition of a necessary new party, Osborn *v.* Osborn, 18 Ind. 373; or a change in plaintiff's name so as to make it correspond with the appeal bond, Hayden *v.* Souger, 56 Ind. 42. See also Louderback *v.* Rosengrant, 4 Ind. 562; Indianapolis, etc., R. Co. *v.* Clark, 21 Ind. 150.

In Nelson *v.* Zink, 3 Blackf. (Ind.) 101, and Bastion *v.* Dalrymple, 3 Blackf. (Ind. 365,) it was held that the defense before the justice could not be amended in substance on appeal.

Iowa.—The filing of further pleadings in cases pending in the District Court on appeal is discretionary and subject to review only in a clear case of abuse. Dunton *v.* Thorington, 15 Iowa 217.

Under equitable circumstances upon proper terms, and after showing excuse for failure to plead before the justice, the defendant may be allowed to amend his answer in the Circuit Court on appeal. Ping *v.* Cockyne, 37 Iowa 211; Warren *v.* Scott, 32 Iowa 22. See also St. Louis Type Foundry *v.* Medes, 60 Iowa 525. And that pleadings may be amended in the Circuit Court on appeal, but not as a matter of right, see further, Packard *v.* Snell, 35 Iowa 80; Griswold *v.* Bowman, 40 Iowa 367; Stanton *v.* Warrick, 21 Iowa 76; May *v.* Wilson, 21 Iowa 79; Nettman *v.* Schramm, 23 Iowa 521; Kuhn *v.* Kuhn, 70 Iowa 682; Orlow *v.* Murphy, 52 Iowa 695.

g. REMAND WITH DIRECTIONS TO AMEND.—Where an appellate court reverses a decision of the lower court it is not uncommon to direct the latter to allow amendments, especially if the error will be obviated thereby;[1] but it is not the practice to re-

California.—On an appeal from a justice court to the Superior Court on questions of law and fact, when issues of fact have been made in the court below, the Superior Court may allow amendments to the pleadings, and its discretion cannot be reviewed on *certiorari*. Ketchum *v.* San Joaquin County Ct., 65 Cal. 494; Kitts *v.* Nevada County Ct., 62 Cal. 203.

A refusal by the County Court to allow an amendment on an appeal from a justice will not be reviewed by the Supreme Court except in a case of manifest abuse of discretion. Canfield *v.* Bates, 13 Cal. 606.

On appeals to the District Court from justice courts, the action must be tried upon the pleadings before the justice. Santa Cruz *v.* Santa Cruz R. Co., 56 Cal. 143.

Kentucky.—On appeal from the justice court to the Court of Common Pleas, the plaintiff may file an amendment to his demand. Puff *v.* Huchter, 78 Ky. 146.

Pennsylvania.—It was held in Gachet de Lisle *v.* Priestman, 1 Browne (Pa.) 115, that when a cause had been arbitrated and then brought into court again by appeal, the declaration could be amended by adding another count.

1. *California.*—Sonoma County Bank *v.* Charles, 86 Cal. 322; Pierce *v.* Jackson, 21 Cal. 641; Sterling *v.* Hanson, 1 Cal. 478; Fish *v.* Redington, 31 Cal. 186.

South Carolina.—Fields *v.* Watson, 23 S. Car. 42; Lindsay *v.* Jamison, 4 McCord (S. Car.) 93; Mitchell *v.* Poyas, 1 Nott. & M. (S. Car.) 85; McClendon *v.* Wells, 20 S. Car. 514.

Pennsylvania.—Wood *v.* Philadelphia, 27 Pa. St. 504; Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169.

Virginia.—Strange *v.* Floyd, 9 Gratt. (Va.) 474; Governor *v.* Withers, 5 Gratt. (Va.) 24.

Wisconsin.—Stevens *v.* Brooks, 22 Wis. 695; Lombard *v.* Cowham, 34 Wis. 486; Saveland *v.* Green, 36 Wis. 612; Davis *v.* Hubbard, 41 Wis. 408; Strong *v.* Hooe, 41 Wis. 659; Davis *v.* Henderson, 20 Wis. 520.

Maine.—Prescott *v.* Prescott, 65 Me. 478.

Georgia.—McLewis *v.* Furgerson, 59 Ga. 644.

Massachusetts.—Denham *v.* Bryant, 139 Mass. 110.

Missouri.—State *v.* Francis, 95 Mo. 44.

New Hampshire.—Boudreau *v.* Eastman, 59 N. H. 467.

New York.—Brown *v.* Colie, 1 E. D. Smith (N. Y.) 265; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9.

United States.—Pollard *v.* Dwight, 4 Cranch (U.S.) 432; U.S. *v.* Kirkpatrick, 9 Wheat. (U. S.) 738; Day *v.* Chism, 10 Wheat. (U. S.) 449; Mollan *v.* Torrance, 9 Wheat. (U. S.) 540; Garland *v.* Davis, 4 How. (U. S.) 131; Robertson *v.* Cease, 97 U. S. 646.

Mississippi. — Geren *v.* Wright, 8 Smed. & M. (Miss.) 360; Bingham *v.* Sessions, 6 Smed. & M. (Miss.) 13.

Texas.—Schmidt *v.* Mackey, 31 Tex. 659.

Tennessee.—Stovall *v.* Bowers, 10 Humph. (Tenn.) 560; Hunter *v.* Litterer, 1 Baxt. (Tenn.) 168; McCandlass *v.* Polk, 10 Heisk. (Tenn.) 617.

Louisiana.—Nichols *v.* Alsop, 10 La. 407.

Oregon. — Bamford *v.* Bamford, 4 Oregon 39; Branson *v.* Oregonian R. Co., 11 Oregon 161.

Kansas.—County of Harvey *v.* Munger, 24 Kan. 760.

Alabama.—Martin *v.* Martin, 22 Ala. 86.

Nevada.—California State Tel. Co. *v.* Patterson, 1 Nev. 158.

Illinois. — Stephens *v.* Sweeney, 2 Gilm. (7 Ill.) 375.

Remand Discretionary. — The court may refuse to remand for amendment. Phillips *v.* Van Shaick, 37 Iowa 229.

Remand Merely Advisory.—It was said in Bingham *v.* Sessions, 6 Smed. & M. (Miss.) 13, and Branson *v.* Oregonian R. Co., 11 Oregon 161, that the appellate court has no power to make a peremptory order to the court below, and can only recommend the desired amendments. But an examination of the cases cited at the head of this note will show that in several instances the trial court was "directed" to allow amendments of a character prescribed in the opinion of the appellate court.

verse a judgment when no errors are found therein in order to give a party an opportunity to make amendments which he did not ask for in the course of the former proceedings.[1]

k. AFTER REMAND—(1) *Where Remand is General.*—Where the appellate court reverses a judgment and remands the cause generally without any specific directions, amendments to the pleadings may be allowed upon the reinstatement of the case in the court below as if it had never been tried,[2] although the appellate

1. Gibbons *v.* Scott, 15 Cal. 285; Mulford *v.* Cohn, 18 Cal. 42; People *v.* Jackson, 24 Cal. 630; Dennison *v.* Tyson, 17 Vt. 549; Malcolm *v.* Baker, 8 How. Pr. (N. Y. Super. Ct.) 301; Colorado Springs Co. *v.* Hopkins, 5 Colo. 338: See also Brown *v.* Colie, 1 E. D. Smith (N. Y.) 265.

North Carolina.—The Code of North Carolina, § 965, confers express power upon the Supreme Court to remand causes for the purpose of making proper amendments or for further proceedings. Holley *v.* Holley, 96 N. Car. 229; Caroon *v.* Rogers, 6 Jones (N. Car.) 240; Robeson *v.* Hodges, 105 N. Car. 49; Morris *v.* Gentry, 89 N. Car. 248; Foy *v.* Haughton, 83 N. Car. 467.

In Ohio the same practice obtains. Buckley *v.* Osburn, 8 Ohio 180.

And in Tennessee.—Stovall *v.* Bowers, 10 Humph. (Tenn.) 560.

In Minnesota the Supreme Court, on appeal from an order sustaining or overruling a demurrer, has power when affirming or reversing the order to grant leave to amend. But as a general rule the matter will be relegated to the discretion of the court below. Farley *v.* Kittson, 27 Minn. 102; Haven *v.* Place, 28 Minn. 551. On the latter point see also Glenn *v.* Noble, 1 Blackf. (Ind.) 104.

California—*Where Plaintiff Mistakes His Remedy.*—When the plaintiff mistakes his remedy and brings an action at law for damages, and his proper remedy is a bill in equity for an accounting, and leaves out a necessary party, but inserts some averments which entitle him to some measure of equitable relief, the appellate court will not dismiss the action, but will send the case back with leave to amend the complaint. Blood *v.* Fairbanks, 48 Cal. 171.

In Respect of Parties.—On an appeal from a judgment of foreclosure, if it appears that unnecessary or improper parties were united with the proper parties the court may order a judgment in favor of proper plaintiffs and direct that the complaint be amended by striking out the names of those improperly joined. De Celis *v.* Porter, 65 Cal. 3.

If an attorney enters an appearance in a case for a person who is not named in the complaint as a party defendant, after the defendant named in the complaint has answered, and by a stipulation the answer on file is considered as the answer of the party for whom the attorney thus appears, the complaint should be amended by inserting the name of such party, and if not amended before an appeal is taken the Supreme Court will direct the court below to allow an amendment, even if it affirms the judment. Baldwin *v.* Bornheimer, 48 Cal. 433.

2. Parker *v.* Shannon, 121 Ill. 452; Cable *v.* Ellis, 120 Ill. 136; Perry *v.* Burton, 126 Ill. 599; Lee *v.* Wright, 1 Rawle (Pa.) 149; Gordon *v.* Downey, 1 Gill (Md.) 41; Holloway *v.* Lowe. 1 Ala. 246; Schreyer *v.* New York, 39 N. Y. Super. Ct. 277; McGrane *v.* New York, 19 How. Pr. (N. Y. C. Pl.) 144; Imhoff *v.* Chicago, etc., R. Co., 22 Wis. 681; McIndoe *v.* Morman, 26 Wis. 588; Blodgett *v.* Hitt, 29 Wis. 169; Irwin *v.* Sanders, 5 Yerg. (Tenn.) 287; Branson *v.* Oregonian R. Co., 11 Oregon 161; Sexton *v.* Henderson, 47 Iowa 131; Adams County *v.* B. & M. R. Co., 44 Iowa 335; Vawter *v.* Brown, 20 Ind. 277; Burns *v.* Barenfield, 84 Ind. 43; Hart *v.* Smith, 20 Fla. 58; Mitchell *v.* Cotten, 3 Fla. 158; Rogers *v.* Phinney, 13 N. J. L. 1; Tiernan *v.* Napier, 5 Yerg. (Tenn.) 410.

"**Stage of the Case.**"—Such amendments are at "a stage of the case," within the meaning of a clause in the statute prescribing the period when amendments must or may be allowed. Walker *v.* Cook, 17 Ga. 126; Gray *v.* Regan, 37 Iowa 688; Jones *v.* Clark, 31 Iowa 497; Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, holding

court may have adjudged the pleadings insufficient on demurrer.[1]

Discretionary.—Leave to amend is largely discretionary, as in the original proceedings, and its allowance or refusal is likewise subject to review for abuse of discretion.[2]

that there was the same right of amendment as if the case had not been tried; Bebb *v.* Preston, 3 Iowa 336; Scott *v.* Chickasaw County, 53 Iowa 47. See also Gallagher *v.* Whalen (Ky., 1888), 9 S. W. Rep. 701.

"In Progress."—After reversal and remand the cause is "in progress," within the meaning of a statute. *Ex parte* North, 49 Ala. 385.

New Breaches of the Bond. — The plaintiff may be allowed to assign new breaches of the bond sued on. Hunt *v.* Gaylor, 25 Ohio St. 620.

Inserting Special Counts.—Where the original declaration contains only the common counts it may be amended by inserting special counts. Rogers *v.* Phinney, 13 N. J. L. 1.

Raising New Issues.—Under the provisions of Gen. Stat., Minn., 1878, c. 66, § 124, the trial court may allow the pleadings to be amended so as to raise new issues requiring a new trial after the cause has been disposed of in the Supreme Court on findings of fact and conclusions of law. Burke *v.* Baldwin, 54 Minn. 514.

After Judgment on Demurrer.—If the appellate court after reversing a judgment on demurrer order judgment to be entered for either party, it is not in the power of the court below to give leave to amend the pleadings or to plead anew. Hale *v.* Lawrence, 22 N. J. L. 72. But if the judgment is reversed and the cause remitted without giving any judgment for the plaintiff in error, the court below may allow the parties to amend or withdraw their pleadings. Hale *v.* Lawrence, 22 N. J. L. 72; Phelan *v.* San Francisco, 9 Cal. 15; Utica Ins. Co. *v.* Scott, 6 Cow. (N. Y.) 606; Farley *v.* Kittson, 27 Minn. 102; Haynes *v.* Covington, 17 Miss. 470; Augusta R. Co. *v.* Andrews (Ga., 1893), 19 S. E. Rep. 713; *Ex parte* North, 49 Ala. 385.

After judgment sustaining a general demurrer has been affirmed the case is entirely out of court. Central R., etc., Co. *v.* Paterson, 87 Ga. 646.

1. Marine Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206.

2. Sanders *v.* Wakefield (Kan., 1889), 20 Pac. Rep. 518; Pierson *v.* McCahill, 22 Cal. 127; Duff *v.* Duff, 101 Cal. 1; Pierce *v.* Jackson, 21 Cal. 641; Troy, etc., R. Co. *v.* Tibbits, 11 How. Pr. (N. Y. Supreme Ct.) 168; People *v.* Fields, 50 How. Pr. (N. Y. Supreme Ct.) 481; Carpenter *v.* Knapp (Supreme Ct.), 26 N. Y. Supp. 436; Ferris *v.* Hard (Buffalo Super. Ct.), 27 N. Y. Supp. 222, 6 Misc. (N. Y.) 359; Saltus *v.* Genin, 3 Bosw. (N. Y.) 639; Getty *v.* Spaulding, 1 Hun (N. Y.) 115; Spawn *v.* Veeder, 4 Cow. (N. Y.) 503; Prindle *v.* Aldrich, 13 How. Pr. (N. Y. Supreme Ct.) 466; Smith *v.* Bogenschutz (Ky., 1892), 19 S. W. Rep. 667; Boettcher *v.* Colorado Nat. Bank, 15 Colo. 16; Chapman *v.* Colby, 47 Mich. 46; Farley *v.* Kittson, 27 Minn. 102; Holley *v.* Holley, 96 N. Car. 229; Wells *v.* American Express Co., 49 Wis. 224; Wallace *v.* Columbia, etc., R. Co., 37 S. Car. 335; Terry *v.* Brightman, 133 Mass. 536; McCaulla *v.* Murphy, 86 Ga. 475; Lathrop *v.* Adkinson, 87 Ga. 339; Moore *v.* Cameron, 12 Ga. 265; Kimbro *v.* Fulton Bank, 49 Ga. 419; Gage *v.* Stokes, 125 Ill. 40; Reed *v.* Howe, 44 Iowa 300.

Withdrawing Demurrer.—A defendant in error after the reversal of the judgment may be allowed to amend by withdrawing his demurrer and pleading *de novo.* Hall *v.* Snowhill, 14 N. J. L. 8.

Withdrawing Replication.—And after a judgment for the plaintiff has been reversed he may withdraw his replication and plead *de novo.* Van Dyke *v.* Van Dyke, 19 N. J. L. 1.

Pleading Statute of Limitations.—After the case has gone to the Supreme Court on a plea of *res adjudicata* the lower court may properly refuse to allow the defendant to plead the statute of limitations. Donnelly *v.* Pepper, 91 Ky. 363.

New Claim Barred by Statute.—Nor should the plaintiff be allowed to set up a different state of facts as the foundation of a claim barred by the statute of limitations during the pendency of the suit. Taylor *v.* Keeler, 51 Conn. 397.

(2) *Where the Remand is Limited.*—Where a cause is remanded for "further proceedings consistent with" the opinion, the mode of proceeding indicated in the opinion must be pursued, and any other mode is excluded.[1]

Res Adjudicata.—A party should not be allowed to amend so as to reopen questions which have been adjudicated by the appellate court.[2]

Changing Admission to Denial.—When a party admits in his answer under oath a material allegation of the complaint, and the case is tried and a judgment rendered and a new trial afterwards granted by the Supreme Court, on the return of the cause to the court below the defendant should not be allowed to amend his answer by changing the admission into a denial. Spanagel *v.* Reay, 47 Cal. 608. See also Palmer *v.* Utah, etc., R. Co., 2 Idaho 350.

Further Amendments.—Where a case was remitted to enable plaintiff to amend and the amendment was insufficient for the purpose intended it was held proper to grant leave for a further amendment. Cleveland *v.* Cohrs, 13 S. Car. 397.

New Cause of Action. — In *South Carolina*, where a new cause of action or ground of defence may be introduced by amendment before trial, it may be allowed before a second trial after remand from the appellate court. Hall *v.* Woodward, 30 S. Car. 564. See also, in *New York*, Hopf *v.* U. S. Baking Co. (Buffalo Super. Ct.), 21 N. Y. Supp. 589.

But amendments making a radical change in the ground of action should be received with great caution and only upon affidavit of merits and showing a reasonable excuse. Sweet *v.* Mitchell, 19 Wis. 524.

Amending to Conform to Judgment on Appeal.—It is error to strike out an amended petition which practically adopts a suggestion of the appellate court made on a former appeal in the same case. Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633. See also Ward *v.* Lathrop, 11 Tex. 287; Bissell *v.* Erwin, 13 La. 143.

Where the complaint demanded possession of land under a deed absolute it was held proper to amend so as to demand judgment for foreclosure after the deed had been declared on appeal to be a mortgage. Robinson *v.* Willoughby, 67 N. Car. 84.

A judgment in an action of forcible entry and detainer was reversed on the ground that it was not shown that the defendant was in possession of all the land described in the complaint; when the case went back on remand the lower court properly allowed the plaintiff to amend so as to include in his complaint only a part of the land described. Thompson *v.* Sornberger, 78 Ill. 353.

Where on appeal a case is reversed on account of the insufficiency of the complaint, its subsequent amendment as to the defects pointed out by the appellate court does not make it good with respect to others not considered. Rinard *v.* West, 92 Ind. 359.

1. Parker *v.* Shannon, 121 Ill. 452; Cable *v.* Ellis, 120 Ill. 136.

After Judgment of Dismissal.—Where the decision of the court on appeal operates as a dismissal of the complaint there can be no amendment. Bleckeley *v.* Branyan, 28 S. Car. 445.

2. Gage *v.* Stokes, 125 Ill. 40.

Mandate Ordering Certain Judgment.—When the mandate of the appellate court orders the entry of a certain judgment, it is not error to refuse permission to file an amended answer setting up facts sufficient to authorize the vacating of the judgment. Scott *v.* Scott, 9 Bush (Ky.) 174.

Where Question Not Res Adjudicata.—In an action brought to recover for an exaction of excessive charges for the carriage of goods the statutory penalty of three times the excess, it was determined in the appellate court that by reason of a repeal of the statute such an action would not lie. After the cause was remanded to the court below, it was held that the complaint might be amended so as to demand only the illegal excess, that question not being *res adjudicata*. Smith *v.* Chicago, etc., R. Co., 49 Wis. 443.

Mere Recital of Facts.—The statement in the original decree and in the opinion of the appellate court of certain facts alleged in the complaint

Matters Arising after Mandate.—Nor can a plaintiff amend by stating a cause of action originating after the return of the record from the appellate court.[1]

12. Effect of Amendments—*a.* RETROACTIVE EFFECT—(1) *In General.*—When an amendment has been properly made and is for the same cause of action, the amended pleading is regarded as a continuation of the original pleading and takes effect as of the date when the latter was filed.[2]

(2) *Statute of Limitations*—**Where Amendment Does Not Introduce a New Cause of Action.**—Where an amendment does not set up a new cause of action or bring in any new parties, the running of the statute of limitations is arrested at the date of filing the original pleading.[3]

and admitted in the answer is not such an adjudication of those facts as to preclude the defendant from subsequently making an issue upon them by an amendment. Hall *v.* Woodward, 30 S. Car. 564.

1. Bell *v.* Williams, 10 La. 514.

2. Heath *v.* Whidden, 29 Me. 108; Brockaway *v.* Thomas, 32 Ark. 311; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Schuyler Nat. Bank *v.* Bollong, 28 Neb. 684; Branch Bank *v.* Morris, 13 Iowa 136; Clark *v.* Delaware, etc., Canal Co., 11 R. I. 36; Fame Ins. Co. *v.* Thomas, 10 Ill. App. 545; Verdery *v.* Barrett, 89 Ga. 349; Chattanooga, etc., R. Co. *v.* Whitehead, 89 Ga. 190; Agee *v.* Williams, 30 Ala. 636.

Amendment After Remand.—Where a judgment is reversed on appeal, a proper amendment filed after remand to the trial court relates to the commencement of the suit. Fleenor *v.* Taggart, 116 Ind. 189.

Striking out a Party.—Where the name of one of two defendants was stricken out by permission of the court on motion of the plaintiff and with the assent of the only defendant appearing in defense, the action stood as if it had been originally brought against the only remaining defendant, and a writ of review was properly brought in the name of the latter alone. Fling *v.* Trafton, 13 Me. 295.

Intervening Fraudulent Conveyances.—A suit upon the cause of action set forth in the amendment, provided it be not entirely new, will be considered as pending from the beginning as regards an intervening fraudulent conveyance made by the defendant. Cooke *v.* Cooke, 43 Md. 522.

Amendment of Bill of Costs.—Where an original bill of costs is filed in time, an amendment of it relates back. Burnham *v.* Hays, 3 Cal. 115.

Averment of Citizenship.—In the federal courts it is proper in an amended declaration to state the citizenship of the parties in the present tense without stating such citizenship as existing at the time of the commencement of the suit, because the amendment relates back. Birdsall *v.* Perego, 5 Blatchf. (U. S.) 251.

Correcting Misnomer in Summons.—The amendment of a summons made after notice to the defendant by the correction of a mistake in the name of the plaintiff relates back to the time of service. Martin *v.* Coppock, 4 Neb. 173.

Opens Default.—That an amendment after default opens the default, see Tullis *v.* Scott, 38 Tex. 537.

Notice of Trial Not Affected.—Where a cause is at issue and noticed for trial and placed upon the calendar, an amendment of the pleading does not render another notice of trial necessary. Stevens *v.* Curry, 10 Minn. 316.

New Process.—Where the claim of the plaintiff is not substantially changed no new summons is necessary. Schuyler Nat. Bank *v.* Bollong, 28 Neb. 684.

3. *Michigan.*—Abbott *v.* Judge, 55 Mich. 410; Long *v.* Judge, 27 Mich. 164; Wood *v.* Lane, 84 Mich. 521.

New York.—Risley *v.* Phœnix Bank, 2 Hun (N. Y.) 349; Elting *v.* Dayton, 67 Hun (N. Y.) 425.

Nebraska.—McKeighan *v.* Hopkins, 19 Neb. 33.

Ohio.—Baltimore, etc., R. Co. *v.* Gibson, 41 Ohio St. 145.

Where Amendment Introduces a New Cause of Action.—If an amendment introduces a new cause of action the statute of limitations runs against it to the time when it is filed.[1]

North Carolina.—Ely *v.* Early, 94 N. Car. 1.

Georgia.—Tift *v.* Towns, 63 Ga. 237; Akin *v.* Bartow County, 54 Ga. 59; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Rutherford *v.* Hobbs, 63 Ga. 243; Hines *v.* Rutherford, 67 Ga. 606.

South Carolina.—Bryce *v.* Massey, 35 S. Car. 127.

Maine.—Heath *v.* Whidden, 29 Me. 108.

West Virginia.—Kuhn *v.* Brownfield, 34 W. Va. 252.

Vermont.—Dana *v.* McClure, 39 Vt. 197.

Tennessee.—Burgie *v.* Sparks, 11 Lea (Tenn.), 84; Nauce *v.* Thompson, 1 Sneed (Tenn.) 321.

Minnesota.—Bruns *v.* Schreiber, 48 Minn. 366.

Indiana.—Monticello *v.* Grant, 104 Ind. 168; Chicago, etc., R. Co. *v.* Bills, 118 Ind. 221.

Alabama.—Stringer *v.* Waters, 63 Ala. 361; Bradford *v.* Edwards, 32 Ala. 628; Dowling *v.* Blackman, 70 Ala. 303; American Union Tel. Co. *v.* Daughtery, 89 Ala. 191; Evans *v.* Richardson, 76 Ala. 329; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112; Alabama G. S. R. Co. *v.* Thomas, 89 Ala. 294; Alabama G. S. R. Co. *v.* Arnold, 80 Ala. 600; Ricketts *v.* Weeden, 64 Ala. 548; Sublett *v.* Hodges, 88 Ala. 491; Western Union Tel. Co. *v.* Way, 83 Ala. 542.

Illinois.—Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416.

New Hampshire.—Gagnon *v.* Connor, 64 N. H. 276.

Pennsylvania.—Smith *v.* Bellows, 77 Pa. St. 441; Clement *v.* Com., 95 Pa. St. 107.

California.—Kamm *v.* Bank of California, 74 Cal. 198; Cox *v.* McLaughlin, 76 Cal. 60; Lorenzana *v.* Camarillo, 45 Cal. 125; Link *v.* Jarvis (Cal., 1893), 33 Pac. Rep. 206; Preston *v.* Culbertson, 58 Cal. 198.

Missouri.—Buel *v.* St. Louis Transfer Co., 45 Mo. 562; Lottman *v.* Barnett, 62 Mo. 159; Smith *v.* Missouri Pac. R. Co., 56 Fed. Rep. 458; Newman *v.* Jefferson City, etc., R. Co., 19 Mo. App. 100; Lilly *v.* Tobbein, 103 Mo. 477.

Iowa.—Myers *v.* Kirt, 68 Iowa, 124; Cooper *v.* Mills County, 69 Iowa, 350; Case *v.* Blood, 71 Iowa 632.

Texas.—Scoby *v.* Sweatt, 28 Tex. 713; Foster *v.* Smith, 66 Tex. 680; Becker *v.* Gulf City St. R., etc., Co., 80 Tex. 475; McIlhenny *v.* Lee, 43 Tex. 205; Thompson *v.* Swearengin, 48 Tex. 555; Rowland *v.* Murphy, 66 Tex. 534; Gulf, etc., R. Co. *v.* McGown, 73 Tex. 355; Hastings *v.* Kellogg (Tex. Civ. App., 1894), 24 S. W. Rep. 1846; Tribby *v.* Wokee, 74 Tex. 142; Telfener *v.* Dillard, 70 Tex. 139; Mayer *v.* Walker, 82 Tex. 222; Turner *v.* Brown, 7 Tex. 489; Thouvenin *v.* Lea, 26 Tex. 612; Becton *v.* Alexander, 27 Tex. 659; Usher *v.* Skidmore, 28 Tex. 616; Hollis *v.* Chapman, 36 Tex. 1; Garrett *v.* Muller, 37 Tex. 589; Kendall *v.* Riley, 45 Tex. 20; Jones *v.* Burgett, 46 Tex. 285; Killebrew *v.* Stockdale, 51 Tex. 529; Western Union Tel. Co. *v.* Brown, 62 Tex. 536; I. & G. R. Co. *v.* Irvine, 64 Tex. 529.

New Jersey.—Guild *v.* Parker, 43 N. J. L. 430.

Pending Proceedings in Error.—The statute will not run pending proceedings in error. Hutchinson *v.* Ainsworth, 73 Cal. 452.

Amendment After Demurrer Sustained.—The amendment relates back to the commencement of the suit, even though a demurrer to the complaint was sustained before permission given to amend it. Zieverink *v.* Kemper, 50 Ohio St. 208; Augusta R. Co. *v.* Andrews (Ga., 1893), 19 S. E. Rep. 713, after a demurrer sustained on the ground that the complaint stated no cause of action.

As to what constitutes a new cause of action, see *supra*, III, 6, *b*, *c*, *d*, where many cases referred to in this note are again cited, together with a statement of the nature of the amendments filed therein.

1. *Michigan.*—Wingert *v.* Carpenter (Mich., 1894), 59 N. W. Rep. 662; People *v.* Judge, 35 Mich. 227; Gorman *v.* Judge, 27 Mich. 138; Nugent *v.* Adsit, 93 Mich. 462; Long *v.* Judge, 27 Mich. 164.

Ohio.—Hills *v.* Ludwig, 46 Ohio St. 374.

Maryland.—Schulze *v.* Fox, 53 Md. 37.

North Carolina.—Hester *v.* Mullen, 107 N. Car. 724.

Question, How Raised.—The question whether an amended complaint introduces a new cause of action barred by the statute of limitations cannot be raised by motion to strike out the amendment. The statute of limitations must be pleaded so as to give the plaintiff an opportunity to set up exceptions.[1]

Where New Parties Are Introduced.—Where a pleading is amended the statute of limitations runs against a new plaintiff,[2] and

Tennessee.—Crofford *v.* Cothran, 2 Sneed (Tenn.) 492.

United States.—Sicard *v.* Davis, 6 Pet. (U. S.) 124.

Alabama.—Alabama G. S. R. Co. *v.* Smith, 81 Ala. 229; Barker *v.* Anniston, etc., R. Co., 92 Ala. 314; Mohr *v.* Lemle, 69 Ala. 180; Anniston, etc., R. Co. *v.* Ledbetter, 92 Ala. 326; Lansford *v.* Scott, 51 Ala. 557.

Georgia.—Jones *v.* Johnson, 81 Ga. 293; Ayers *v.* Daly, 56 Ga. 119.

Pennsylvania.—Leeds *v.* Lockwood, 84 Pa. St. 70.

California.—Atkinson *v.* Amador, etc., Canal Co. 53 Cal. 102; Anderson *v.* Mayers, 50 Cal. 525; Buntin *v.* Chicago, etc., R. Co. 41 Fed. Rep. 744.

Missouri.—Holliday *v.* Jackson, 21 Mo. App. 660.

Texas.—McLane *v.* Belvin, 47 Tex. 493; Littlefield *v.* Fry, 39 Tex. 299; Erskine *v.* Wilson, 20 Tex. 77, 27 Tex. 117; Pridgin *v.* Strickland, 8 Tex. 427; Beal *v.* Alexander, 6 Tex. 531; Governor *v.* Burnett, 27 Tex. 32; Williams *v.* Randon, 10 Tex. 74; Ayres *v.* Cayce, 10 Tex. 99; Gulf, etc., R. Co. *v.* Thompson (Tex. App., 1890), 16 S. W. Rep. 174; American Salt Co. *v.* Heidenheimer, 80 Tex. 344; Hopkins *v.* Wright, 17 Tex. 30.

See also Taylor *v.* Keeler, 51 Conn. 397; Delaware County *v.* Andrews, 18 Ohio St. 49; Trousdale *v.* Thomas, 3 Lea (Tenn.) 715; Kaul *v.* Lawrence, 73 Pa. S. 410; Tyrrill *v.* Lamb, 96 Pa. St. 464; Wright *v.* Hart, 44 Pa. St. 454; Stout *v.* Stout, 44 Pa. St. 457; Trego *v.* Lewis, 58 Pa. St. 463.

Reasserting Claim after Dismissal.—Where an action was brought on two promissory notes and during the trial it was dismissed as to one of them without prejudice, and afterwards the plaintiff amended his petition and claimed the same amount as balance due on a settlement which the pleadings showed was outside of the period of limitations, it was error to overrule a demurrer setting up the statute of limitations. Parsons Water Co. *v.* Hill, 46 Kan. 145.

New Promise.—Where a new promise or acknowledgement of the debt is pleaded by amendment the statute of limitations runs against it until the filing of the amendment. Erskine *v.* Wilson, 20 Tex. 77, 27 Tex. 117.

In New York it has been said that the court probably has power to permit an amendment setting up a new cause of action barred by the statute of limitations and thereby defeat that defense. Hatch *v.* Central Nat. Bank, 78 N. Y. 487; Eggleston *v.* Beach (Supreme Ct.), 33 N. Y. St. Rep. 835, 11 N. Y. Supp. 525.

But that the power should be sparingly exercised, and only under circumstances showing that the plaintiff has pursued his rights with diligence and is free from fault or neglect, and that the fact that he has discovered his inability to prove the cause of action declared on is no ground for granting such relief, see Eggleston *v.* Beach (Supreme Ct.), 33 N. Y. St. Rep. 835, 11 N. Y. Supp. 525.

In Davis *v.* New York, etc., R. Co., 110 N. Y. 646, 14 N. Y. St. Rep. 1, however, the court said: "There is no doubt that the court may at special term allow the amendment of a complaint by introducing therein even a cause of action barred by the statute of limitations; but in such case the defendant must not be deprived of his defense of the statute." See also Quimby *v.* Claflin, 27 Hun (N. Y.) 611.

Statute of Limitations, How Pleaded.—If the defendant desires to plead the statute of limitations to an amendment introducing a new cause of action, he should properly plead it only to the amendment and not to the original and amendment. Pennsylvania Co. *v.* Sloan, 125 Ill. 72.

1. Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48.

2. Kille *v.* Ege, 82 Pa. St. 102; Flatley *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 230; Telfener *v.* Dillard, 70 Tex. 139; Willink *v.* Renwick, 22 Wend. (N. Y.) 608; Cogdell *v.* Exum, 69 N. Car. 464.

in favor of a new defendant,[1] to the date of filing the amendment by which he is brought into the case.

b. EFFECT UPON INJUNCTION—**Without Prejudice.**—An amended complaint which does not affect the identity of the action may be filed by leave of court without prejudice to a preliminary injunction already granted.[2]

Original Defects Cured.—And if the complaint upon which an injunction is granted is defective, but the defects are cured by an amendment which states good ground for an injunction, a motion to dissolve the injunction based upon the original defects should be overruled.[3]

c. AS A WAIVER OF ERROR IN PREVIOUS RULINGS.—Where a party amends a pleading after it has been pronounced insufficient he cannot assign the ruling of the court as error.[4] But a

Plaintiff Not Entirely New.—Where a suit is brought in the name of an association incompetent to sue, an amendment substituting some of its members as plaintiffs relates to the commencement of the suit for the purpose of avoiding the bar of the statute of limitations. Lilly *v.* Tobbein, 103 Mo. 477.

So where an amendment merely inserts the representative character of plaintiff, Hines *v.* Rutherford, 67 Ga. 606; Rutherford *v.* Hobbs, 63 Ga. 243; Tift *v.* Towns, 63 Ga. 237; or strikes it out, Fame Ins. Co. *v.* Thomas, 10 Ill. App. 545; or where it merely corrects an error in assigning a party to the wrong side of the case. Buel *v.* St. Louis Transfer Co., 45 Mo. 562.

1 Jeffers *v.* Cook, 58 Cal. 147; Seibs *v.* Engelhardt, 78 Ala. 508, an action against a husband to enforce a mechanic's lien where the wife was brought in by amendment after the statutory period had elapsed. Leatherman *v.* Times, 88 Ky. 291, a suit against a corporation and an amendment bringing in the individual members. Woodward *v.* Ware, 37 Me. 563; Lagow *v.* Neilson, 10 Ind. 183; Shaw *v.* Cock, 78 N. Y. 194.

Not a New Defendant.—Where an action on a judgment against several joint debtors is originally brought against one of them alone, a subsequent amendment to the complaint by inserting the names of the other judgment debtors relates back to the commencement of the suit as against them. Lewis *v.* Adams, 70 Cal. 403. See also the *quære* in Woodward *v.* Ware, 37 Me. 563.

Where an executor is a defendant on a cause of action founded on the liability of the testator and a coexecutor is added by amendment the latter cannot set up the statute of limitations to save the estate from liability. Burgie *v.* Sparks, 11 Lea (Tenn.) 84.

2. Barber *v.* Reynolds, 33 Cal. 497; Shipman *v.* Superior Court (Cal., 1887), 12 Pac. Rep. 787; Seldon *v.* Vermilya, 4 Sandf. Ch. (N. Y.) 573; Furniss *v.* Brown, 8 How. Pr. (N. Y.) 59; Walker *v.* Walker, 3 Kelley (Ga.) 302; Warburton *v.* London, etc., R. Co., 2 Beav. 254; Pratt *v.* Archer, 1 Sim. & Stu. 254; Pickering *v.* Hanson, 2 Sim. 488.

3. Crawford *v.* Paine, 19 Iowa 172; Sweatt *v.* Faville, 23 Iowa 321.

Where Amendment Abandons Original.—But if the plaintiff, instead of so amending his petition as to make it appear therefrom that his purpose is to support his existing writ, files what is in fact a new petition, though styled an amended one, and asks therein for a new writ, the action of the court in sustaining a motion to dissolve the writ filed before the amendment will not be disturbed. Des Moines N. & R. Co. *v.* Carpenter, 27 Iowa 487.

Radical Defects not Cured.—In Rhodes *v.* Union Bank, 7 Rob. (La.) 63, it was held that after a motion to dissolve an injunction the plaintiff cannot, by filing an amended petition containing new allegations, cure a radical defect in his original proceedings, and thereby give effect to an injunction originally illegal.

4. **Amendment of Complaint After Demurrer Sustained** waives an objection to the ruling. Lane *v.* Burlington, etc., R. Co., 52 Iowa 18; Taylor *v.*

party by amending one paragraph of a pleading does not waive the exception to a ruling upon a demurrer to another paragraph of the same pleading.[1]

d. ORIGINAL PLEADING SUPERSEDED.—**The Original Complaint** is superseded and its effect as a pleading destroyed by filing an amended complaint which is complete in itself and does not refer

Galland, 3 Greene (Iowa) 17; Smith *v.* Cedar Falls, etc., R. Co., 30 Iowa 244; City of Muscatine *v.* Keokuk, 47 Iowa 350; Philips *v.* Hosford, 35 Iowa 593; Ford *v.* Jefferson County, 4 Greene (Iowa) 273; Gale *v.* Tuolumne Water Co., 14 Cal. 25; Loveland *v.* Garner, 71 Cal. 541; Walsh *v.* McKeen, 75 Cal. 519; Earp *v.* Putnam County, 36 Ind. 470; Kennedy *v.* Anderson, 98 Ind. 151; Murphy *v.* Peter, 56 Ind. 545; Short *v.* Spotts, 58 Ind. 29; Mutual Benefit L. Ins. Co. *v.* Cannon, 48 Ind. 264; Scotten *v.* Longfellow, 40 Ind. 23. See also Bobb *v.* Bobb, 89 Mo. 411; Birnbaum *v.* Crowinshield, 137 Mass. 177; Vaiden *v.* Bell, 3 Rand. (Va.) 448; Moore *v.* Wade, 8 Kan. 380; Kirkpatrick *v.* Holman, 25 Ind. 293.

In Alabama under the Code, § 2255, if the plaintiff amends after demurrer sustained it is no waiver unless the record shows that in consequence of the amendment he sustained no injury by the ruling. Williams *v.* Ivey, 37 Ala. 242, *overruling* Sheppard *v.* Shelton, 34 Ala. 652, and limiting Stallings *v.* Newman, 26 Ala. 300, to cases commenced before the Code.

Amendment of Complaint After Plea in Abatement.—If the plaintiff amends by leave after plea in abatement filed to his declaration, it amounts to a confession of the plea and disposes of it. Webster *v.* Tiernan, 4 How.(Miss.) 352.

Amendment of Plea or Answer After Demurrer Sustained is a waiver of error. Martin *v.* Capital Ins. Co., 85 Iowa 643; McClintock *v.* Crick, 4 Iowa 453; Duncan *v.* Hobart, 8 Iowa 336; Franklin *v.* Twogood, 18 Iowa 515; Ham *v.* Carroll, 17 Ind. 442; Jay *v.* Indianapolis, etc., R. Co., 17 Ind. 262; Patrick *v.* Jones, 21 Ind. 249; State *v.* Hay, 88 Ind. 74; White *v.* Garretson, 34 Ind. 514; Miles *v.* Buchanan, 36 Ind. 490; Wingate *v.* Wilson, 53 Ind. 78; Robinson *v.* L'Engle, 13 Fla. 482; Sanford *v.* Cloud, 17 Fla. 532; Mayo *v.* Keyser, 17 Fla. 744; Heaton *v.* Myers, 4 Colo. 59; Hurd *v.* Smith, 5 Colo. 233; Derry *v.* Ross, 5 Colo. 295.

The ruling is not brought up for review from a final judgment rendered for the plaintiff upon the amended answer. Forcheimer *v.* Holly, 14 Fla. 239.

Striking Out an Answer or a part thereof is not assignable as error if the defendant files an amended answer. Irvinson *v.* Van Riper, 34 Ind. 140; Hexter *v.* Schneider, 14 Oregon 184; Gale *v.* James, 11 Colo. 540. And this is so even if the defendant excepts to the action of the court. Gale *v.* Foss, 47 Mo. 276.

Waiver of Ruling on Evidence.—Where the court refused to permit evidence offered by the defendant to go to the jury on the ground that it was not pertinent to the issue made by the pleadings, whereupon the defendant obtained leave to amend and did amend his answer, setting up the fact sought to be established by the evidence offered, it was held that by pleading over he waived his objection to the ruling of the court. Rees *v.* Leech, 10 Iowa 439.

Amendment of Application to be Made a Party.—One who, after the overruling of his application to be substituted as a party to an action, amends his application, which is then granted, waives his right to appeal from the former ruling. Bixby *v.* Blair, 56 Iowa 416.

1. Washburn *v.* Roberts, 72 Ind. 213, an amendment of a complaint after demurrer.

Setting up a New Defense.—So where an answer is held bad on demurrer the defendant does not waive his exception to the ruling on the demurrer by amending his answer so as to set up new defenses. Ingham *v.* Dudley, 60 Iowa 16, holding that a waiver occurs only where the amendment is designed to supply the omission or to cure the defect pointed out by the demurrer.

Abandoning Counterclaim.—Where a counterclaim set up in one paragraph of an answer was held bad on demurrer, the defendant did not waive his exception to the ruling by filing an amendment to another paragraph, in which amendment there was no reference to the counterclaim. Folsom *v.* Winch, 63 Iowa 477.

to or adopt the original as a part of it.[1] And where a count is struck out of a declaration by leave of the court, the declaration must be considered as if that count had never been introduced.[2]

An Amended Answer, complete in itself, is to be considered as if it

1. Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54; Seneca County Bank *v.* Garlinghouse, 4 How. Pr. (N. Y. Supreme Ct.) 174; Wood *v.* Gibbs, 35 Miss. 559; Anderson *v.* Robertson, 32 Miss. 241; Hawkins *v.* Massie, 62 Mo. 552; Jones *v.* Frost, 28 Cal. 245; Kay *v.* Fredrigal, 3 Pa. St. 221; White *v.* Hampton, 9 Iowa 181; Thompson *v.* Toohey, 71 Ind. 296; Westerman *v.* Foster, 57 Ind. 408; Yancy *v.* Teter, 39 Ind. 305; Specht *v.* Wiliamson, 46 Ind. 599; Kirkpatrick *v.* Holman, 25 Ind. 293; McFadden *v.* Ellsworth M. & M. Co., 8 Nev. 57; State *v.* Simpkins, 77 Iowa 676, holding that the original is so far out of the case that it cannot be considered upon demurrer to the substituted petition. See also Boisse *v.* Langham, 1 Mo. 572; Basye *v.* Ambrose, 28 Mo. 39; Flint *v.* Gauer, 66 Iowa 696; Young *v.* Broadbent, 23 Iowa 539; Braindeis *v.* Neustadtl, 13 Wis. 142.

Illustration.—Where a complaint in foreclosure names a partnership as a party defendant, and an amended complaint is filed naming each member of the partnership as a defendant, a judgment for a deficiency cannot be rendered against the partnership; and the fact that service of summons and the original complaint was made on the partnership is immaterial. La Société, etc., *v.* Weidemann, 97 Cal. 507.

A pleading was styled in the caption, "the third amended answer," and commenced as follows: "Now comes the defendant and for an amended answer," etc. It was held that it took the place of and was not an amendment to the preceding answer filed, and that after a demurrer was sustained thereto the defendant was not entitled to a trial on the issues raised by the preceding answer. Bates *v.* Kemp, 12 Iowa 99.

The Original Complaint as Evidence.—The allegations of the original complaint are not admissible as evidence for or against the plaintiff. Mecham *v.* McKay, 37 Cal. 154; Wheeler *v.* West, 71 Cal. 126; Ponce *v.* McElvy, 51 Cal. 222. See also Turner *v.* Madden, 15 La. Ann. 510. Even though they were sworn to for the purpose of obtaining a writ of sequestration. Coats *v.* Elliott, 23 Tex. 606.

Contra.—The statements and admissions in the original pleadings are evidence for all the purposes of the trial. Smith *v.* Pelott (Supreme Ct.), 8 N. Y. Supp. 301, *citing* Holmes *v.* Jones, 121 N. Y. 461. See also Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181.

A party making allegations in his petition which constitute distinct items of proof may be bound by such allegations, notwithstanding he may have superseded the petition by an amended one. *Aliter* where averments are made of the existence of ultimate facts to be established by evidence. Johnson *v.* McGrew, 42 Iowa 555.

The Rule Qualified.—An original complaint is not superseded by an amendment which alleges substantially the same cause of action, and it remains "a pleading" within the meaning of the *California* Code of Civ. Pro. § 670, subd. 2, which makes the pleadings part of the judgment roll, and it may also be brought up by bill of exceptions. Redington *v.* Cornwell, 90 Cal. 49.

Waiver of the Rule.—Where a defendant treated both complaints as one in his answer by expressly answering the allegations contained in both he waived his right to take advantage of the rule that an amended complaint supersedes the original. Kline *v.* Corey, 18 Hun (N. Y.) 524.

Where Original Not Superseded.—An amendment to a complaint (not an amended complaint) must be considered together with the original. Wiggins *v.* Kirkpatrick (N. Car., 1894), 19 S. E. Rep. 152. See also Thomas *v.* Browder, 33 Tex. 783; Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641.

In *Iowa*, that filed as an amendment will not be considered as a substitute unless it is therein so expressed, but both will be considered together. Cooley *v.* Brown, 35 Iowa 475; Montgomery *v.* Shockey, 37 Iowa 107.

2. Prescott *v.* Tufts, 4 Mass. 146; Colvin *v.* Peck, 62 Conn. 155.

were the only answer which had been interposed in the case;[1] and when an answer is withdrawn by leave of the court the case is in the same condition as if no answer had been filed.[2]

Effect of Striking Out.—But where an amended pleading is stricken out the original is restored.[3]

c. RIGHT TO PLEAD DE NOVO—**Substantial Amendments.**—Where a complaint to which a plea or answer has been filed is amended in matter of substance the defendant has an absolute right to plead *de novo*.[4] And if he avails himself of the right, his original

1. Hanscom *v.* Herrick, 21 Minn. 9; Sands *v.* Calkins, 30 How. Pr. (N. Y. Supreme Ct.) 1; Kapp *v.* Barthan, 1 E. D. Smith (N. Y.) 622; Cramer *v.* Mack (District of New York), 12 Fed. Rep. 803; Dunlop *v.* Robinson, 12 Ohio St. 530; Barnsville First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555; Ticknor *v.* Voorhies, 46 Mo. 110; Young *v.* Woolfolk, 33 Mo. 110; Wells *v.* Applegate, 12 Oregon 208, holding that all motions and demurrers relating to the original cease to be a part of the record; Mecham *v.* McKay, 37 Cal. 154; Kuhland *v.* Sedgwick, 17 Cal. 123; Kentfield *v.* Hayes, 57 Cal. 409; Gilman *v.* Cosgrove, 22 Cal. 356; Smith *v.* Wigton, 35 Neb. 460; Lanman *v.* County of Des Moines, 29 Iowa 310. See also Mitchell *v.* Williamson, 9 Gill (Md.) 71.

Original as Evidence. — In Strong *v.* Dwight, 11 Abb. Pr. N.S. (N.Y. Supreme Ct.) 319, it was held that admissions in a sworn answer struck out by amendment may be used as evidence on the trial subject to be rebutted by the defendant.

In Brown *v.* Pickard, 4 Utah 292, it was held that an answer which has been superseded by an amended answer is still admissible in evidence against the defendant as an admission of the facts alleged therein.

Where Original Not Superseded.—When an amended answer does not take the place of the original on file both must must be considered together in determining the issues joined. Pharo *v.* Johnson, 15 Iowa 560. See also Nunnerlyn *v.* Alexander, 38 Tex. 125; Kostendader *v.* Pierce, 37 Iowa 645.

2. Roberts *v.* State Ins. Co., 26 Mo. App. 92.

3. Spooner *v.* Cady (Cal., 1894), 36 Pac. Rep. 104. See also cases cited in note 2, page 626.

4. Yates *v.* French, 25 Wis. 661; Gill *v.* Young, 88 N. Car. 58; Matlock *v.* Gray, 4 Hawks (N. Car.) 1, where the court said that every substantial amendment in the writ or declaration should be accompanied with permission to the defendant to amend his plea; and so permission to the defendant to amend his plea should be accompanied with a permission to the plaintiff to amend his replication. Cleveland *v.* Cohrs, 13 S. Car. 397; Adams *v.* Adams, 39 Ala. 603; Kennedy *v.* Dear, 4 Port. (Ala.) 423; Butler *v.* Thompson, 2 Fla. 16; Jones *v.* Grantham, 80 Ga. 472; Bennett *v.* Collins. 52 Conn. 1; Estlin *v.* Ryder, 20 La. Ann. 251; Harney *v.* Appelgate, 57 Cal. 205; Green *v.* Gill, 5 Mass. 379; Thompson *v.* Musser, 1 Dall. (U. S.) 464; Stanton *v.* Kenrick (Ind., 1893), 35 N. E. Rep. 19; Nelson *v.* Akeson, 1 Ill. App. 165; Logan *v.* Tibbott, 4 Greene (Iowa) 389; Travis *v.* Peabody Ins. Co., 28 W. Va. 583; Schulze *v.* Fox, 53 Md. 37; Kenny *v.* Van Cleef, 1 Hall (N. Y.) 165; People *v.* New York C. Pl., 18 Wend. (N. Y.) 534, where a mandamus issued to compel the allowance; Bogart *v.* McDonald, 2 Johns. Cas. (N. Y.) 219; Work *v.* Ogden (Supreme Ct.), 16 N. Y. Supp. 268; Fink *v.* Manhattan R. Co., 15 Daly (N. Y.) 479, 24 Abb. N. Cas. (N. Y.) 81, holding that defendant may demur and cannot be restricted to an answer; Harriott *v.* Wells, 9 Bosw. (N. Y.) 631, and State *v.* Green, 4 Gill & J. (Md.) 381, holding that defendant has a right to plead the statute of limitations. *Compare*, on the last point, Green *v.* Gill, 5 Mass. 379, and Shaw *v.* Brown, 42 Miss. 309.

Conflicting Authorities.—But there is some confusion in the authorities, as was pointed out in Yates *v.* French, 25 Wis. 661. Thus in Barstow *v.* Randall, 5 Hill (N. Y.) 556, it was held that the opposite party is not entitled to answer *de novo* unless the right is

pleading is to be considered as abandoned and may be stricken from the files on motion;[1] but he may at his election stand upon his original pleading without pleading anew.[2]

expressly reserved in the order granting leave to amend. See also Good *v.* Martin, 1 Colo. 406.

After Demurrer.—Defendant's right to plead anew is not taken away because a demurrer has been filed before the amendment is made. Myrick *v.* Myrick, 67 Ga. 771.

Pleading in Abatement.—The defendant has no right in pleading *de novo* to plead in abatement. Chapman *v.* Davis, 4 Gill (Md.) 166.

Status of Amended Answer.—The new answer may be amended to the same extent as an original pleading. Jones *v.* Grantham, 80 Ga. 472.

In Texas the defendant may answer by exception or plea as in the first instance. Speake *v.* Prewitt, 6 Tex. 252.

In South Carolina the defendant may either answer or demur. Cleveland *v.* Cohrs, 13 S. Car. 397.

California.—Amending a complaint in matter of substance opens a default on the original pleading, and the amendment must be served upon the parties, including the defaulted defendant, and each is entitled to an opportunity to answer it. Cal. Code Cov. Pro. §§ 432, 465; Thompson *v.* Johnson, 60 Cal. 292; People *v.* Woods, 2 Sandf. (N. Y.) 652; Reinhart *v.* Lugo, 86 Cal. 395, holding that the bringing in of new parties in an action for partition is an amendment of substance. But a defendant who appears and answers has no right to object on appeal that an amendment has not been served on codefendants. McGary *v.* Pedrorena, 58 Cal. 91.

Mississippi.— The plaintiff opens a default by amending thereafter and the defendant has a right to plead anew. Summers *v.* Foote, 28 Miss. 671. The defendant after an amendment by plaintiff may demur or plead in abatement or in bar. Shaw *v.* Brown, 42 Miss. 309.

Objection on Appeal. — An objection that the order permitting plaintiff to amend required the defendant to *answer* the amended complaint, is not available on appeal on the ground that it prevented the defendant from demurring, nor because the order required defendant to answer within twenty days after service of the amended complaint. The remedy in such cases is by motion for a resettlement of the order. Second Ave. R. Co. *v.* Metropolitan El. R. Co., 58 N. Y. Super. Ct. 172.

1. Yates *v.* French, 25 Wis. 661.

2. Yates *v.* French, 25 Wis. 661, where the amendment consisted only in changing the *ad dammum* clause. See also Power *v.* Ivie, 7 Leigh (Va.) 147, holding that a verdict on the original issue will stand, and Butler *v.* Thompson, 2 Fla. 9, to precisely the same point; Kennedy *v.* Dear, 4 Port. (Ala.) 423; Topeka *v.* Sherwood, 39 Kan. 690; Stevens *v.* Thompson, 5 Kan. 305.

That no answer is necessary where the denials in the original answer are applicable to the amendment, see further, Robinson *v.* Williamson, 7 Bush (Ky.) 604. *Compare* McAllister *v.* Ball, 28 Ill. 210.

When New Answer Required. — In Robinson *v.* Keys, 9 Heisk. (Tenn.) 144, leave to plaintiff to amend his declaration and to defendant for time to plead was held to be an abandonment of all existing issues; and that if plaintiff amends his declaration and no plea be filed to such amended declaration, the plaintiff is entitled to judgment by default.

In Wilson *v.* Preston, 15 Iowa 240, the defendant having answered and the plaintiff having amended by adding a verification to his complaint, a default was granted against the defendant for refusing to verify his answer or to file a verified answer, as the statute required a verified answer to a verified complaint.

In Iowa an amendment to a petition setting up a material fact which is not denied by the answer is regarded as admitted. Code of Iowa, § 271; Eslich *v.* Mason City, etc., R. Co., 75 Iowa 443; Clough *v.* Adams, 71 Iowa 17.

In Wisconsin.—Averments in a complaint after answer will be taken as admitted unless a further answer thereto is made, except where the first answer is sufficiently broad to meet them. Kelly *v.* Bliss, 54 Wis. 187; Knips *v.* Stefan, 50 Wis. 286, a case within the exception mentioned.

Formal Amendments.—Where the amendment is in some mere matter of form and does not affect the merits, the defendant is not as of right entitled to answer anew;[1] nor, on the other hand, will the court require him to do so.[2]

13. Leave to Amend—*a.* AMENDMENTS OF COURSE—(1) *Statutory Provisions—Absolute Right.*—The statutes generally provide that the party filing a pleading may amend it once of course—that is, without application to the court—and without costs,[3] at any time before answer or demurrer thereto,[4] or before the

Estoppel of Plaintiff. — Where an amended complaint is filed and the plaintiff tries the case upon the theory that answers to the original complaint are addressed to the complaint as amended, he is bound by that theory on appeal. McFadden *v.* Fritz, 110 Ind. 1, where it was insisted that the amended complaint took the answers from the record because they were not refiled.

1. Sinnet *v.* Mulhollan, 3 Martin (La.) 398; Harvey *v.* Corcoran, 60 Cal. 314, holding that after plaintiff had dismissed as to certain defendants not served, an amendment erasing their names from the title was not such as to require service of it upon the defendant, or which entitled the defendant to answer anew, although the California Code of Civ. Pro. (§§ 432, 465) requires all amendments to the complaint to be served and answered. See also Brock *v.* Martinovich, 55 Cal. 516; Smith *v.* Dorn, 96 Cal. 73, where the omission of the signature to the amended complaint was corrected by amendment, the court holding that at any rate the defendant could not complain of denial of leave to answer anew where the error was proved not to be prejudicial; Morford *v.* Dieffenbacker, 54 Mich. 593; Stanton *v.* Kenrick (Ind., 1893), 35 N.E. Rep. 19; Santo *v.* Maynard, 57 Conn. 157; Harris *v.* Wickes, 28 Wis. 198, holding that a mere consolidation of two actions, in each of which a sufficient answer has been filed, without change in the plaintiff's allegations, does not render necessary a new or amended answer. At least, he is not entitled to time to answer. Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409; Topeka *v.* Sherwood, 39 Kan. 690; Ellen *v.* Lewison, 88 Cal. 253; George *v.* Swafford, 75 Iowa 491; Estlin *v.* Ryder, 20 La. Ann. 251.

2. Cohen *v.* Hamill, 8 Kan. 621.

If an amendment to a petition does not change the issue and the court enters a default for want of an answer, it may in its discretion set the default aside on motion of the defendant. McQuade *v.* Chicago, etc., R. Co., 78 Iowa 688.

3. Where plaintiff amends of course within the time prescribed, he cannot be compelled to pay the costs of a motion previously served on him to strike out irrelevant allegations, although in his amendment he complies with the requirement of the defendant's motion. Welch *v.* Preston, 58 How. Pr. (N. Y. Supreme Ct.) 52. But a party cannot amend of course without costs if the opposite party has moved to set aside the first pleading for irregularity which is cured by the amendment. Williams *v.* Wilkinson, 5 How. Pr. (N. Y. Supreme Ct.) 357; Aymar *v.* Chase, 1 Code Rep. N. S. (N. Y.) 141; Hall *v.* Huntley, 1 Code Rep. N. S. (N. Y.) 21, note.

4. *California* Code Civ. Pro. sec. 472; *New York* Code, sec. 542.

In California the plaintiff may amend his complaint of course at any time before issuing a summons where there has been no appearance of the defendant. Allen *v.* Marshall, 34 Cal. 165.

In Kansas the plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceedings. Civil Code, § 133; Pierce *v.* Myers, 28 Kan. 364.

In West Virginia the plaintiff may as of course amend his declaration at any time before appearance by the defendant, and in such case it is not necessary to summon the defendant to plead to the amended declaration. Phelps *v.* Smith, 16 W. Va. 522.

Amendments of Course After Demurrer. —Some of the Codes also provide for amendments of course after demurrer and before the trial of the issue of law

period for answering it expires.[1] And in some jurisdictions the privilege of amending a pleading of course exists until a certain period after answer or demurrer thereto.[2] Where the right to amend is thus conferred, it is an absolute right of which a party cannot be deprived except for causes specified in the statute.[3]

thereon. See *California* Code Civ. Pro. § 472; *Colorado* Code 1887, § 73; McDonald *v.* Hallicy, 1 Colo. App. 303.

It is not allowable to amend of course after a pleading has been held bad on demurrer by filing another which differs in phraseology but not in substance. Epley *v.* Ely, 68 Iowa 70.

In *New York* prior to the Code, under a rule allowing an amendment after demurrer, the defendant was not allowed to add new pleas. Dole *v.* Moulton, Col. & Cai. (N. Y.) 91; Benedict *v.* Ripley, 5 Cow. (N. Y.) 37. And unless there was a demurrer to the plea defendant could not amend it of course. Squires *v.* Mallory, 17 Johns. (N. Y.) 3; Benedict *v.* Ripley, 5 Cow. (N. Y.) 37.

1. *New York* Code, sec. 542.

Time to Amend.—After a motion made by the plaintiff for a receiver has been denied, but before the time for the defendant to answer the complaint has expired, the plaintiff may serve an amended complaint of course. Fausten *v.* Weishas (Supreme Ct.), 6 N. Y. St. Rep. 730.

By obtaining an extension of time in which to answer the defendant extends the time of the plaintiff to amend his complaint as of course. Albert Palmer Co. *v.* Shaw, 64 How. Pr. (N. Y. Super. Ct.) 80.

An order extending the time of the plaintiff to serve a reply to a counterclaim set up in the answer does not extend the time to amend the complaint of course. Dawson *v.* Bogart, 10 Civ. Pro. Rep. (N. Y. C. Pl.) 56.

2. New York.—The New York Code, sec. 542, provides for amendment of course within twenty days after answer or demurrer to the original pleading, without prejudice to the proceedings already had.

An amended complaint cannot be served as of course more than twenty days after the original, though defendant has not answered or demurred. Clark *v.* Humphrey, 2 Month. L. Bull. (N. Y.) 21.

In New York a party by serving his pleading by mail does not thereby secure twice the time to serve an amended pleading which he would have had if the service had been a personal one. Armstrong *v.* Phillips, 60 Hun (N. Y.) 243. See Evans *v.* Lichtenstein, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 141; Toomey *v.* Andrews, 48 How. Pr. (N. Y. Supreme Ct.) 332; Washburn *v.* Herrick, 4 How. Pr. (N. Y. Supreme Ct.) 15.

Where one of several defendants served with the complaint demurred thereto and the demurrer was noticed for argument, and nearly three months thereafter another defendant was served with the complaint, it was held that the plaintiff could not amend the complaint of course as to the defendant who had demurred, although the amendment was claimed within twenty days of the time when the last complaint, was served, thus giving effect to the words "without prejudice to the proceedings already had." George *v.* Grant, 56 How. Pr. (N. Y. Supreme Ct.) 244. See also Prudden *v.* Lockport, 40 How. Pr. (N. Y. Supreme Ct.) 46.

Service of Amended Complaint.—Where an amended complaint does not substantially change the original complaint it need not be served upon defendants who have been served with the summons and complaint and have appeared in the action. Weil *v.* Martin, 24 Hun (N. Y.) 645, *distinguishing* McMurray *v.* McMurray, 60 Barb. (N. Y.) 117; People *v.* Woods, 2 Sandf. (N. Y.) 653.

3. Stillwell *v.* Kelly, 37 N. Y. Super. Ct. 417; Cooper *v.* Jones, 4 Sandf. (N. Y.) 699; Frank *v.* Bush, 5 Civ. Pro. Rep. (N. Y. Marine Ct.) 250 Clifton *v.* Brown, 2 Civ. Pro. Rep. (N. Y. Supreme Ct.) 44; Allen *v.* Bidwell, 35 Iowa 218; Champion *v.* Robertson, 4 Bush (Ky.) 17. See also Spooner *v.* Cady (Cal., 1894), 36 Pac. Rep. 104; Allen *v.* Marshall, 34 Cal. 165; Smith *v.* Pfister, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 409.

Pending Motion for Change of Venue.—In Allen *v.* Bidwell, 35 Iowa 218, it was held that, pending a motion for a

(2) *Waiver of Right.*—The plaintiff's right to amend as of course, after answer served, is waived by an application for leave to amend and becomes discretionary with the court.[1] Noticing the cause for trial is a waiver,[2] or appealing from an order giving leave to amend.[3] But a proceeding by the plaintiff for the examination of the defendant before trial within the time allowed for amendments of course is not inconsistent with the right to amend and is not a waiver.[4]

(3) *What Amendments May Be Made—By the Plaintiff.*—The plaintiff may amend his complaint by changing the place of trial,[5] or by changing the prayer for relief,[6] and, according to some

change of venue and before answer, it was reversible error to refuse to allow the plaintiff to amend his petition so as to remove the ground for the motion.

Noticing a Cause for Trial does not affect the right of the other party to amend as of course. Washburn *v.* Herrick, 4 How. Pr. (N. Y. Supreme Ct.) 15; Ostrander *v.* Conkey, 20 Hun (N. Y.) 421; Clifton *v.* Brown, 2 Civ. Pro. Rep. (N. Y. Supreme Ct.) 44; Townsend *v.* Hillman, 18 Civ. Pro. Rep. (N. Y. City Ct.) 213.

Where the plaintiff after noticing a cause for trial amends his complaint, and defendant serves an amended answer, the plaintiff must serve a new notice of trial and file a new note of issue. Graham *v.* Stirling Ins. Co. (C. Pl.), 13 N. Y. Supp. 562.

Effect of Amending of Course.—As to the effect of an amendment in defeating intervening motions by the opposite party, see Burrall *v.* Moore, 5 Duer (N. Y.) 654; Frank *v.* Bush, 63 How. Pr. (N. Y. Marine Ct.) 282; Rider *v.* Bates, 66 How. Pr. (N. Y. Supreme Ct.) 129; and that it supersedes the original pleading, Seneca County Bank *v.* Garlinghouse, 4 How. Pr. (N. Y. Supreme Ct.) 174; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200, *aff'd*, 28 N. Y. 324; Dann *v.* Baker, 12 How. Pr. (N. Y. Supreme Ct.) 521; Sands *v.* Calkins, 30 How. Pr. (N. Y. Supreme Ct.) 1; Fogg *v.* Edwards, 20 Hun (N. Y.) 90; New York, etc., Transp. Co. *v.* Hurd (Supreme Ct.), 8 N. Y St. Rep. 718; Kelly *v.* Christal, 81 N. Y. 619, *aff'g* 16 Hun (N. Y.) 242; Cramer *v.* Mack (District of New York), 12 Fed. Rep. 803; and that it relates back to the commencement of the action, Ward *v.* Kalbfleish, 21 How. Pr. (N. Y. Supreme Ct.) 283.

The right to amend of course does not operate *per se* as a stay of proceedings. Cusson *v.* Whalon, 1 Code Rep. N. S. (N. Y.) 27.

1. Hamilton *v.* Carrington (S. Car., 1894), 19 S. E. Rep. 676.

The right to amend of course is substantial, and a waiver must be clearly shown. Low *v.* Graydon, 14 Abb. Pr. (N. Y. Supreme Ct.) 443.

2. Phillips *v.* Suydam, 6 Abb. Pr. N. S. (N. Y. Supreme Ct.) 289, 54 Barb. (N. Y.) 153. *Contra*, Clifton *v.* Brown, 2 Civ. Pro. Rep. (N. Y. Supreme Ct.) 44, 27 Hun (N. Y.) 231; Duychinck *v.* New York El. R. Co., 49 N. Y. Super. Ct. 244, 5 Civ. Pro. Rep. (N. Y.) 22; Carpenter *v.* Adams, 34 Hun (N. Y.) 429.

A defendant who has accepted the conditions of an order granting him time to answer by waiving notice of trial, and consenting to place the cause on the calendar and consenting to a reference, cannot amend his answer of course so as to raise new issues. Schwab *v.* Wehrle, 14 N. Y. Wkly. Dig. 529.

3. Shibley *v.* Angle, 37 N. Y. 626.

4. Stillwell *v.* Kelly, 37 N. Y. Super. Ct. 417.

5. Stryker *v.* New York Exch. Bank, 42 Barb. (N. Y.) 511, 28 How. Pr. (N. Y.) 20; Toll *v.* Cromwell, 12 How. Pr. (N. Y. Supreme Ct.) 79; Rector *v.* Ridgewood Ice Co., 38 Hun (N. Y.) 293; on appeal, 101 N. Y. 656; Moulton *v.* Beecher, 1 Abb. N. Cas (N. Y. Supreme Ct.) 193; McCosker *v.* Smith (Supreme Ct.), 14 N. Y. Supp. 615, 38 N. Y. St. Rep. 227. See also in *New York*, before the Code, Hitchcock *v.* Post, 1 Wend. (N. Y.) 16. *Contra*, Wadsworth *v.* Georger, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 199. *Compare* Faherty *v.* Schuyler Steam Tow Boat Line, 43 Hun (N. Y.) 432.

6. Getty *v.* Hudson River R. Co., 6 How. Pr. (N. Y. Supreme Ct.) 269.

authorities, by setting forth an entirely new cause of action.[1] But he cannot introduce matters that occurred subsequent to the commencement of the suit.[2]

By the Defendant.—Whatever form of pleading the defendant concludes to be necessary to present his defense may be amended by him, of course, within the time prescribed.[3] If it be an answer, the facts may be stated in another way or other facts added, or some of those first stated omitted entirely.[4] If it be a demurrer, its form may be changed or other additional grounds may be alleged.[5] But an issue of law cannot be changed by an amendment of course to an issue of fact—a demurrer cannot be amended by serving an answer;[6] nor can an issue of fact be converted

Compare Gray *v.* Brown, 15 How. Pr. (N. Y. Supreme Ct.) 555.

1. Brown *v.* Leigh, 49 N. Y. 78; Sullivan *v.* Sullivan, 24 S. Car. 474, *quære.* See Mason *v.* Whitely, 1 Abb. Pr. (N. Y. Super. Ct.) 85; Thompson *v.* Minford, 11 How Pr. (N. Y. Supreme Ct.) 273; Spencer *v.* Tooker, 12 Abb. Pr. (N. Y. Supreme Ct.) 353, 21 How. Pr. (N. Y.) 333; Spuyten Duyvil Rolling Mills Co. *v.* Williams, 1 Civ. Pro. Rep. (N. Y. Supreme Ct.) 280; Wyman *v.* Remond, 18 How. Pr. (N. Y. Supreme Ct.) 272; Griffin *v.* Cohen, 8 How. Pr. (N. Y. Supreme Ct.) 451; Fielden *v.* Carelli, 26 How. Pr. (N. Y. Supreme Ct.) 173; Townsend *v.* Platt, 3 Abb. Pr. (N. Y. C. Pl.) 323.

In *New York*, prior to the Code, a count in debt could be substituted of course for a count in assumpsit. Garlock *v.* Bellinger, 2 How. Pr. (N. Y. Supreme Ct.) 43.

2. Hornfager *v.* Hornfager, 6 How. Pr. (N. Y. Supreme Ct.) 13; Anthony *v.* Day, 5 N. Y. Wkly. Dig. 296.

The objection may be waived. Beck *v.* Stephani, 9 How. Pr. (N. Y. Supreme Ct.) 193.

Mere Verification.—A verification is no part of a complaint, and therefore a new complaint served as of course which is the same as the original except that it is verified is not an amended complaint, and the defendant may disregard it. George *v.* McAvoy, 6 How. Pr. (N. Y. Supreme Ct.) 200.

Change of Parties is not an amendment of pleadings. Billings *v.* Baker, 6 Abb. Pr. (N. Y. Supreme Ct.) 213.

3. Cashman *v.* Reynolds, 123 N. Y. 141.

4. Cashman *v.* Reynolds, 123 N. Y. 141.

New Defense.—In McQueen *v.* Babcock, 3 Keyes (N. Y.) 428, it was held that the defendant may serve an amended answer containing a new defense. So in Brown *v.* Leigh, 49 N. Y. 48; Jackson *v.* Peer, 4 Cow. (N. Y.) 418; Wyman *v.* Remond, 18 How. Pr. (N. Y. Supreme Ct.) 272.

The defendant may withdraw a counterclaim. Branagan *v.* Palmer, 5 N. Y. Wkly. Dig. 521.

An answer which is of the same legal effect as the original is not an amended answer. Snyder *v.* White, 6 How. Pr. (N. Y. Supreme Ct.) 321.

5. Cashman *v.* Reynolds, 123 N. Y. 141; Hedges *v.* Dam, 72 Cal. 520.

6. **New York.**—Cashman *v.* Reynolds, 123 N. Y. 138, 33 N. Y. St. Rep. 70, 25 Abb. N. Cas. (N. Y.) 392, 19 Civ. Pro. Rep. (N. Y.) 161, *aff'g* 56 Hun (N. Y.) 333, 31 N. Y. St. Rep. 143, 24 Abb. N. Cas. (N. Y.) 455, 18 Civ. Pro. Rep. (N. Y.) 317, 9 N. Y. Supp. 614.

The Foregoing Decision Sustains Smith *v.* Laird, 44 Hun (N. Y.) 530, 9 N. Y. St Rep. 376; Wise *v.* Gessner, 47 Hun (N. Y.) 306, 14 N. Y. St. Rep. 268. See also Bleecker *v.* Bellinger, 11 Wend. (N. Y.) 179. *It overrules* Robertson *v.* Bennett, 52 How. Pr. (N. Y. Super. Ct.) 287; People *v.* Whitwell, 62 How. Pr. (N. Y. C. Pl.) 383; Adams *v.* West Shore, etc., R. Co., 65 How. Pr. (N. Y. Supreme Ct.) 329; Frank *v.* Bush, 63 How. Pr. (N. Y. Marine Ct.) 282, 2 Civ. Pro. Rep. (N. Y.) 250; Betts *v.* Kridell, 20 Abb. N. Cas. (N. Y. City Ct.) 1, 12 N. Y. St. Rep. 163; Hoyt *v.* Shelp, 20 Abb. N. Cas. (N. Y. City Ct.) 10; Robostelli *v.* Noxon (Supreme Ct.), 5 N. Y. Supp. 315, 24 N. Y. St. Rep. 894; Carpenter *v.* Adams, 34 Hun (N. Y.) 429; Barnes *v.* Gibbons, 20 Abb. N. Cas. (N. Y. City Ct.) 10.

into an issue of law—an answer cannot be amended by a demurrer.[1]

(4) *What Pleadings May Be Amended.*—Under the statutes which provide for the amendment of course of any "pleading," a supplemental complaint may be so amended.[2] But a notice of lien cannot be amended,[3] nor an offer by the defendant for the plaintiff to take judgment;[4] nor can the plaintiff amend the summons of course.[5]

(5) *Once Only.*—The Codes provide for amendment "once" of course, and a second amended pleading cannot be filed as of course after the first amended pleading has been stricken out,[6] nor, it seems, after the pleading has been once amended by an order of court.[7]

In California any pleading may be amended of course, and without costs, after demurrer and before the trial of the issue of law thereon; and a demurrer is not waived by filing an answer at the same time. Cal. Code Civ. Pro. § 472.

1. Cashman *v.* Reynolds, 123 N. Y. 141.

Relief, How Obtained.—When a party has made a mistake by serving a demurrer when he should have served an answer, or by serving an answer when he should have served a demurrer, he can be relieved from the consequences of his mistake by an application to the court, and in that way permitted to substitute an answer for a demurrer, or *vice versa;* which the court may allow to be done when satisfied that justice requires it, and upon such terms as it may consider just. Cashman *v.* Reynolds, 123 N. Y. 141.

2. Divine *v.* Duncan, 2 Abb. N. Cas. (N. Y.) 328, 52 How. Pr. (N. Y.) 446.

In **New York**, prior to the Code, a plea of *puis darrein continuance* could be amended of course. Siver *v.* Smith, 18 Johns. (N. Y.) 310.

A pleading which had been answered could not be amended. Cowles *v.* Coster, 4 Hill (N. Y.) 550.

A declaration in ejectment could be amended of course, Lounsbury *v.* Ball, 12 Wend. (N. Y.) 247; and a writ of *scire facias* when used as a pleading. Jackson *v.* Tanner, 18 Wend. (N. Y.) 526.

3. Diossy *v.* Martin, 6 N. Y. Wkly. Dig. 54.

4. Vellerman *v.* King, 2 Edm. Sel. Cas. (N. Y.) 371.

Under the *New York* Code of 1849, a pleading not requiring an answer or demurrer was not amendable of course. Plumb *v.* Whipples, 7 How. Pr. (N. Y. Supreme Ct.) 411; Lampson *v.* McQueen, 15 How. Pr. (N. Y. Supreme Ct.) 345; Farrand *v.* Herbeson, 3 Duer (N. Y.) 655. Otherwise at the present time. Townsend *v.* Platt, 3 Abb. Pr. (N. Y. C. Pl.) 323.

5. Walkenshaw *v.* Perzel, 32 How. Pr. (N. Y. Super. Ct.) 310; Diblee *v.* Mason, 1 Code Rep. (N. Y.) 37; McCrane *v.* Moulton, 3 Sandf. (N. Y.) 736; Follower *v.* Laughlin, 12 Abb. Pr. (N. Y. Supreme Ct.) 105; Billings *v.* Baker, 6 Abb. Pr. (N. Y. Supreme Ct.) 213; Russell *v.* Spear, 5 How. Pr. (N. Y. Supreme Ct.) 142. See People *v.* Monroe C. Pl., 5 Wend. (N. Y.) 105.

The pleadings cannot be amended as of course in any case in which the court would be prohibited from allowing an amendment on special motion. Spalding *v.* Spalding, 3 How. Pr. (N. Y. Supreme Ct.) 297.

6. Mussinan *v.* Hatton (N. Y. Super. Ct.), 28 N. Y. Supp. 1006, 31 Abb. N. Cas. (N. Y.) 254; Schmid *v.* Arguimban, 46 How. Pr. (N. Y. Super. Ct.) 105, holding that an answer cannot be amended without leave after it has been stricken out as sham. *Compare* Ross *v.* Dinsmore, 20 How. Pr. (N. Y. Supreme Ct.) 328, 12 Abb. Pr. (N. Y.) 4.

7. Jeroliman *v.* Cohen, 1 Duer (N. Y.) 629; Sands *v.* Calkins, 30 How. Pr. (N. Y. Supreme Ct.) 1; White *v.* New York, 5 Abb. Pr. (N. Y. Super. Ct.) 322, 6 Duer (N. Y.) 685. See also, before the Code, Lewis *v.* Watkins, 6 Hill (N. Y.) 230. *Compare* Lintzenich

(6) *For the Purpose of Delay.*—At least one of the Codes provides that if it is made to appear to the court that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading restored to its original form.[1] Except, perhaps, in extreme instances[2] an amendment made in bad faith cannot be treated as a nullity, but the question of intent must be passed upon by the court upon motion and proof before it can be stricken out.[3]

(7) *Remedy for Unauthorized Amendment.*—Where a party makes an unauthorized amendment the remedy of the other party is to refuse to accept, or to return promptly the amended pleading to the attorney by whom it is subscribed,[4] or to give notice that he disregards it, stating his reasons for so doing;[5] and if the party persists in serving it, motion may be made to have it struck out or set aside.[6] It is never necessary to return the second time a pleading which has once been sent back to the pleader and by him again served.[7]

b. WHEN LEAVE IS NECESSARY—IMPLIED LEAVE.—Excepting such amendments as a party is allowed to make as of course,[8]

v. Stevens (Supreme Ct.), 17 N. Y. St. Rep. 862, 3 N. Y. Supp. 395; Cooper *v.* Jones, 4 Sandf. (N. Y.) 699.

1. *New York* Code, § 542.

2. Allen *v.* Compton, 8 How. Pr. (N. Y. Supreme Ct.) 251; Vanderbilt *v.* Bleeker, 4 Abb. Pr. (N. Y. Supreme Ct.) 289. See also Rogers *v.* Rathburn, 8 How. Pr. (N. Y. Supreme Ct.) 466.

3. Frank *v.* Bush, 2 Civ. Pro. Rep. (N. Y. Marine Ct.) 250, 63 How. Pr. (N. Y.) 282; Ostrander *v.* Conkey, 20 Hun (N. Y.) 421; Griffin *v.* Cohen, 8 How. Pr. (N. Y. Supreme Ct.) 451; Rogers *v.* Rathburn, 8 How. Pr. (N. Y. Supreme Ct.) 466; Thompson *v.* Minford, 11 How. Pr. (N. Y. Supreme Ct.) 273; Burrall *v.* Moore, 5 Duer (N. Y.) 654; Spencer *v.* Tooker, 21 How. Pr. (N. Y. Supreme Ct.) 333; Conquest *v.* Barnes (Supreme Ct.), 21 N. Y. St. Rep. 112. See Minrath *v.* Teacher's Land, etc., Co. (Supreme Ct.), 50 N. Y. St. Rep. 39, 21 N. Y. Supp. 204.

4. When such a party is a municipal corporation having a counsel chosen under a statute, the papers should be returned to such counsel. Taylor *v.* New York, 11 Abb. Pr. (N. Y. Supreme Ct.) 255.

5. Hollister *v.* Livingston, 9 How. Pr. (N. Y. Supreme Ct.) 140. See also Follower *v.* Laughlin, 12 Abb. Pr. (N. Y. Supreme Ct.) 105; Williams *v.* Sholto, 4 Sandf. (N. Y.) 641; Spencer *v.* Tooker, 12 Abb. Pr. (N. Y. Supreme Ct.) 353; Laimbeer *v.* Allen, 2 Sandf. (N. Y.) 648; Becker *v.* Weisner, 22 Alb. L. J. 156; Duval *v.* Busch, 14 Civ. Pro. Rep. (N. Y. City Ct.) 6; Farrand *v.* Herbeson, 3 Duer (N. Y.) 655; Chemung Canal Bank *v.* Judson, 10 How. Pr. (N. Y. Supreme Ct.) 133; Broadway Bank *v.* Danforth, 7 How. Pr. (N. Y. Supreme Ct.) 264; Russell *v.* Spear, 5 How. Pr. (N. Y. Supreme Ct.) 142; Walker *v.* Bissell, 3 Month. L. Bull. (N. Y.) 16.

Prior to the Code, when amendments were made by rule of course, it was not necessary that the rule should specify the amendment to be made. Mumford *v.* Stocker, 1 Cow. (N. Y.) 601.

6. Follower *v.* Laughlin, 12 Abb. Pr. (N. Y. Supreme Ct.) 105.

In Epley *v.* Ely, 68 Iowa 70, an amendment after demurrer sustained which did not substantially differ from the original was stricken out.

7. Jacobs *v.* Marshall, 6 Duer (N. Y.) 689; Richardson *v.* Brooklyn, etc., R. Co., 22 How. Pr. (N. Y. Supreme Ct.) 368.

8. See the preceding section on *Amendments of Course*, page 629.

no alteration can be made in the pleadings without leave of the court first obtained.[1] Thus a pleading which requires verification cannot be verified without leave of the court after it is filed.[2]

Effect of Filing without Leave.—An amendment filed without leave where leave is necessary may be treated as a nullity by the court and counsel,[3] or stricken from the files on motion.[4] The irregularity is not reached by demurrer.[5]

1. Lewis *v.* Watkins, 6 Hill (N. Y.) 230; Jones *v.* Ilsley, 1 Allen (Mass.) 273; Clark *v.* Ward, 7 Gray (Mass.) 409; Missouri River, etc., R. Co. *v.* Wilson, 10 Kan. 105; Kirkland *v.* His Creditors, 7 Martin N. S. (La.) 511; Rost *v.* St. Francis's Church, 5 Martin N. S. (La.) 191; Robinson *v.* Williams, 3 Martin N. S. (La.) 665; Baines *v.* Higgins, 2 La. 220; Johnston *v.* Marshall, 14 Tex. 490; Thomas *v.* Young, 5 Tex. 253; Coles *v.* Kelsey, 2 Tex. 541.

The Object of requiring parties to obtain leave to amend is to give notice of the amendment to the opposite party. Lee *v.* Hamilton, 12 Tex. 413.

Mere Remark by the Court.—Where the court of its own motion during the trial of a case said, "I will allow the plaintiff to amend," without reciting the amendment, and no amendment was made and the trial proceeded as if the remark had not been made, and no motion was subsequently made for the amendment, it was held irregular for the plaintiff to serve a proposed order reciting that motion was made to amend, etc., which was granted, and that a motion should have been made for leave to amend, so that the defendant could oppose it. Poole *v.* Hayes (Supreme Ct.), 17 N. Y. St. Rep. 685.

No Prejudice.—A judgment will not be reversed because an amendment was filed without leave where the opposite party was not prejudiced. Bell *v.* Chicago, etc., R. Co., 64 Iowa 321.

In Texas it is not absolutely necessary to obtain formal leave of court to amend the petition unless the amendment will operate as a continuance of the case; in the latter event leave must be obtained and spread upon the record. Haynes *v.* Rice, 33 Tex. 167. See also Connell *v.* Chandler, 11 Tex. 249.

Amendment Before Service Completed.—Prior to the service of a writ the plaintiff may amend the declaration at his pleasure. Greeley *v.* Thurston, 4 Me. 479. But whether it can be so amended after service commenced, *quære*, in the same case.

2. Lee *v.* Hamilton, 12 Tex. 413; Missouri River, etc., R. Co. *v.* Wilson, 10 Kan. 105.

3. Cowles *v.* Coster, 4 Hill (N. Y.) 550; Hyatt *v.* Kirk, 8 Ind. 178; Best *v.* Powers, 19 Ind. 85; Hopkins *v.* Cothran, 17 Kan. 173; Orton *v.* Noonan, 31 Wis. 90; Bentley *v.* Dickson, 1 Ark. 165.

4. Allen *v.* Bidwell, 35 Iowa 86; Schoenhofen Brewing Co. *v.* Armstrong (Iowa, 1894), 57 N. W. Rep. 436; Hyatt *v.* Kirk, 8 Ind. 178.

Where an amendment is made without leave and by interlineation, it is not a ground for striking the entire original pleading from the files. Gilmore *v.* Nowland, 26 Ill. 200.

Amending in Excess of Leave.—Where a party amends in excess of the order granting him leave, so much of the amendment as is improper may be struck out. Brotherson *v.* Consaulus (Supreme Ct.), 5 N. Y. St. Rep. 105; Kelly *v.* Downing, 2 Brev. (S. Car.) 302.

Filing Bad Pleas.—If a party having leave to amend files bad pleas, they may be stricken out on motion. Parker *v.* Lewis, Hempst. (U. S.) 72. See also Pennington *v.* Ware, 16 Ark. 120.

Laches in Taking Objection.—Where an amended answer was filed without leave and without notice, but no objection was made until the trial, it was held an abuse of discretion to refuse to permit the defendant to refile the amended answer on a proper showing. Lower King's River Water Ditch Co. *v.* King's River, etc., Canal Co., 67 Cal. 577.

Motion to Strike Out After Jury Sworn.—Where an amendment is filed without leave it is not too late to move to strike it out after the jury are sworn. Baines *v.* Higgins, 2 La. 220.

5. State *v.* Wright, 80 Ind. 425.

When Allowed to Stand.—An amended pleading filed without leave of court may be allowed to stand where it would be an abuse of discretion to refuse to permit it to be filed.[1]

Waiver of Irregularity.—If the opposite party treats the amended pleading, filed without leave, as if it were properly filed the irregularity is waived.[2]

Implied Leave.—A refusal to strike out a pleading filed without leave is tantamount to permission to file it.[3]

Presumption of Leave.—Where a new party is joined as plaintiff the presumption may be indulged upon appeal that the amendment was made by leave of court.[4]

c. APPLICATION FOR LEAVE—**Suggestion by the Court.**—While it has been held not to be the duty or within the province of the court to make, suggest, or order amendments *sua sponte*, but only upon application,[5] there are authorities affirming the propriety of such a course.[6]

1. Miller *v.* Perry, 38 Iowa 301, holding it reversible error to strike out such an amendment.

2. Hopkins *v.* Cothran, 17 Kan. 173; McCaulla *v.* Murphy, 86 Ga. 475; Looney *v.* Looney, 116 Mass. 283, where the whole trial was had as if the amendment was made by leave; Baldwin *v.* Cullen, 51 Mich. 33, where the objection for want of leave was made on the trial after long delay; Redmond *v.* Peterson (Cal., 1894), 36 Pac. Rep. 923; Keokuk County *v.* Howard, 43 Iowa 354, where a replication was filed to an unauthorized amendment of an answer.

3. Thomas *v.* Young, 5 Tex. 253.

4. Moyle *v.* Landers, 83 Cal. 579.

Presumption of Leave. — Where the transcript on appeal shows an amendment to the petition by interlineation, conforming it to the proof, but fails to show when the same was made, it will be presumed to have been made at the time the testimony was introduced and by leave of the court. Giddings *v.* Giddings, 57 Iowa 297. See also Sturdevant *v.* Gains, 5 Ala. 435.

Where an amended answer indorsed "filed" by the clerk appears in the judgment roll it must be presumed that it was filed by leave of the court. Livermore *v.* Webb, 56 Cal. 489.

5. Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251; Ten Broeck *v.* Orchard, 79 N. Car. 518, holding it reversible error to order an answer to be amended without application, on account of inconsistent and contradictory defenses. See also Gillespie *v.* Wright, 93 Cal. 169; Clark *v.* Clark, 64 N. Car. 152; Enright *v.* Seymour (C. Pl.), 8 N. Y. St. Rep. 356. A plaintiff cannot be compelled to amend after the sustaining of a demurrer to his declaration. Rigg *v.* Parsons, 29 W. Va. 522.

6. **Suggestion Discretionary.** — In Crimm *v.* Crawford, 29 Ala. 623, it was held to be proper for the court in charging the jury to suggest at the request of the defendant that the complaint may be amended if the plaintiff desires, so as to obviate the effect of the charge.

In Warder *v.* Nolan (Ind., 1894), 37 N. E. Rep. 821, where the ethics of the question are glanced at, it was held that the plaintiff could not complain because the defendant was permitted to file an additional paragraph to his answer upon the suggestion of the court.

In Reck *v.* Phœnix Ins. Co., 3 Civ. Pro. Rep. (N. Y. Supreme Ct.) 376, it was said that if there is a substantial defect in the complaint which the defendant does not call to the attention of the court until after the evidence was closed, and the evidence makes a proper case for recovery, the court should of its own motion order an amendment of the complaint immediately.

In Rhodes *v.* Baird, 16 Ohio. St. 580, it was said that the court below "would have been warranted *sua sponte* in requiring counsel to reform their pleadings so as to make the issues sought to be raised more definite and certain." See also Sutton *v.* Van Akin, 51 Mich. 463.

Stipulation for Amendment. — An agreement for an amendment will not

Proposed Amendment.—An application for leave to amend should be accompanied by a statement of the amendment which the party proposes to make.[1]

A General Application to amend an answer so as to set up fraud, without stating what amendment the defendant wishes to make, is properly denied.[2] The party should state at least enough to show the materiality of the proposed amendment.[3]

Grounds Shown by Affidavit.—It is in all cases proper to require from the party asking leave to amend some reasonable excuse for the defect in the pleading which it is sought to correct.[4] The grounds

be enforced if it is disputed and not clearly established. Thompson *v.* Phelan, 22 N. H. 339.

In a Divorce Case the court should, of its own motion, suggest an amendment setting up any valid defense of which it has knowledge. Strong *v.* Strong, 24 How. Pr. (N. Y. Supreme Ct.) 432.

1. Barker *v.* Walbridge, 14 Minn. 469; Shaw *v.* Binkard, 10 Ind. 227; Balch *v.* Smith, 4 Wash. 497; Shaw *v.* Lawrence, 14 How. Pr. (N. Y. Supreme Ct.) 94; Cashman *v.* Anderson, 26 Mo. 67; Robinson *v.* Lawson, 26 Mo. 69; Rainey *v.* Sanders, 4 Humph. (Tenn.) 447.

Indefinite Motions. — In Stern *v.* Knapp, 52 N. Y. Super. Ct. 14, a motion "for an order permitting the plaintiff to amend his complaint herein," without showing the proposed amendment, was held insufficient.

In Noxon *v.* Glen (Supreme Ct.), 2 N. Y. St. Rep. 661, a motion to amend the complaint "as far as necessary," etc., was denied.

A motion by the plaintiff at the close of the testimony "to amend the complaint to conform to the evidence so far as to allow the plaintiff every possible advantage under the decisions upon the evidence" was denied because it was too indefinite. Crooks *v.* Second Ave. R. Co., 66 Hun (N. Y.) 626, 20 N. Y. Supp. 813.

Multifarious Motion. — Leave will not be granted to serve a proposed "amended and supplemental complaint," as a supplemental and amended complaint are distinct pleadings. Oelberman *v.* New York, etc., R. Co. (Supreme Ct.), 29 N. Y. Supp. 864.

Presumption in Favor of Court.—Refusal to allow an amendment is presumed to be right unless the character of the proposed amendment is shown in the record. Jessup *v.* King, 4 Cal. 331; Shaw *v.* Qinkard, 10 Ind. 227; Perry *v.* Watts, 67 Ga. 602; Craig *v.* Blow, 3 Stew. (Ala.) 448.

Second Amendment.—Where a party has amended his pleadings once and seeks to make a second amendment he must show that the change which he offers to make is substantial. Harvey *v.* Spaulding, 7 Iowa 423.

2. Allen *v.* Ranson, 44 Mo. 263.

3. State *v.* Homey, 44 Wis. 615.

An application not alleging as facts the matter proposed to be pleaded in the amendment is properly denied. Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

4. Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Deline *v.* Michigan F. & M. Ins. Co., 70 Mich. 435, a motion to add a new notice of defense after the opening of the trial; Johnson *v.* Swayze, 35 Neb. 117; Garrison *v.* Goodale, 23 Oregon 307; Holladay *v.* Elliott, 3 Oregon 340; Phenix Ins. Co. *v.* Stocks, 149 Ill. 319; Foote *v.* Sprague, 13 Kan. 155; People *v.* Burton (Colo. App., 1894), 36 Pac. Rep. 299; Martin *v.* Noble, 29 Ind. 216; Shaw *v.* Binkard, 10 Ind. 227; Taylor *v.* Blair, 14 Mo. 437; Sweet *v.* Mitchell, 19 Wis. 529.

Second Application.—Where a party has obtained leave to amend and failed to avail himself of it, and makes a second application, the court is fully justified in requiring a sufficient showing. Butcher *v.* Brownsville Bank, 2 Kan. 70.

Amendment Making New Issues.—Leave to amend a pleading for the purpose of raising a new issue will not be granted unless the applicant establishes to the satisfaction of the court that he was not aware of the facts at the time of pleading and excuses laches in his application. Cocks *v.* Radford, 13 Abb. Pr. (N. Y. Supreme Ct.) 207. See also Shropshire *v.* Kennedy, 84 Ind. 111; Burr *v.* Mendenhall, 49 Ind. 496.

for the motion must ordinarily be shown by affidavit.[1]

No Affidavit is Necessary to authorize an amendment where it appears from the case as then before the court that it is material and in furtherance of justice.[2]

Renewal of Motion.—Where a motion to amend is made while a new trial is pending, an objection that it is a renewal without leave of a motion already denied is not tenable if the motion formerly made was for leave to amend on the trial after the evidence was closed in order to conform the pleadings to the proof.[3]

Prima Facie Case Sufficient.—The court will not, as a general rule, undertake to determine upon an application for leave to amend a pleading, whether the proposed amendment sets forth a cause of action or defense which can be finally maintained or established, unless it can be made to appear conclusively that the amendment, if granted, can be of no possible avail to the party asking it.[4]

1. Garrison *v.* Goodale, 23 Oregon 307; Canfield *v.* Bates, 13 Cal. 606. See also, as indicating this practice, Koons *v.* Price, 40 Ind. 164; Carpenter *v.* Knapp (Supreme Ct.), 26 N. Y. Supp. 436; People *v.* Sackett, 14 Mich. 320; Goddard *v.* Williamson, 72 Mo. 131.

Substance of Affidavit. — "Leave to amend ought never to be given unless the motion for it be supported by an affidavit that it will affect the merits of the case and that the change is not desired for any other reason." Hartman *v.* Keystone Ins. Co., 21 Pa. St. 475.

Affidavit of Party Himself. — An amendment of a verified answer which is allowed upon affidavit showing good cause (Colo. Civ. Code, § 75) may be refused where there is no affidavit of the defendant himself showing how the misapprehension occurred. Barton *v.* Laws (Colo. App., 1894), 35 Pac. Rep. 284.

In Indiana.—A party may have leave to amend his pleading after the jury is sworn but before the cause is submitted, without placing on record the specific grounds on which the motion is based, where the amendment does not change the issues; but where the amendment changes the issues or makes a new issue the amendment must be made upon cause shown. Maxwell *v.* Day, 45 Ind. 509. See also Kerschbaugher *v.* Slusser, 12 Ind. 453; Ostrander *v.* Clark, 8 Ind. 211.

2. Caldwell *v.* Meshew, 53 Ark. 263, an amendment to conform to the proof.

An application to amend a pleading at the trial to obviate an objection for a variance does not require an affidavit. Murdoch *v.* Finney, 21 Mo. 138; Wabash Western R. Co. *v.* Morgan, 132 Ind. 430. See also Buddee *v.* Spangler, 12 Colo. 216.

The allowance of a verified amended complaint after defendant has answered, which is for substantially the same cause of action though unaccompanied by an affidavit of merits, is not an abuse of discretion. Ball *v.* McGeoch, 78 Wis. 355. See also Sweet *v.* Mitchell, 19 Wis. 524; Rogers *v.* Wright, 21 Wis. 681.

3. Ehlein *v.* Brayton, 66 Hun (N. Y.) 635, 21 N. Y. Supp. 825.

4. Campbell *v.* Campbell, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 187; Mitchell *v.* Allen, 25 Hun. (N. Y.) 543; Turner *v.* Dexter, 4 Cow. (N. Y.) 555; Miller *v.* McDonald, 13 Phila. (Pa.) 27. See also State *v.* Keokuk, 18 Iowa 388; Mitchell *v.* Joyce, 69 Iowa 121; Beard *v.* Young, 2 Overton (Tenn.) 54. *Compare* Sweet *v.* Mitchell, 19 Wis. 524.

General Objection.—An objection to a motion for leave to file an amended count to the complaint which states no reason for objection may properly be overruled. Reynolds *v.* Dismuke, 48 Ala. 209.

Counter-affidavits.—An affidavit contradicting the proposed amendment should not be considered in determining the question of its allowance. Richardson *v.* Chynoweth, 26 Wis. 656.

Hearing on Motion.—A motion to amend a plea by filing an affidavit denying the execution of written instru-

d. NOTICE OF MOTION—**When Required.**—Notice of motions to amend is usually required in accordance with statutory provisions relating to notice of motions in general.[1]

Service of Proposed Amendment.—The better and more orderly practice requires that where it is sought to make a substantial amendment to the complaint a copy of the proposed amendment should be served with the motion papers.[2]

Prayer for General Relief.—Where a notice of motion for leave to serve a supplemental answer asks for "such other and further relief" as to the court may seem proper, and the case is one in which a supplemental answer is not allowable, the court may permit an amended answer to be filed.[3]

ments described in the declaration is properly heard by the circuit court before whom the case has been tried and who has reserved his decision, although at the time of the entry of the motion the county in which the suit was brought has been made a part of another judicial circuit. Portsmouth Sav. Bank *v.* Hart, 83 Mich. 646.

1. "**In the Absence of Statutory Provisions** a defendant having been regularly brought into court by service of process is in legal contemplation in court until the final disposition of the cause, and is presumed to be cognizant of every step taken in its progress." Haynes *v.* Rice, 33 Tex. 167; Coor *v.* Smith, 107 N. Car. 430; Yonge *v.* Broxson, 23 Ala. 684; Smith *v.* Brittenham, 98 Ill. 188.

In Pennsylvania the court said that "no amendment except one merely formal should be allowed without notice to the opposite party." Mercur, J., in Tyrrill *v.* Lamb, 96 Pa. St. 464.

In Nevada a complaint cannot be altered in a material part without notice to the defendant. Keller *v.* Blasdel, 2 Nev. 162.

In Kansas it is error for the district court to allow a party to amend his pleadings in a material respect in the absence of and without notice to the adverse party who is in default. St. Louis, etc., R. Co. *v.* McReynolds, 24 Kan. 368.

In New York a defendant who has appeared is entitled to notice of a motion to strike out his name from the summons and complaint. Stephens *v.* Hall, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 300.

A defendant who has answered, although he does not appear, is entitled to notice of a motion to amend by increasing the demand for judgment. Work *v.* Ogden (Supreme Ct.), 16 N. Y. Supp. 368.

Allowing an amendment at the commencement of the trial increasing the amount claimed in the complaint, without previous notice of motion therefor, was held to be a matter resting in the discretion of the court. Hamilton *v.* Third Ave. R. Co., 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 318.

Waiver of Notice.—Notice of amendment is waived by an appearance thereto. Kimball *v.* Bryan, 56 Iowa 632.

2. Shaw *v.* Bryant, 66 Hun (N. Y.) 627, 20 N. Y. Supp. 785; Parsons *v.* Copland, 5 Mich. 143.

Where the notice of motion for leave to amend the complaint asks only "for an order permitting plaintiff to amend his complaint," and no copy of the proposed amendment is served with the motion papers, the motion should be denied. Stern *v.* Knapp, 8 Civ. Pro. Rep. (N. Y. Super. Ct.) 54.

Where it does not appear from the transcript on appeal that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment proposed, the court cannot find an abuse of discretion in refusing to allow the amendment. Martin *v.* Thompson, 62 Cal. 618.

Where a petition for the sale of real estate of a deceased person is defective in omitting a description of all the real estate of which the decedent died seized, it cannot without further notice be amended at the hearing so as to validate an order of sale based thereon. Gharky *v.* Werner, 66 Cal. 388.

3. Myers *v.* Rosenback (C. Pl.), 28 N. Y. Supp. 9, *affirmed* in 29 N. Y. Supp. 34.

No Notice is Required of merely formal amendments.[1] The Christian name of the plaintiff may be amended without notice, and judgment then taken by default will stand.[2] No notice of a motion to supply lost pleadings is necessary.[3]

e. ORDERS GRANTING LEAVE—**General Leave.**—In some jurisdictions a party may be granted leave to "amend as he may be advised;"[4] and where a plaintiff has obtained such a general leave to amend he may join other proper parties as defendants without special permission so to do.[5] After a general leave granted to the defendant to amend without qualification when the cause is at issue, the court will not on motion strike out a plea of the statute of limitations filed under the leave.[6]

Limiting Time.—An order permitting an amendment should limit the time within which it is to be made;[7] but an omission to do so is not an error of law.[8]

A party having leave to amend must file his amendment within the time prescribed, or not at all unless further leave be given;[9] but the failure to file it in time may be waived.[10]

14. Method of Making Amendments—*a.* ACTUAL AND IMPLIED AMENDMENTS—**Actual Amendment.**—If a party obtains leave to amend he may elect to make the amendment or not, as he pleases; and if he fails to amend, the issue made by the original pleading should be tried.[11] Permission to amend does not *per se* amount to an amendment, but the amendment must be actually made either by altering the pleading or by filing or serving a new one.[12]

1. Spencer *v.* McCarty, 46 Tex. 213.

An amendment may be ordered at a general term and without formal notice of motion for that purpose when the object of the amendment is only to conform the pleading to the facts proved and when the record furnishes the only grounds for and against the same. Clark *v.* Dales, 20 Barb. (N. Y.) 42.

2. Sidway *v.* Marshall, 83 Ill. 438.

3. Benedict *v.* Cozzens, 4 Cal. 381.

4. Wallace *v.* Columbia, etc., R. Co., 37 S. Car. 335. *Compare* Thompson *v.* Malone, 13 Rich. (S. Car.) 252.

An order at the trial permitting an amendment to the complaint in certain particulars, "and otherwise as he may be advised to be material in his cause of action *stated in said complaint*," is not objectionable, as the words italicized limit the amendment so as not to substantially change the claim. Moore *v.* Christian, 31 S. Car. 337.

In New York an order granting leave to a party to amend his pleadings as he may be advised cannot be sustained. New *v.* Aland, 62 How. Pr. (N. Y. Supreme Ct.) 185; Gaylord *v.* Beardsley (Supreme Ct.), 19 N. Y. Supp. 548.

5. Lowvall *v.* Gridley, 70 Cal. 507. *Contra*, Salt Lake County *v.* Golding, 2 Utah 319.

Under "leave to amend the complaint herein" the plaintiff may change the existing paragraphs and add new ones. State *v.* Wright, 80 Ind. 425.

6. Burton *v.* Rodney, 1 Houst. (Del.) 442.

7. Moore *v.* Christian, 31 S. Car. 337.

8. Moore *v.* Christian, 31 S. Car. 339.

9. Haight *v.* Schuck, 6 Kan. 192.

10. Smith *v.* Groverman, 9 Ind. 304; Brinkley *v.* Duncan, 10 Ark. 252, where the opposite party appeared after the amendment and consented to a continuance, and entered into an agreement of record recognizing the amended pleading.

11. Fox *v.* Cosby, 2 Call (Va.) 1; East St. Louis *v.* Board, etc., 6 Ill. App. 130; Collier *v.* Wheldon, 1 Mo. 1.

12. Lohrfink *v.* Still, 10 Md. 530, where it was held reversible error for

Implied Amendment.—But where there is an order granting leave to amend, and the subsequent proceedings in the cause are based upon the assumption that the amendment has been made, the course is to consider the order as standing for the amendment itself.[1] Where a motion to amend has been granted, but no amended pleading appears in the judgment roll, it may be treated on appeal as if actually made.[2]

Order Operating as an Amendment.—Under an order allowing an amendment, when the record furnishes the means of applying the court to treat the leave to amend as an actual amendment. Kimball *v.* Gearhart, 12 Cal. 46; Briggs *v.* Bruce, 9 Colo. 282. See also Malone *v.* Hundley, 52 Ala. 147.

Entry of Record.—Whatever amendments are made to the pleadings ought to be entered of record so as to prevent inconvenience on appeal. Shearin *v.* Neville, 1 Dev. & B. (N. Car.) 3. See also Eshleman *v.* Snyder, 82 Ind. 498.

If leave to amend the complaint is improperly granted, but the record does not show that the amendment was in fact made, the error is without injury. Golden *v.* Conner, 89 Ala. 598; Rooker *v.* Wise, 14 Ind. 276.

Keith *v.* Cliatt, 59 Ala. 408, holds that in the absence of anything in the record to show that an amendment was made it cannot be presumed to have been made from the mere fact that leave was given to amend.

Compare Seitz *v.* Buffum, 14 Pa. St. 71, where the court said that "it is a principle of law well settled that when leave is given to amend the court considers the amendment as made." See also Eyster *v.* Rineman, 11 Pa. St. 147.

Refiling Discarded Pleading.—A complaint to which a demurrer has been sustained cannot be treated as an amended complaint by simply filing exhibits at the commencement of the next term without also refiling such complaint with the exhibits. Heizer *v.* Kelly, 73 Ind. 582.

Notice of Amendment Not Sufficient.—Service upon defendant of a proposed amendment to the complaint with a notice that the original has been so amended is not sufficient unless the amendment has also been put on file or has been inserted by leave of the court in the original complaint on file. Flanders *v.* Wood, 24 Wis. 572.

Actual Amendment When Dispensed With.—In Hoes *v.* Van Alstyne, 20 Ill. 201, the court said that it is not the practice in Illinois, when the representatives of a deceased party are made parties, to amend the declaration by the insertion of their names.

Stipulation for Amendment.—Where it is agreed in the trial court that a complaint may be amended so as to supply necessary averments, but it is not done, the appellate court will allow the amendment to be filed in that court. Hines *v.* Wilmington, etc., R. Co., 95 N. Car. 434.

1. Holland *v.* Crow, 12 Ired. (N. Car.) 275; Ufford *v.* Lucas, 2 Hawks (N. Car.) 214; Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202; Lindsborg *v.* Hageman, 31 Kan. 599; Eaton *v.* Case, 17 R. I. 429; Brantz *v.* Marcus, 73 Iowa 64; Hellyer *v.* Bowser, 76 Ind. 35; Lyon *v.* Brown, 6 Baxt. (Tenn.) 64.

Where an amendment is not formally filed, but is taken down by the reporter, treated at the trial as made, and incorporated into the record on appeal by bill of exceptions, it may be deemed an effectual amendment so as to support the verdict and judgment. Kretser *v.* Cary, 52 Wis. 374.

That the omission to make a formal amendment may be supplied by the record of the subsequent proceedings, see Moore *v.* Lewis, 76 Mich. 300.

Objection on Appeal.—Where a plaintiff has leave to amend and proceeds without actually amending his declaration, and there is no objection at the time, the objection cannot be raised in the appellate court. Hawkes *v.* Davenport, 5 Allen (Mass.) 390; Horne *v.* Meakin, 115 Mass. 326; Kuhn *v.* Gustafson, 73 Iowa 633.

2. Maders *v.* Whallon (Supreme Ct.), 26 N. Y. Supp. 614. See also Kennedy *v.* Dear, 4 Port. (Ala.) 423.

On appeal if the record shows that the amendment was allowed and made it is immaterial that the original pleading as it appears in the record was not altered Fulkerson *v.* State, 14 Mo. 49.

the order so as to show the precise effect of the amendment desired, it may be considered as made, although the verbal changes are not actually made in the original pleading.[1]

b. By Interlineation.—Slight alterations may be made by interlineation in the original pleading, unless that method is prohibited by statute or rule of court.[2]

An amendment to obviate a mere technical objection to the complaint may be made by interlining, notwithstanding it has been verified.[3]

Where after the filing of a complaint the same was amended by writing the amendment below the signature of counsel to the original complaint, and the complaint was then resubscribed under the amendment, the proceeding was not objectionable.[4]

Discretionary.—It has been held that error cannot be predicated

1. Ballou *v* Hill, 23 Mich. 60.

Order to Strike Out Parties.—Where the plaintiff obtains leave to strike out one of the defendants, the order will operate to effect the amendment, and an actual amendment is not necessary. Palmer *v.* Lesne, 3 Ala. 741. See also Hawkes *v.* Davenport, 5 Allen (Mass.) 390, where such leave was granted and an actual amendment held to have been waived by proceeding without objection.

Sufficiency of Record on Appeal. — If the record affirms that an amendment was made, and fully states the matter therein, it is sufficiently before the appellate court, although not copied into the transcript. Booth *v.* Hubbard, 8 Ohio St. 248.

By Interlineation.—Where leave to amend by interlineation is granted by the trial court, the appellate court will regard the amendment as made, although the changes were not actually made. Underwood *v.* Bishop, 67 Mo. 374.

2. Fitzpatrick *v.* Gebhart, 7 Kan. 35; Hyer *v.* Vaughn, 18 Fla. 647, where the partnership name of the defendants was inserted by interlining.

That a noncompliance with rules of court in respect of the form of amended pleadings is not a ground of demurrer, see Lewis *v.* Alexander, 51 Tex. 578.

In *Iowa* amendments by interlineation are prohibited by the Code, § 2692, and on application a sworn answer by striking out a word therein was refused. Simmons *v.* Rust, 39 Iowa 241.

In *Texas* the rules of practice do not apply to cases on appeal from justice courts, and in these cases amendments may be made without rewriting the original. Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444.

Toleration of the Practice. — The practice of mutilating pleadings by striking out or inserting new matter by way of amendment was disapproved in Hill *v.* Road Dist. No. 6, 10 Ohio St. 621, and Schneider *v.* Hosier, 23 Ohio St. 98, the latter case holding, however, that if the amendment is so made with the permission of the court and no prejudice results to the adverse party, the final judgment will not be reversed therefor.

Amendments by interlineation are distinctly sanctioned in Maryland. Scarlett *v.* Academy of Music, 43 Md. 208; Lohrfink *v.* State, 10 Md. 535.

It was said in Garrity *v.* Wilcox, 83 Ill. 159, that the remark made in Stanberry *v.* Moore, 56 Ill. 472, condemning amendments by erasure and interlineation was simply intended to indicate a better practice, and was not meant to be prohibitive.

An amendment of a complaint by striking out of the caption the name of certain defendants who were not proper parties, without filing an amended complaint, while not commendable as a method of amending, is without prejudice to other defendants who are proper parties. Doane *v.* Houghton, 75 Cal. 360.

In Maddox *v.* Thorn, 60 Fed. Rep. 217, where the plaintiff had leave to amend by alleging diversity of citizenship of the parties, the court ordered that it be made without rewriting the pleading.

3. Meshke *v.* Van Doren, 16 Wis. 319.

4. Nicodemus *v.* Simons, 121 Ind. 564.

of an exercise of a discretionary power to allow amendments to be made by way of interlineation;[1] and clearly, if a party desires to question the propriety or legality of an amendment by the adverse party because it was made by interlineation, he should move to strike the amended pleading from the files and save the point in a bill of exceptions.[2]

Not a Ground of Demurrer.—Making an amendment by interlineation instead of rewriting the original pleading, where the latter method would be preferable, is not a ground of demurrer.[3]

c. BY A SEPARATE PLEADING.—Where the whole structure of a pleading is to be changed by amendment it is usually rewritten;[4] but where the amendment is not so radical it may be proper to file a statement of the amendment and designate by reference where the new matter is to be inserted or what is to be considered as stricken out.[5]

By Reference.—A pleader may by reference to one count in a complaint adopt a certain specified portion of another and add to it averments so as to constitute another and separate count; but this method would be objectionable after a demurrer has been sustained to the count to which reference is made.[6]

d. FORM OF AMENDED PLEADING—**Venue.**—Where a suit is instituted in one county and removed to another, and the declaration is amended, the venue should be laid as of the county in which the suit was instituted.[7]

Averments.—An amended petition should state the date of the original petition, but the omission may be cured by a statement of it in the answer to the amendment.[8] An amended petition

1. South Joplin Land Co. *v.* Case, 104 Mo. 572. See also Schneider *v.* Hosier, 23 Ohio St. 98; Simpson *v.* Greeley, 8 Kan. 586.

2. Teutonia L. Ins. Co. *v.* Mueller, 77 Ill. 22. See Gilmore *v.* Nowland, 26 Ill. 200.

3. Payne *v.* Crawford (Ala., 1892), 10 So. Rep. 911.

4. Eigenman *v.* Rockport, etc., Assoc., 79 Ind. 41; Hill *v.* Road Dist. No. 6, 10 Ohio St. 621.

It is the better practice when a complaint is amended to set out in full the complaint or count as amended unless the amendment is of such a character that it may be readily made by interlineation. Birmingham R., etc., Co. *v.* Allen, 99 Ala. 359.

In Missouri the Code provides that every answer amendatory or supplemental must be entire and separate; and the courts will not permit parties to dispense by agreement with that provision, as by agreeing that the original and amended answers shall be considered as one. Basye *v.* Ambrose, 28 Mo. 39.

5. Hill *v.* Road Dist. No. 6, 10 Ohio St. 621; Eigenman *v.* Rockport, etc., Assoc., 79 Ind. 41.

A party amending a pleading should indicate the precise part which is amended and not leave to the court to decide where the amendment should be inserted; otherwise it may be disregarded. Bourland *v.* Sickles, 26 Ill. 497; Ransome *v.* Bearden, 50 Tex. 119, where the new averments contradicted averments in the original pleading without showing the exact extent of the amendment.

6. Birmingham R., etc., Co. *v.* Allen 99 Ala. 359. *Compare* Mahaska County Sav. Bank *v.* Crist (Iowa, 1893), 54 N. W. Rep. 450, where it was held that an amendment to a pleading may by reference to the original pleading adopt its allegations, although the original pleading was stricken from the files before the amendment was filed.

7. Calvert County *v.* Gibson, 36 Md. 229.

8. Walter A. Wood Mowing, etc., Mach. Co. *v.* Hancock, 4 Tex. Civ. App. 302.

must set out all the facts necessary to constitute a cause of action.[1] Where an amended declaration in an action by an administrator is only an additional count, a repetition of the profert of plaintiff's letters of administration is unnecessary.[2]

Signature.—An amended petition to county commissioners may be signed by the petitioners' attorney, although the petitioners signed their own names to the original petition.[3] Where an amended complaint was not signed by the party or his attorney, it was held that as the defect was amendable in the trial court, it would be regarded as amended on appeal unless the objection was presented to the court below by a motion to strike it from the files.[4] An amended answer is properly disregarded where it is not subscribed by the attorney serving it.[5]

Verification.—Where the statute requires a complaint to be verified, an amendment thereto should also be verified;[6] and, following the practice in chancery, it has been held that where a sworn answer is amended, the original should remain on file and not be altered, and the amendment should be made by verifying and filing an entire new amended answer.[7]

Failure to Comply with Rule of Court.—In Lewis *v.* Alexander, 51 Tex. 578, it was held that a failure to comply with a rule of court requiring that an amended pleading shall give the dates and descriptions of the abandoned pleadings would not be sufficient of itself to sustain a general judgment upon general and special demurrers to the amended pleading.

1. Hagood *v.* Hutton, 33 Mo. 244.

2. McMillan Marble Co. *v.* Black, 89 Tenn. 118.

3. New Marlborough *v.* Berkshire County, 9 Met. (Mass.) 423.

4. Lowry *v.* Dutton, 28 Ind. 473.

Ommission of Signature Not Fatal.—The omission of the signature of the plaintiff's attorney to an amended declaration, where his name appears in the record and defendant pleads to the amendment, is no ground for arresting or reversing the judgment. Huling *v.* Florida Sav. Bank, 19 Fla. 695.

In Stewart *v.* Sonneborn, 49 Ala. 178, it was held that when an amendment of the complaint is allowed by the court, it is not necessary that it should be marked "filed" by the clerk nor that it should be signed by counsel.

5. Duval *v.* Busch, 13 Civ. Pro. Rep. (N. Y. City Ct.) 366.

6. Where a petition for divorce is amended the facts averred by the amendment must be sworn to as the statute requires or they will not be regarded. Foy *v.* Foy, 13 Ired. (N. Car.) 90.

Compare Hamill *v.* Phenicie, 9 Iowa 525, where it was held that an amendment to a sworn petition for an attachment need not be verified where it does not change the cause of action or the cause for an attachment, as alleged in the original petition; and Matthews *v.* Roundtree, 20 Mo. 282, where the appellate court refused to reverse a judgment because the plaintiff did not swear anew to his petition after an amendment in the caption.

In Illinois it was held that a petition under the Burnt Records Act, if amended in a material respect, should be sworn to; but if the amendment was merely formal it was not necessary. McCabe *v.* Porter, 73 Ill. 244.

An amended complaint, where the original complaint and the answer thereto are verified, is not a "subsequent pleading" within § 523 of the *New York* Code, which, with certain exceptions, requires verification of each pleading subsequent to a verified pleading. Duval *v.* Busch, 13 Civ. Pro. Rep. (N. Y. City Ct.) 366.

7. Strong *v.* Dwight, 11 Abb. Pr. N. S. (N. Y. Supreme Ct.) 319, so that the plaintiff might use the existing original answer as evidence on the trial to prove the defendant's admission, which he had leave to strike out.

15. Service of Amended Pleadings.—An order granting leave to amend a complaint need not be served on the defendant unless it so directs, where the statute does not require it.[1] But in many of the states service of amended pleadings is required by statute.[2]

An amended petition claiming a larger amount than in the original should be served upon the defendant;[3] and judgment by default for the increased demand without such service is erroneous.[4]

A mere formal amendment does not require service of the amended petition.[5]

1. Holmes *v.* Campbell, 12 Minn. 221; Sidway *v.* Marshall, 83 Ill. 438; Ward *v.* Lathrop, 11 Tex. 287; Freeland *v.* Lanfear, 2 Martin N. S. (La.) 257; Barrow *v.* Wright, 3 La. Ann. 130.

In Kansas, under § 136 of the Civil Code, a plaintiff who is compelled to file an amended petition by an order of court, such petition being challenged by a motion directed against it, is not required to serve a copy of the amended petition on the defendant. Cross *v.* Stevens, 45 Kan. 443.

2. That material amendments must be served, see Allaben *v.* Wakeman, 10 Abb. Pr. (N. Y. Supreme Ct.) 162; McMurray *v.* McMurray, 60 Barb. (N. Y.) 117; People *v.* Woods, 2 Sandf. (N. Y.) 652; Alvey *v.* Wilson, 9 Kan. 401; Leavenworth, etc., R. Co. *v.* Van Riper, 19 Kan. 817; Reinhart *v.* Lugo, 86 Cal. 395; Thompson *v.* Johnson, 60 Cal. 292; Ball *v.* Danforth, 63 N. H. 420; Cleveland *v.* Cohrs, 13 S. Car. 402; Tyrrill *v.* Lamb, 96 Pa. St. 464; Schuttler *v.* King, 12 Mont. 149; Barber *v.* Briscoe, 8 Mont. 214. See also Phillips *v.* Atlanta (Ga., 1887), 4 S. E. Rep. 256.

Kansas.—Notice of the filing of an amendment to the complaint must be given to the defendant unless such notice is waived. Haight *v.* Schuck, 6 Kan. 192.

The rule applies where the original service was by publication. Wood *v.* Nicolson, 43 Kan. 461.

California.—An amended complaint must be served on all the adverse parties who are to be bound by the judgment whether it materially affects them or not. Elder *v.* Spinks, 53 Cal. 293.

A defendant who appears and answers an amended complaint cannot object on appeal that the complaint as amended was not served on the other defendants. McGary *v.* Pedrorena, 58 Cal. 91.

New York.—Under the provisions of the New York Code an amended pleading is to be served on the attorney of a party if he has one, and if not, on the party personally. Mercier *v.* Pearlstone, 7 Abb. Pr. (N. Y. Super. Ct.) 325.

As to what constitutes an office letter-box of an attorney within the meaning of § 979 of the New York Code relating to service of pleadings, see Duval *v.* Busch, 13 Civ. Pro. Rep. (N. Y. City Ct.) 366.

Ohio.—When a bill for divorce is amended there must be service of the amendment. Smith *v.* Smith, Wright (Ohio) 643.

Iowa.—Notice of an amendment filed in vacation must be given to the opposite party. Allen *v.* Bidwell, 35 Iowa 86.

3. Clark *v.* Holbrook, 14 La. Ann. 581, holding that it will be considered as abandoned if not served. Hittson *v.* Gentry, 2 Tex. Civ. App. 670; Meyer *v.* North River Const. Co., 53 N. Y. Super. Ct. 387; Schuttler *v.* King, 12 Mont. 149. See also Leavenworth, etc., R. Co. *v.* Van Riper, 19 Kan. 317.

4. Hittson *v.* Gentry, 2 Tex. Civ. App. 670.

5. Chaffe *v.* Thornton, 28 La. Ann. 837; Barber *v.* Briscoe, 8 Mont. 214; King *v.* Goodson, 42 Tex. 81.

Immaterial Amendment.—Where an amendment is immaterial, and gives to the plaintiff no more or greater rights than he would have without the amendment, the judgment will not be affected for want of service of the amendment. Alvey *v.* Wilson, 9 Kan. 401.

A Rule of Court, requiring service of a copy of an amended declaration, will not be construed to require such service where the amendment is slight and cannot affect the merits of the

An amendment of the complaint relating only to the parties to the action and not to the subject of litigation need not be served upon parties appearing, but in default.[1]

Where a pleading is amended at the trial it need not be served, unless the service is a condition of allowing the amendment.[2]

16. Terms—*a.* POWER TO IMPOSE OR DISPENSE WITH.—Unless the court is restrained by statute or rules of court,[3] it has power when granting leave to amend to impose proper terms upon the applicant, for the purpose of preventing prejudice to the opposite party, or to compensate him for injury or delay caused by the amendment,[4] or to discourage an obnoxious practice;[5] and the power to grant amendments upon terms, where such terms are left to the discretion of the court, includes the power to allow an amendment without terms.[6] Where amendments are to be

case. Spofford *v.* Ritten, 4 McLean (U. S.) 253.

1. Weil *v.* Martin, 24 Hun (N. Y.) 645.

California.—Striking from the title of the action the names of one or more defendants without changing the issues is not an amendment which needs to be served. Harney *v.* Corcoran, 60 Cal. 314.

So where one party is substituted for another by order of the court. Kittle *v.* Bellegarde, 86 Cal. 556.

Where a complaint is amended under Cal. Code Civ. Pro. § 474, by inserting the true name of a defendant sued by a fictitious name, service of a copy of the amended complaint on such defendant is not required. Brock *v.* Martinovich, 55 Cal. 516.

In an action for partition the bringing in of new parties, alleging that they have or claim an interest in the subject-matter, is an amendment of substance which must be served. Reinhart *v.* Lugo, 86 Cal. 395.

Texas.—Adding the name of one of the members of a partnership in a suit by the partnership does not require service, Roberson *v.* McIlhenny, 59 Tex. 615; nor an amendment changing the Christian name of the plaintiff, Williams *v.* Huling, 43 Tex. 113.

An amendment introducing a new cause must be served, McRee *v.* Brown, 45 Tex. 503; Hewitt *v.* Thomas, 46 Tex. 232, 37 Tex. 520; King *v.* Goodson, 42 Tex. 152; McNeil *v.* Childress, 34 Tex. 370; Erskine *v.* Wilson, 27 Tex. 117; unless the defendant has appeared and answered, Erskine *v.* Wilson, 27 Tex. 117; Weatherford *v.* Van Alstyne, 22 Tex. 22.

Omission may be waived by failing to make proper objection. Carter *v.* Eames, 44 Tex. 544.

Amendment not introducing a new cause of action need not be served. Perkins *v.* Wood, 63 Tex. 396.

2. Lane *v.* Hayward, 28 Hun (N. Y.) 583.

3. See *supra*, III, 13, *a.*, in respect of *Amendments of Course.*

Where plaintiff amends of course within the time prescribed he cannot be compelled to pay the costs of a motion previously served on him to strike out irrelevant allegations, although in his amendment he complies with the requirements of the defendant's motion. Welch *v.* Preston, 58 How. Pr. (N. Y. Supreme Ct.) 52. But see Williams *v.* Wilkinson, 5 How. Pr. (N. Y. Supreme Ct.) 357.

4. Harkins *v.* Edwards, 1 Iowa 296; Burns *v.* Scooffy, 98 Cal. 271; Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317.

Election of Party.—Where the court grants leave to amend upon payment of costs the party asking leave may elect not to accept the privilege. Smith *v.* Powers, 15 N. H. 546.

Effect of Payment.—Costs ordered to be paid by a party on obtaining leave to amend should not afterwards be taxed and included in the final judgment. Kellogg *v.* Graham, Wright (Ohio) 87.

5. McQuestion *v.* Young, 21 N. H. 462.

6. *Maine.*—Bolster *v.* China, 67 Me. 551; Ham *v.* Ham, 37 Me. 261.

Wisconsin.—Moll *v.* Semler, 28 Wis. 589; Wells *v.* American Express Co., 49 Wis. 224.

California.—Tormey *v.* Pierce, 49 Cal. 306.

allowed "on such terms as may be just," the court may allow an amendment of the complaint after demurrer without costs.[1] But where an amendment is allowed upon the motion of one party it is error to adjudge the costs of the motion against the other party.[2]

b. DISCRETIONARY—REVIEW FOR ABUSE.—The imposition of terms upon granting leave to amend is a matter resting in the discretion of the trial court, the exercise of which is not a subject of review by an appellate tribunal, except in a clear case of abuse,[3] or where a positive statutory provision or rule of court has been violated.[4]

Colorado. — Cooper *v.* McKeen, 11 Colo. 41.

South Carolina.—Green *v.* Iredell, 31 S. Car. 588; Wallace *v.* Columbia, etc., R. Co., 37 S. Car. 335; Stallings *v.* Barrett, 26 S. Car. 474.

Iowa.—Harrison *v.* Colton, 31 Iowa 16; Thomson *v.* Wilson, 26 Iowa 120.

New York.—Cayuga County Bank *v.* Warden, 6 N. Y. 19; Hagins *v.* De Hart, 12 How. Pr. (N. Y. Supreme Ct.) 322; Miller *v.* Garling, 12 How. Pr. (N. Y. Supreme Ct.) 203.

Delaware. — Doe *v.* Prettyman, 1 Houst. (Del.) 334.

Massachusetts.—Harrington *v.* Harrington, 107 Mass. 329; Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117; Munroe *v.* Cooper, 5 Pick. (Mass.) 412.

See also Beneway *v.* Thorp, 77 Mich. 181.

1. Stallings *v.* Barrett, 26 S. Car. 474.

2. Mohr *v.* Sherman, 25 Ark. 7.

3. *California.* — Clune *v.* Sullivan, 56 Cal. 249; Culverhouse *v.* Crosan, 94 Cal. 544.

Michigan. — Borden *v.* Clark, 26 Mich. 410.

Colorado.—Miller *v.* Thorpe (Colo. App., 1894), 36 Pac. Rep. 891; Coleman *v.* Davis, 13 Colo. 98.

New York.—Felix *v.* Van Slooten (City Ct.), 46 N. Y. St. Rep. 791; Schermerhorn *v.* Wood, 30 How. Pr. (N. Y. C. Pl.) 316; Minton *v.* Home Ben. Soc. (Supreme Ct.), 16 N. Y. St. Rep. 1001; Smith *v.* Rathbun, 75 N. Y. 122; Van Ness *v.* Bush, 22 How. Pr. (N. Y. Supreme Ct.) 481; Bausch *v.* Ingersoll, 61 Hun (N. Y.) 627, 16 N. Y. Supp. 336.

South Carolina.—Green *v.* Iredell, 31 S. Car. 588; Stallings *v.* Barrett, 26 S. Car. 474.

Wisconsin.—Smith *v.* Dragert, 65 Wis. 507; McIlquham *v.* Barber, 83 Wis. 500; Jones *v.* Walker, 22 Wis. 220; McHenry *v.* Grant, 84 Wis. 311.

North Carolina.—Robinson *v.* Willoughby, 67 N. Car. 84; Clements *v.* Van Norden, 4 Dev. & B. (N. Car.) 235; Hinton *v.* Deans, 75 N. Car. 18.

Minnesota. — Caldwell *v.* Bruggerman, 8 Minn. 286.

Georgia.—Renew *v.* Redding, 56 Ga. 311.

Texas.—Turner *v.* Lambeth, 2 Tex. 365.

Illinois.—Heslep *v.* Peters, 4 Ill. 45; Jackson *v.* Warren, 32 Ill. 331.

Kansas.—First Nat. Bank *v.* Tappan, 6 Kan. 456; Wands *v.* School Dist., 19 Kan. 204.

Indiana.—Burk *v.* Andis, 98 Ind. 59.

Iowa.—Harrison *v.* Colton, 31 Iowa 16.

See, further, as to abuse of discretion, *supra*, III, 4, *a*.

Order Affecting Substantial Right.—It was held, in Cramer *v.* Lovejoy, 41 Hun (N. Y.) 581, that a question of terms decided in a county court, if it affects a substantial right, is reviewable on appeal by the general term; and a decision was reversed for improvidently allowing an amendment without terms. See also Marsh *v.* McNair, 40 Hun (N. Y.) 216.

No Prejudice. — The taxing of accrued costs to the plaintiff upon allowing an amendment of his petition could not have prejudiced him where he failed upon the trial and thus became liable for all the costs. Keller *v.* Bare, 62 Iowa 468.

4. **New Hampshire.**—It was held, in Gale *v.* French, 16 N. H. 95, upon a construction of the New Hampshire statute that the court could not impose terms for an amendment in matters of form.

In Massachusetts it seems that rule 15 of the Superior Court, which

Objections to Rulings relating to terms of amendment should be made in the trial court in order to be available on appeal.[1]

Effect of Accepting Terms.—A party cannot accept, so far as it is for his benefit, a conditional order granting him leave to amend and then question the validity of the order;[2] and where a party accepts the terms imposed upon him the appellate court will not modify those terms, although it should appear that the amendment was unnecessary.[3]

c. PROPER TERMS—**Customary to Exact Terms.**—It is the ordinary course of the court, in granting leave to amend, to impose terms of some kind upon the party at whose instance the amendment is made.[4] And where an amendment is allowed before trial, it is customary to exact from the party applying

requires payment of costs upon amendments of substance, does not apply to a plea *puis darrein continuance*. Burton *v.* Frye, 139 Mass. 131; Goodrich *v.* Bodurtha, 6 Gray (Mass.) 323. See further, in regard to the same rule, Webber *v.* Davis, 5 Allen (Mass.) 393. See State *v.* Moses, 20 S. Car. 465, where it was said that leave to amend an answer by pleading matter *puis darrein continuance* should always be upon payment of costs.

In **Maine** it is error to permit an amendment of a declaration held insufficient on demurer except on payment of costs from the time when the demurrer was filed, the statute being imperative. Colton *v.* Stanwood, 67 Me. 25. Fiedler *v.* Carpenter, 2 Woodb. & M. (U. S.) 211, was decided under a similar rule.

And an amendment to a declaration cannot be allowed except upon payment of costs when exceptions have been taken to the overruling of a general demurrer, until the exceptions have been passed upon by the law court. Shorey *v.* Chandler, 80 Me. 409.

1. Teberg *v.* Swenson, 32 Kan. 224; Griggs *v.* Howe, 31 Barb. (N. Y.) 100. See also Tupper *v.* Kilduff, 26 Mich. 394.

If a party wishes to except to the allowance of an amendment without terms he should show to the trial court that he is prejudiced thereby. Ruege *v.* Gates, 71 Wis. 634.

Noncompliance with Terms.—When leave to amend is conditional, the terms must be complied with before the party can proceed. Smith *v.* Johnson, 4 Harr. (Del.) 541. But see McCabe *v.* Gentes, 18 La. 31, where it was held that costs awarded on leave to amend are not required to be paid up before the suit proceeds, as in case of nonsuit or discontinuance.

Objection for noncompliance with terms required should be made in the trial court and not for the first time on appeal. Woods *v.* Durrett, 28 Tex. 429; Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376.

If a case is submitted to the jury without objection because terms imposed upon plaintiff for amending have not been complied with, it is too late for defendant to object after verdict in plaintiff's favor, especially if the court orders judgment not to be entered until the terms are complied with. Cannon *v.* Leonard, 10 Allen (Mass.) 247.

Waiver of Exceptions.—An exception to the allowance of an amendment to a complaint without terms is waived by asking a continuance as a condition thereof. Ruege *v.* Gates, 71 Wis. 634, where it was so held, although the request for a continuance was subsequently withdrawn.

After a party has answered an amendment it is too late for him to object that terms should have been imposed on the party amending. Dailey *v.* Wynn, 33 Tex. 614.

2. Smith *v.* Rathbun, 75 N. Y. 122; Austin *v.* Wauful (Supreme Ct.), 36 N. Y. St. Rep. 779.

3. Simpson *v.* Norton, 45 Me. 281.

4. Heslep *v.* Peters, 4 Ill. 45; Huntington *v.* Sheldon, 3 Day (Conn.) 497; Baxter *v.* Baxter, 3 Jones (N. Car.) 305.

If the amendment is material and calculated to surprise the other party, a continuance is granted if demanded. Jackson *v.* Warren, 32 Ill. 331; Atkinson *v.* State Bank, 5 Blackf. (Ind.) 84.

the payment of the costs of the motion,[1] and such other costs and expenses, if any, as the opposite party will lose by reason of the desired amendment.[2]

There Is No Precise Rule governing the discretion of the court, except that it must be a judicial discretion,[3] and not be exercised arbitrarily.[4] The terms must not be so onerous as to amount to a deprivation of the right to amend;[5] nor can they be inflicted

1. Saltus *v.* Bayard, 12 Wend. (N. Y.) 228.

When Dispensed With.—A motion to amend is sometimes denied without costs where the practice was unsettled, or the question raised was new and not free from difficulty. Daguerre *v.* Orser, 3 Abb. Pr. (N. Y. C. Pl.) 89; Boington *v.* Lapham, 14 How. Pr. (N. Y. Supreme Ct.) 360; Field *v.* Morse, 8 How. Pr. (N. Y. Supreme Ct.) 47. See also Barstow *v.* Randall, 5 Hill (N. Y.) 559; Williamson *v.* Updike, 14 N. J. L. 270.

Tender before Application.—Where a reasonable offer to pay costs is made before application for an amendment which the opposite party declines to accept, be will not be entitled to the costs of resisting the motion. Bell *v.* Judson, 2 How. Pr. (N. Y.) 42.

2. Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y. Supreme Ct.) 317; Burns *v.* Scooffy, 98 Cal. 271; Turner *v.* Hillerline, 14 How. Pr. (N. Y. Supreme Ct.) 231; Culverhouse *v.* Crosan, 94 Cal. 544.

Taxable Costs up to Amendment.—"The general rule in ordinary cases is conceded to be that the party amending his pleading will be required to pay all taxable costs up to the time of amending, and also costs for opposing the motion." Smith *v.* Dragert, 65 Wis. 507. See also Wolhtman *v.* Goft, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 39; Mitreaud *v.* Delassize, 13 La. 416; Street *v.* Bushnell, 24 Mo. 328.

Costs of New Plea.—The plaintiff was allowed to amend after the case was noticed for trial on payment of the costs of a new plea, should the same be required, and also on payment of the costs of the motion. George *v.* Orcutt, 19 Wend. (N. Y.) 648.

A similar amendment was allowed on paying the costs of the motion. Jackson *v.* Tuttle, 6 Cow. (N. Y.) 590.

Production of Witness Required.—In Knauth *v.* Heller, 68 Hun (N. Y.) 570, 23 N. Y. Supp. 106, a motion to amend an answer under special circumstances was allowed on condition that the defendant produce his agent for examination and pay the costs of the motion.

Restriction of Claim.—In Freeman *v.* Fogg, 82 Me. 408, an amendment of the complaint by adding a special count was allowed upon condition that a sum greater than that originally claimed should not be recovered.

Striking Out Defendant.—Where one who had been improperly made a defendant in an action of covenant died pending the action, the court refused to strike out his name except upon payment of costs. Parsons *v.* Plaisted, 13 Mass. 189.

After Argument of Demurrer. — In Walker *v.* Maxwell, 1 Mass. 104, the defendant had leave to amend his plea after argument of a demurrer upon payment of costs.

3. The terms should be such as the circumstances may require. Glick *v.* Hartman, 10 Iowa 410; Grafton Bank *v.* White, 17 N. H. 389; Beneway *v.* Thorp, 77 Mich. 181; Caldwell *v.* Bruggerman, 8 Minn. 286.

4. People *v.* Judges (Mich., 1888), 38 N. W. Rep. 322; Tate *v.* Hamilton, 81 Mich. 221. See also Ser *v.* Bobst, 9 Mo. 29.

5. Misch *v.* McAlpine, 78 Ill. 507, where it was held reversible error to require as a condition of an amendment by defendant that he refrain from asking a continuance when it appeared that he could not submit to such terms without abandoning his defense.

"Just and Reasonable."—The terms "just and reasonable," as employed by the legislature in authorizing the imposition of costs, have reference to the rules of practice existing at common law, and contemplate no other or different terms than would be just and reasonable, as adjudged by that practice. Empire F. Ins. Co. *v.* Real Estate Trust Co., 1 Ill. App. 391, where it was held reversible error to require, as a condition to the amendment of a

by way of punishment.[1]

Where Prejudice or Surprise would be worked by an amendment, strong terms should be fixed even to requiring payment of full costs up to the time of amendment.[2]

plea after demurrer sustained thereto, that the defendant make a sufficient showing by affidavit of merits.

1. In People *v.* Judges (Mich., 1888), 38 N. W. Rep. 322, mandamus issued to compel the judge to annul an order made by his predecessor which permitted the defendant to amend the notice attached to his plea in an action for libel, but required him to pay $1000, and also allowed the plaintiff to increase the *ad damnum*, and the court was ordered to hear the application upon its merits.

2. Harkins *v.* Edwards, 1 Iowa 296.

Notice of Amendment.—The court may require notice to be given to the party to be affected by the amendment. Sidway *v.* Marshall, 83 Ill. 438.

Where Opposite Party Misled.—If the defendant makes it appear that he is surprised or misled, an amendment will be allowed at the trial only upon terms—usually that the trial be postponed and the party asking the favor pay the costs. Wilde *v.* Hexter, 50 Barb. (N. Y.) 448; McHenry *v.* Grant, 84 Wis. 311.

Reducing the Ad Damnum.—Where an amendment reducing the *ad damnum* was allowed, it was deemed to be reasonable to require the plaintiff to pay costs to the time of the amendment, because if the amount had been so stated originally, the defendant could have paid it and thus escape the subsequent costs. Pierce *v.* Strickland, 2 Story (U. S.) 292.

Increasing the Ad Damnum.—Amendment increasing the *ad damnum* after issue joined, should be allowed only upon payment of costs accruing after issue joined. Gaff *v.* Hutchinson, 38 Ind. 341.

Upon a new trial after reversal, the plaintiff was allowed to amend by increasing the amount demanded upon payment of $300 and stipulating to waive costs of all former trials and appeals. Brady *v.* Cassidy (C. Pl.), 37 N. Y. St. Rep. 501.

Costs to Time of Amendment.—In Culp *v.* Steere, 47 Kan. 746, a material amendment of the complaint was allowed upon payment of substantially all the costs up to the time of amendment.

An amendment of the answer may be allowed upon payment of the costs of the cause up to the time of amendment. Coleman *v.* Davis, 13 Colo. 98.

After Special Demurrer.—In Davis *v.* Evans, 2 Murph. (N. Car.) 202, the court allowed an amendment of the declaration upon payment of costs after sustaining a special demurrer.

And in Condit *v.* Neighbor, 12 N. J. L. 320, the plaintiff upon amending after a special demurrer had been filed was required to pay the costs.

Misnomer of Plaintiff.—Misnomer of the plaintiff corporation was amended on the election by the defendant of the costs of the action to the time of amendment or a continuance. Sherman *v.* Connecticut River Bridge, 11 Mass. 338.

On Filing New Plea on Appeal.—In *North Carolina* the Superior Court on appeal from a justice may allow a new plea to be filed and require payment of all costs up to that time. Hinton *v.* Deans, 75 N. Car. 18.

Amendment in Appellate Court.—In Weed *v.* Richardson, 2 Dev. & B. (N. Car.) 535, the plaintiff, upon amending in the appellate court, in a case where an actual amendment was necessary, was required to pay the costs in both courts.

To the same effect, see Grist *v.* Hodges, 3 Dev. (N. Car.) 198.

In Stone *v.* White, 8 Gray (Mass.) 589, the plaintiff was allowed to amend in the appellate court so as to conform to the proof, he taking no costs since the trial.

Obviating Technical Objection. — On granting leave to amend the complaint so as to cure a technical objection, the court need not impose all the costs of action as a condition. Minton *v.* Home Ben. Soc. (Supreme Ct.), 16 N. Y. St. Rep. 1001.

Changing a Date.—Where the plaintiff was allowed to amend by changing the date of an alleged transaction in his bill of particulars, the defendant having no ground to claim surprise, it was erroneous to require the plaintiff to pay the costs and permit a

Controlling Considerations.—The severity of the terms imposed is largely determined by the materiality of the amendment and the stage of the case at which it is offered.[1]

continuance. Tate *v.* Hamilton, 81 Mich. 221.

1. **Costs and Continuance.**—In Jackson *v.* Warren, 32 Ill. 331, the action of the trial court in granting leave to amend a complaint in forcible entry and detainer upon payment of all the costs up to the time of amendment, and thereupon granting a continuance, was held to be proper.

After Nonsuit.—Where, after nonsuit for want of a special count, the plaintiff was permitted to amend, he was required to pay the defendant's costs of the plea and the subsequent proceedings, together with the costs of opposing the motion. Bennett *v.* New York, 1 Sandf. (N. Y.) 658.

In Downer *v.* Thompson, 6 Hill (N. Y.) 377, a plaintiff nonsuited at the circuit was not allowed to amend by adding a count adapted to the nature of the case without payment of all costs subsequent to the plea.

Introducing New Cause of Action.—Where leave is given to introduce a new cause of action after trial before a referee, the plaintiff should be required to stipulate to set aside the report and vacate the order of reference, with costs to abide the event; and the order should provide for service of the amended complaint and summons and for time for defendant to answer. Allaben *v.* Wakeman, 10 Abb. Pr. (N. Y. Supreme Ct.) 162.

And generally an amendment setting up a new cause of action should be allowed only upon payment of all costs previously incurred. Woods *v.* Durrett, 28 Tex. 429.

Changing Entire Form of Action.—Where plaintiff's amendment changes the entire form of action, the practice is to require him to pay all the defendant's costs. Carrier *v.* Dellay, 3 How. Pr. (N. Y. Supreme Ct.) 173, *distinguishing* Alston *v.* Mechanics' Mut. Ins. Co., 1 How. Pr. (N. Y.) 82.

After New Trial Granted.—In Spawn *v.* Veeder, 4 Cow. (N. Y.) 503, the plaintiff was allowed to amend his bill of particulars after the granting of a new trial and after two notices of trial, on payment of costs to the time of amendment, if the defendant should vary his defense; otherwise upon payment only of the costs of the motion. See also Chapman *v.* Webb, 6 How. Pr. (N. Y. C. Pl.) 390; Jackson *v.* Sanders, 2 Edm. Sel. Cas. (N. Y.) 12.

Amendment of Declaration After Plea.—In Holmes *v.* Lansing, 1 Johns. Cas. (N. Y.) 248, the court established the practice of allowing an amendment of the declaration after plea only upon payment of costs and giving imparlances.

Bringing in New Plaintiffs.—Where new parties plaintiff are brought in by amendment, it is proper to tax costs on the party amending. Lanes *v.* Squyres, 45 Tex. 382; Clawson *v.* Cone, 2 Handy (Ohio) 67; Boyd *v.* Steamboat Falcon, 1 Handy (Ohio) 362.

But if the new plaintiff be merely formal and no objection was taken in the trial court, it has been held that the requisite amendment could be made in the appellate court without terms. Grant *v.* Rogers, 94 N. Car. 755.

Striking Out Coplaintiff.—Where an unnecessary party is joined as plaintiff, either through ignorance or carelessness, the party responsible should not be allowed to strike him out by amendment without being taxed with all the costs up to the time of the amendment. Andrus *v.* Pettus, 36 Tex. 108.

Striking Out a Defendant in Effect.—A party should not be allowed to amend on the trial by striking out all the allegations referring to one of the defendants, so as to virtually discontinue the action as to him, except upon payment of all costs in the action, whether awarded to him on appeal from a former judgment or otherwise. Kent *v.* Popham, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 336.

Costs or Continuance at Option.—On the trial the defendant was allowed to annex an affidavit to his plea of *non est factum* upon payment of costs or consenting to a continuance at the plaintiff's option. Taylor *v.* Colvin, Wright (Ohio) 449.

Election and Waiver.—Upon an application at the trial for leave to file an amended answer containing two inconsistent defenses, the court may require that the defendant elect on which defense he will rely, and also

After Verdict.—The plaintiff will not be allowed to amend after verdict in his favor by increasing the damages claimed unless he abandons his verdict, pays the defendant's costs of the trial and of resisting the motion, and consents to a new trial.[1]

that a written reply shall be waived. Caldwell *v.* Bruggerman, 8 Minn. 286.

Filing New Rejoinder.—Upon affidavit that a rejoinder tendering a mere question of law was filed under a mistake, the defendant had leave to rejoin anew on the terms of paying the plaintiffs their costs since the rejoinder and taxing no costs for the same period in the case after being ultimately the prevailing party. Rixford *v.* Wait, 11 Pick. (Mass.) 339.

Second Amended Answer.—The defendant should not have leave to serve a second amended answer just before trial without paying taxable term fees and filing and serving an affidavit of merits. Haggerty *v.* Phelan (Super. Ct.), 18 N. Y. Supp. 789.

After Referee's Report.—In Proctor *v.* Andrew, 1 Sandf. (N. Y.) 70, a referee's report was set aside and the plaintiff permitted to amend, but upon payment of the costs of the reference and of the subsequent proceedings, the objection which made the amendment necessary having been taken before the referee on the first opportunity. See also Smith *v.* Proctor, 1 Sandf. (N. Y.) 72.

Costs Divided.—In the federal court an amendment curing a defective averment of diverse citizenship was allowed pending a motion in arrest of judgment, each party paying half the costs as then taxed. Maddox *v.* Thorn, 60 Fed. Rep. 217.

Costs of Former Appeal.—Where the court allowed the plaintiff to amend his original petition and taxed all the costs of the district court up to the time of the amendment against him, it properly refused to tax against him the costs of the Supreme Court on a former appeal which was decided against the defendant. Armstrong *v.* O'Brien, 83 Tex. 635.

Adding New Defendant.—Plaintiff as a condition of being allowed to amend his petition at the hearing by introducing a necessary party defendant may be required to give security for costs and to pay a solicitor's fee and witness fees to be taxed. Rugg *v.* Bassett (Mich., 1894), 59 N. W. Rep. 645.

Striking Out a Defendant.—In Bemis *v.* Bronson, 1 Code Rep. (N. Y.) 27, the plaintiff was allowed to strike out the name of a defendant after the evidence was closed and in order to conform to the proof, upon payment of his costs and allowing the trial to stand over if the other defendant should so desire.

After Verdict Set Aside.—In Hopf *v.* U. S. Baking Co. (Super. Ct.), 21 N. Y. Supp. 589, the plaintiff was allowed to amend after a verdict in his favor was set aside, upon paying defendant's attorney's fees, a trial fee, and $10 costs for opposing the motion to amend.

An amendment at that stage was allowed upon full payment of costs in Troy, etc., R. Co. *v.* Tibbits, 11 How. Pr. (N. Y. Supreme Ct.) 168, and Utica Ins. Co. *v.* Scott, 6 Cow. (N. Y.) 606. See also Prindle *v.* Aldrich, 13 How. Pr. (N. Y. Supreme Ct.) 466; Downer *v.* Thompson, 6 Hill (N. Y.) 377; Carrier *v.* Dillaye, 3 How. Pr. (N. Y. Supreme Ct.) 173; Hare *v.* White, 3 How. Pr. (N. Y. Supreme Ct.) 297; Hall *v.* Snowhill, 14 N. J. L. 8.

In Rogers *v.* Phinney, 13 N. J. L. 1, the plaintiff upon amending was required to pay the costs of the motion and the costs of the defendant in the court of appeals.

After Reversal on Appeal.—So, after a reversal by the appellate court, and where the defendant was allowed to amend his answer and was in fault for not applying sooner, it was upon payment of all the plaintiff's disbursements, as well as the costs of service of summons and complaint. Ferris *v.* Hard (Super. Ct.), 27 N. Y. Supp. 222, 6 Misc. Rep. 359.

Where an amendment is asked for after reversal and remand in order to obviate an error which was the ground of reversal, the party should be required to pay the costs of the motion and the costs of the opposite party in the appellate court. Rogers *v.* Phinney, 13 N. J. L. 1.

The terms should in all cases be consistent with the judgment of the appellate court. Ireland *v.* Metropolitan El. R. Co. (Super. Ct.), 8 N. Y. St. Rep. 127.

1. Dox *v.* Dey, 3 Wend. (N. Y.) 356;

Without Terms.—But the imposition of terms presupposes the party to whom leave is granted to be resting under neglect or inattention to his rights; and where an amendment is trivial and offered in due time, or for other reasons cannot be prejudicial to the adverse party, it is frequently allowed without terms.[1]

Brown *v.* Smith, 24 Ill. 196, where it was declared that all amendments of substance after verdict must be made only upon the terms stated in the text. citing Tomlinson *v.* Blacksmith, 7 T. R. 128. See also Hoffnagle *v.* Leavitt, 7 Cow. (N. Y.) 517; Bowman *v.* Earle, 3 Duer (N. Y.) 691.

To Cure a Variance.—In Carpenter *v.* Payne, 10 Wend. (N. Y.) 604, the plaintiff was permitted to amend after verdict so as to cure a variance without costs; but the verdict was vacated in order to give the defendant an opportunity to contest the case on the merits, which he had neglected to do, because he had relied upon the variance.

Correcting Description of Locus.—In Bannon *v.* Angier, 2 Allen (Mass.) 128, an action in tort for the obstruction of a way, the plaintiff was allowed to amend after verdict by changing the description of the way, the plaintiff taking no costs up to the time of filing the amendment.

1. Brinkley *v.* Mooney, 9 Ark. 445, where the trial court was reversed for imposing terms.

Preventing Immaterial Issue.—Where the court permits an amendment for the purpose of preventing the jury from finding upon an immaterial issue, it is allowed without costs to either party. Ham *v.* Ham, 37 Me. 261.

Informality in Replication.—Where a replication was demurred to specially for informality in the conclusion, the plaintiff was allowed to amend without any terms. Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117.

Mere Clerical Mistakes.—In Munroe *v.* Cooper, 5 Pick. (Mass.) 412, the plaintiff was allowed to amend without costs by setting up the true date and place of execution of the note in suit.

It was not an abuse of discretion to allow the plaintiff on the trial, and without costs, to correct a clerical error in the *ad damnum* clause of the declaration where the merits of the case could not be affected. Borden *v.* Clark, 26 Mich. 410.

In Chandos *v.* Edwards, 86 Wis. 493, it was held reversible error to refuse to permit the plaintiff to amend on the trial without costs or delay in order to correct a "mere slip of the pen."

It was held in Tate *v.* Hamilton, 81 Mich. 221, to be an abuse of discretion to refuse to allow a mere formal amendment of plaintiff's bill of particulars except upon condition of his paying the costs and submitting to a continuance.

Where Defendant was Misled. — The defendant having been misled by the plaintiff's declaration, he was permitted to amend without terms by pleading the statute of limitations. Brickett *v.* Davis, 21 Pick. (Mass.) 404.

Prayer for Relief.—The prayer for relief may be amended at any stage of the case without terms. Draper *v.* Moore, 2 Cin. Sup. Ct. Rep. (Ohio) 167.

But in People *v.* Fields, 50 How. Pr. (N. Y. Supreme Ct.) 481, where the prayer was amended on a second trial, it was upon payment of costs to the defendant up to that trial.

Striking Out Plaintiffs.—Amendments by striking out the names of several plaintiffs may be made on payment of the costs of the term. Collins *v.* Townsend, 2 Harr. (Del.) 317, n. a. But it is not an abuse of discretion to allow the amendment, without costs. Tormey *v.* Pierce, 49 Cal. 306.

During the Trial.—The court may allow a libel for divorce to be amended during the trial without terms. Harrington *v.* Harrington, 107 Mass. 329.

In Hagins *v.* DeHart, 12 How. Pr. (N. Y. Supreme Ct.) 322, the plaintiff was permitted to amend on the trial without costs unless the defendant could show that he was not prepared to meet the new issue. So in Miller *v.* Garling, 12 How. Pr. (N. Y. Supreme Ct.) 203. See also Beneway *v.* Thorp, 77 Mich. 181.

In Cooper *v.* McKeen, 11 Colo. 41, the plaintiff was allowed to amend during the trial without terms so as to allege the date when the claim sued upon became due.

Government Pays No Costs.—It is not according to rule for the government to be ordered to pay costs upon being granted leave to amend.[1]

17. Amendments in Miscellaneous Proceedings—*a.* GREAT LATITUDE ALLOWED.—Under the statute of amendments the courts may correct defects not only in the ordinary pleadings in civil causes, but may allow amendments in almost every species of proceeding before judicial or quasi-judicial tribunals.[2]

b. AFFIDAVITS.—Affidavits incident to judicial proceedings, such as that of merits or for a continuance, are usually amendable.[3]

In Bonner *v.* Home Ins. Co., 13 Wis. 677, an amendment was allowed at the trial, without costs, describing with greater exactness the policy of insurance upon which the suit was founded.

Pending Motion in Arrest.—An amendment after verdict and pending a motion in arrest of judgment curing a variance between the name of defendant as stated in the petition and as signed to the promissory note sued on, was properly allowed without terms, the defendant not being prejudiced. Thomson *v.* Wilson, 26 Iowa 120.

After Error Brought.—If there is an agreement by attorneys in the trial court for an amendment the court will give leave to amend after error brought and without terms. Johnson *v.* Chaffant, 1 Binn. (Pa.) 75.

After Remand from Appellate Court.—On remand from the appellate court after a decision that the complaint stated a cause of action defectively, it is within the discretion of the court to allow an amendment without terms. Wallace *v.* Columbia, etc., R. Co., 37 S. Car. 335; Wells *v.* American Express Co., 49 Wis. 224.

Absence of Delay.—If an amendment require a continuance, leave will be granted only on payment of the costs of the term. King *v.* Phillips, 1 Houst. (Del.) 349; Doe *v.* Prettyman, 1 Houst. (Del.) 334. Otherwise, it may be granted without conditions. Doe *v.* Prettyman, 1 Houst. (Del.) 334.

1. State *v.* Folsom, 26 Me. 209.

2. **What Constitutes Pleading.** — In Snelling *v.* Darrell, 17 Ga. 141, where a motion for a new trial was deemed to be a part of the pleadings in the case, and therefore amendable, Lumpkin, J., said: "Pleadings have a restricted as well as a general meaning. The one is denominated regular and the other irregular or collateral pleading. The former begins with the declaration and terminates with the issue of fact or of law, or both. The latter includes bills of exceptions, writs of error, motions for new trials, and everything which transpires during the progress of the cause from its inception to its consummation." See also Roundtree *v.* Rutherford, 65 Ga. 444.

Quo Warranto Proceedings are in the nature of civil proceedings and amendable. Com. *v.* Gill, 3 Whart. (Pa.) 228.

The statutes usually authorize the amendment of "pleadings or proceedings."

Basis of Action Not Amendable.— Proceedings under the *California* Code Civ. Pro. §§ 989–994, for the purpose of binding a partner by a judgment against his copartner, are in the nature of an action upon a judgment, and neither the pleadings nor the judgment in the original action can be amended. Waterman *v.* Lipman, 67 Cal. 26.

3. Clerical errors are amendable; Murphy *v.* Hall, 38 Hun (N. Y.) 528; or omission of jurat, Hees *v.* Snell, 8 How. Pr (N. Y. Supreme Ct.), 185, note; or omission of certificate of secretary of state, Lawton *v.* Kiel, 51 Barb. (N. Y.) 30. See also Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657, commenting on Clickman *v.* Clickman, 1 N. Y. 611.

An affidavit of merits is amendable, Wells *v.* Booth, 35 Mich. 424; and also an affidavit of publication, *In re* Newman, 75 Cal. 213; Burr *v.* Seymour, 43 Minn. 401; Higgs *v.* Huson, 8 Ga. 317; or of service, Den *v.* Fen, 12 N. J. L. 321; and an affidavit in bastardy proceedings, State *v.* Giles, 103 N. Car. 391; and a laborer's affidavit for writ of seizure, May *v.* Williams, 61 Miss. 126; and an affidavit to the truth of a plea, Baker *v.* Wahrmund, 5 Tex. Civ. App. 268; Taylor *v.* Colvin, Wright (Ohio), 449;

where the defect is not jurisdictional.[1] (See article AFFIDAVITS.)

c. PETITIONS.—Petitions by interveners may be amended;[2] and a petition for condemnation by eminent domain,[3] a petition to lay out a road,[4] a petition for partition,[5] a petition to require an executor to give bond,[6] a petition for reëstablishment of lost papers,[7] a petition for a rehearing[8] or writ of review,[9] a petition for mandamus,[10] a petition by an insolvent debtor[11] and a return to the alternative writ,[12] a petition under a statute to foreclose a mortgage,[13] a petition under a statute to enforce payment of a

and an affidavit in proceedings supplementary to execution, Burkett *v.* Bowen, 118 Ind. 379; and an affidavit in replevin, Frink *v.* Flanagan, 6 Ill. 35; Cutler *v.* Rathbone, 1 Hill (N. Y.) 204; Cassidy *v.* Fleak, 20 Kan. 54; Hauf *v.* Ford, 37 Ark. 544; Applewhite *v.* Allen, 8 Humph. (Tenn.) 697; Martinez *v.* Martinez, 2 N. Mex. 464; Romero *v.* Luna (N. Mex., 1892), 30 Pac. Rep. 855.

Affidavits to foreclose mortgages are amendable, Nicholson *v.* Harris, 90 Ga. 257, *compare* Lewis *v.* Frost, 69 Ga. 755; and an affidavit for a continuance, Lucas *v.* Sevier, 1 Overt. (Tenn.) 105; but it will not be amended after the court has passed upon the motion, Pence *v.* Christman, 15 Ind. 257.

As to amendments of affidavits of illegality in *Georgia*, see Inman *v.* Miller, 71 Ga. 293; County of Lee *v.* Walden, 68 Ga. 664.

1. **Jurisdictional Defect.**—In Harris *v.* Durkee, 50 N. Y. Super. Ct. 202, where the jurat of an affidavit to procure an order of arrest was not in proper form, it was held that the defect was jurisdictional and could not be amended. But see Hudson *v.* Fishel, 17 R. I. 69, and Baker Mfg. Co. *v.* Knotts, 30 Kan. 356, the latter case holding that a district judge at chambers has power to permit an amendment of an affidavit for an order of arrest.

In *Georgia* a claim affidavit is the foundation of a legal proceeding and cannot be amended. Blackwell *v.* Pennington, 66 Ga. 240. See, however, Goldie *v.* McDonald, 78 Ill. 605; Veal *v.* Perkerson, 47 Ga. 92.

2. Gillis *v.* Carter, 29 La. Ann. 698. See Taylor *v.* Gillean, 23 Tex. 508.

3. Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 324, by express statute. See also Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100. But the court may refuse to allow an amendment by joining other persons having interest in the land. Wood *v.* West Boston, etc., Bridges, 122 Mass. 394. See further, for amendment in proceedings by eminent domain, *In re* Rochester R. Co., 19 Abb. N. Cas. (N. Y. Supreme Ct.) 421; Colorado Cent. R. Co. *v.* Allen, 13 Colo. 230; Bowman *v.* Venice, etc., R. Co. 102 Ill. 459; Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86.

4. Pridgen *v.* Anders, 7 Jones (N. Car.) 257, holding that it is an "action;" *In re* Patten's Petition, 16 N. H. 277. See also *In re* Melton's Petition, 20 N. H. 261.

5. Swanton *v.* Crooker, 52 Me. 415.

6. Phillips *v.* Smith, 62 Ala. 575.

7. Hart *v.* Smith, 20 Fla. 58.

8. Dothard *v.* Teague, 40 Ala. 583, after a demurrer to the original petition.

9. Elwell *v.* Sylvester, 27 Me. 536; Winch *v.* Hosmer, 122 Mass. 438, under authority to allow amendments in any civil suit or proceeding; Davenport *v.* Holland, 2 Cush. (Mass.) 1, the court holding that though not strictly a "civil action," it is a "proceeding."

10. State *v.* Bailey, 7 Iowa 390; State *v.* Slavan, 11 Wis. 153; State *v.* Pierce County, 71 Wis. 321, holding that it may be amended to conform to the proof; Fornoff *v.* Nash, 23 Ohio St. 335; State *v.* Baggott (Mo., 1888), 8 S. W. Rep. 737, by express statute.

11. *In re* Johnson, 1 Ashm. (Pa.) 157.

12. Springfield *v.* Hampden County, 10 Pick. (Mass.) 59.

The alternative and peremptory writs were amended in State *v.* Francis, 95 Mo. 44, and the alternative writ in State *v.* Minneapolis, etc., R. Co., 39 Minn. 219; Johnes *v.* State Auditor, 4 Ohio St. 493. See also State *v.* Bailey, 7 Iowa 390; Wheeler *v.* Northern Colo. I. Co., 10 Colo. 582; State *v.* Milwaukee, 22 Wis. 397.

13. Ledbetter *v.* McWilliams, 90 Ga. 43, it is a "pleading."

mechanic's lien,[1] the petition by a claimant in an action for the trial of a right to property,[2] a petition for removal of a cause to a federal court,[3] a petition to the probate court in behalf of an infant to have land set apart for his benefit,[4] or by an administrator for the sale of lands belonging to the estate,[5] a petition in drainage proceedings,[6] a petition to county commissioners to alter a town way,[7] or to assess damages for the construction of a railroad,[8] and a petition to the mayor and aldermen for the assessment of damages for a local improvement.[9]

d. MISCELLANEOUS.—Bills of particulars are amendable;[10] and a copy of the note sued on and attached to the declaration,[11] a specification of claim,[12] a statement of an account against the estate of a decedent on a hearing before the probate court,[13] a notice of special matter accompanying a plea of the general issue,[14] special denials required by statute,[15] complaints in forms prescribed by statute,[16] a referee's report,[17] a motion for a new trial,[18] a report of the evidence made upon a motion to set aside a verdict as against the evidence,[19] an assignment of errors,[20] a caveat,[21] *scire facias* on a recognizance,[22] the pleadings by which an issue is formed between the plaintiff and the trustee in foreign attachment,[23] notices of pendency and returns to attachments,[24] offers of judgment,[25]

1. McGee *v.* Piedmont Mfg. Co., 7 S. Car. 263; Challoner *v.* Howard, 41 Wis. 355; Witte *v.* Meyer, 11 Wis. 295; Huse *v.* Washburn, 59 Wis. 414.

2. Cleveland *v.* Tufts, 69 Tex. 580.

3. Hall *v.* Chattanooga Agricultural Works, 48 Fed. Rep. 599; Glover *v.* Sheppard, 15 Fed. Rep. 833.

4. Hudson *v.* Stewart, 48 Ala. 204.

5. Brown *v.* Powell, 45 Ala. 149. See also Fennell *v.* Tucker, 49 Ala. 453; Lucich *v.* Medin, 3 Nev. 93.

6. Metty *v.* Marsh, 124 Ind. 18; Turns *v.* Simmons, 101 Ind. 557; Williams *v.* Stevenson, 103 Ind. 243; Coolman *v.* Fleming, 82 Ind. 117.

7. New Marlborough *v.* Berkshire County, 9 Met. (Mass.) 424; Dartmouth *v.* Bristol County, 153 Mass. 12. See also McKeen *v.* Porter, 134 Ind. 483. *Compare* Spencer *v.* Graham, 5 Ind. 158, decided before the enactment of the Indiana Practice act.

8. Grand Junction R., etc., Co. *v.* Middlesex, 14 Gray (Mass.) 553—"in the nature of a civil action and within the spirit if not the letter of the statute." See also Sanger *v.* Newton, 134 Mass. 308.

9. Porter *v.* Newton, 133 Mass. 56.

10. See *post*, BILLS OF PARTICULARS.

11. Chapman *v.* Skellie, 65 Ga. 124; Stevens *v.* Campbell, 6 Iowa 538.

12. Pierce *v.* Wood, 23 N. H. 519.

13. *In re* Hidden, 23 Cal. 362.

14. Rosevelt *v.* Gardiner, 3 N. J. L. 571; Hopkins *v.* Briggs, 41 Mich. 175; Minnock *v.* Eureka, F., etc., Ins. Co., 90 Mich. 236; Mason *v.* Peter, 58 Mich. 554; People *v.* Judges (Mich., 1888), 38 N. W. Rep. 322.

15. Ham *v.* Kerwin, 146 Mass. 378.

16. Kennedy *v.* Vandiver, 55 Ga. 171; Akin *v.* Bartow County, 54 Ga. 59; Bailey *v.* Jones, 14 Ga. 384; Vreeland *v.* Ryerson, 28 N. J. L. 205.

17. Wilson *v.* Schorop, 62 Hun (N. Y.) 621, 16 N. Y. Supp. 823.

It is always competent for the court to send a referee's report back to him to make such corrections and supply such inadvertent omissions as may be made from the report itself even where no exceptions are taken. Runnels *v.* Moffat, 73 Mich. 188; Bryant *v.* Hendee, 40 Mich. 543.

A referee may by permission of the judge amend the form of his report after it has been filed in court without a formal order to recommit. Fales *v.* Hemenway, 64 Me. 373.

18. See *post*, NEW TRIAL.

19. Treat *v.* Union Ins. Co., 56 Me. 231.

20. See *post*, ASSIGNMENT OF ERRORS.

21. Daniel *v.* Phelps, 86 Ga. 363.

22. Peacock *v.* People, 83 Ill. 331.

23. Butman *v.* Hobbs, 35 Me. 227.

24. Vanderheyden *v.* Gary, 38 How. Pr. (N. Y. Supreme Ct.) 367.

25. Eagan *v.* Moore, 2 Civ. Pro. Rep.

the statement required to be signed and verified upon confession of judgment,[1] a rule upon which money has been brought into court,[2] a motion and notice in proceedings against a sheriff for failing to pay over on demand,[3] a bill of costs and the affidavit accompanying it,[4] a bond in replevin,[5] a bond for a *ne exeat*,[6] interrogatories filed on the return of an attachment against a sheriff for not returning process,[7] pleadings in civil suits to recover penalties for violation of municipal ordinances,[8] a summary proceeding by notice and motion,[9] plaintiff's sworn statement in an action for injuries from a defective highway,[10] the pleadings in proceedings for judgment against delinquent lands for taxes,[11] a notice served with the summons stating the amount for which judgment will be taken in case of default,[12] a citation to a creditor in a poor debtor's disclosure.[13]

A general notice of appearance may be amended so as to make it special.[14] A notice of motion may be amended so as to make it conform to a rule of court by stating the grounds of the motion.[15] In an election contest the statement of the grounds of contest may be amended,[16] and the specifications in an answer

(N. Y. C. Pl.) 300; Stark *v.* Stark, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 360. *Compare* the earlier cases of Riggs *v.* Waydell, 17 Hun (N. Y.) 515, *affirmed*, 78 N. Y. 586.

1. Mitchell *v.* Van Buren, 27 N. Y. 300; Cook *v.* Whipple, 55 N. Y. 150; Symson *v.* Silheimer, 40 Hun (N. Y.) 116; Thorp *v.* Platt, 34 Iowa 314.

Where a confession of judgment does not state a cause of action an amendment cannot be allowed after trial unless the evidence shows a sufficient cause of action. Southern Porcelain Mfg. Co. *v.* Thew, 5 S. Car. 5.

2. Freeze *v.* Marston, 5 N. H. 220. See also Jones *v.* Hoar, 5 Pick. (Mass.) 285.

3. Walker *v.* Turnipseed, 8 Ala. 679.

4. Burnham *v.* Hays, 3 Cal. 115, because it is a "proceeding." But see Jeffery *v.* Hursh, 58 Mich. 247.

5. Dale *v.* Gilbert (Ct. of App.), 40 N. Y. St. Rep. 353; Smith *v.* Howard, 23 Ark. 203. *Contra*, Simpson *v.* Wilcox (R. I., 1892), 25 Atl. Rep. 391.

6. Fitzgerald *v.* Gray, 59 Ind. 254.

7. People *v.* Brown, 6 Cow. (N. Y.) 41.

8. Bristol *v.* Burrow, 5 Lea (Tenn.) 128; Childress *v.* Nashville, 3 Sneed (Tenn.) 347; Washington *v.* Frank, 1 Jones (N. Car.) 436.

9. Palmer *v.* Fitts, 51 Ala. 489.

10. Harvey *v.* Northwood, 65 N. H. 117.

11. Walsh *v.* People, 79 Ill. 521, by express statute, however.

12. Cassidy *v.* Boyland, 15 Civ. Pro. Rep. (N. Y. City Ct.) 320, holding that the amendment should be made only upon notice.

13. Driscoll *v.* Stanford, 74 Me. 103. See Perry *v.* Plunkett, 74 Me. 328.

14. Hohorst *v.* Hamburg-American Packet Co., 38 Fed. Rep. 273; U. S. *v.* Yates, 6 How. (U. S.) 605.

Where an infant defendant appears by attorney the proceedings may be amended by entering an appearance by guardian. Smith *v.* Minor, 1 N. J. L. 416.

15. Sweeney *v.* Stanford, 60 Cal. 362, holding it reversible error to refuse where the grounds of the motion were stated in an affidavit attached to the notice.

16. Minor *v.* Kidder, 43 Cal. 229; Preston *v.* Culbertson, 58 Cal. 198; *In re* Contested Election, 10 Phila. (Pa.) 579; *In re* Contested Elections, 2 Brewst. (Pa.) 1; *In re* Election Cases, 65 Pa. St. 20, holding that the court may amend as at common law. *Contra*, Ford *v.* Wright, 13 Minn. 518.

In Halstead *v.* Rader, 27 W. Va. 818, it was held that a notice which does not state some substantial ground of contest cannot be amended. See also Ralston *v.* Meyer, 34 W. Va. 737.

therein.[1] The statement of the parties in an agreed case cannot in general be amended.[2] In proceedings to collect a local assessment an informal special tax bill cannot be amended by the court.[3] Exceptions to an auditor's report are not pleadings in such a sense as to give the right of amendment by adding new exceptions after other exceptions have been filed and disallowed and the time for excepting has elapsed.[4]

Where no sum is mentioned in the minutes of the recognizance for costs upon a writ, or where the name of the person recognized is omitted, the court has no power to amend the defect.[5]

It has been held that a petition for *certiorari* must set forth specifically the ground of error, and is not amendable.[6]

IV. Of Process—1. Of Writ or Summons—*a.* In General.—By the Common Law, process was not amendable where it appeared upon the face of it that it was absolutely void.[7] If it were not a nullity, the old rule was that an amendment would be allowed where there was anything to amend by;[8] but even this was not

In Loomis *v.* Jackson, 6 W. Va. 617, it was held that where the proceedings are before a body which has no common law jurisdiction, but becomes *functus officio* as soon as the cause is determined, there can be no amendment whatever.

1. *In re* Contested Elections, 1 Brewst. (Pa.) 67.

2. See *ante*, Agreed Case, V, 3.

3. Galbreath *v.* Newton, 45 Mo. App. 312. See also Chemung Nat. Bank *v.* Elmira, 39 How. Pr. (N. Y. Supreme Ct.) 373.

4. Suttles *v.* Smith, 75 Ala. 830.

5. Peck *v.* Smith, 3 Vt. 265.

6. Western, etc., R. Co. *v.* Jackson, 81 Ga. 478; Singer Mfg. Co. *v.* Walker, 77 Ga. 649; People *v.* Cook, 62 Hun (N. Y.) 303.

7. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 521; Brigham *v.* Este, 2 Pick. (Mass.) 420; Kyles *v.* Ford, 2 Rand. (Va.) 1.

Void Process.—The *Georgia* Code, § 3490, provides that "void process, or where there is no process or waiver thereof, cannot be amended."

In Scarborough *v.* Hall, 67 Ga. 576, it was held that where the clerk failed to attach any process to the declaration, and it was served alone, it was not competent to amend at a subsequent term by attaching process and ordering service.

In such a case, if there has been an acknowledgement of service without a waiver of process, it is necessary to show that the process was intended to be waived, and that by accident or mistake the entry of such waiver was omitted in order to entitle the plaintiff to supply the omission by a *nunc pro tunc* amendment. Ross *v.* Jones, 52 Ga. 22.

Where a complaint and summons are served without the name of any court appearing therein the summons is not amendable. Ward *v.* Stringham, 1 Code Rep. (N. Y. Supreme Ct.) 118.

An amendment of a summons in the superior court that would if made in the justice court have given the justice jurisdiction which he did not possess before the amendment will not be allowed. Allen *v.* Jackson, 86 N. Car. 321. *Compare* McLean *v.* Breece, 113 N. Car. 390.

Process Not Void.—A summons which states that the complaint is "annexed," when in fact no complaint is annexed, and which omits to state when and where a complaint will be filed, is not a nullity and may be amended. Keeler *v.* Belts, 3 Code Rep. (N. Y.) 183; Foster *v.* Wood, 1 Abb. Pr. N. S. (N. Y. C. Pl.) 150.

In *Georgia*, under the judiciary act of 1799, which required the process to be "annexed" to the writ, if it were indorsed on the back of the writ and omitted to state the case or name the defendant it was amendable. Smith *v.* Morris, 29 Ga. 339.

8. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 523.

Something to Amend By.—In Dean *v.* Swift, 11 Vt. 331, an original writ con-

adhered to, and amendments have been allowed where there was nothing to amend by.[1]

Under the Modern Statutes authorizing amendments of any pleading, process, or proceeding,[2] in form or substance, an amendment will generally be allowed whenever it is in furtherance of justice,[3]

tained a wrong return day, but it was returnable to the right term, and it was held sufficient to amend by.

In Dwight *v.* Merritt, 18 Blatchf. (U. S.) 305, it was said that there must be something to amend and to amend by. See also U. S. *v.* Turner, 50 Fed. Rep. 734.

In Course *v.* Stead, 4 Dall. (U. S.) 22, a writ of error was directed to the judges, etc., of the district aforesaid, and no district was previously named, but the attestation of the record was in the proper district, and it was properly indorsed, etc. It was held that there was enough to amend by.

In U. S. *v.* Rose, 14 Fed. Rep. 681, an amendment was refused apparently because there was nothing to amend by.

In Kavanaugh *v.* Brown, 1 Tex. 481, the writ was amended by the petition. But in *Texas* the petition is filed before issuing the writ.

In Jones *v.* Cox, 7 Mo. 173, an amendment was allowed to conform to the declaration, the latter preceding the writ in Missouri.

In Emmons *v.* Bailey, 1 Strobh. (S. Car.) 422, the writ was amended to conform to the declaration; also in Wilday *v.* Wight, 71 Ill. 374.

In Benner *v.* Frey, 1 Binn. (Pa.) 366, *habeas corpus* for the removal of a case was amended by the præcipe.

In Porter *v.* Miller, 7 Tex. 468, a writ of sequestration was amended by the petition.

In Jackson *v.* Fletcher, 1 Morr. (Iowa) 304, a clerical mistake in suing out a writ in assumpsit instead of debt was amended by the præcipe.

In Knapp *v.* Palmer, 1 Cai. (N. Y.) 486, a writ of *certiorari* was amended according to the affidavit on which it was obtained.

In Tice *v.* Monfort, 3 N. J L. 632, it was held that an original writ is not amendable, as there is nothing to amend by. Hence, in Anonymous, 6 N. J. L. 166, a writ of dower was held not to be amendable.

In Johnson *v.* Kentucky Bank, 5 T. B. Mon. (Ky.) 119, it was held that where both the writ and declaration are defective neither can be amended, as there is nothing to amend by.

1. 1 Tidd Pr. 130; Rutherford *v.* Mein, 2 Smith 392, where it was urged that, the writ being radically defective, the application was not to amend, but to supply; but the court allowed it upon the authority of Carr *v.* Shaw, 7 T. R. 295, where it was said that "the amendment was allowed without anything *dehors* to amend by."

2. **Commission to Take Testimony.**—In Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518, it was held that a commission to take testimony was either a "process" or "proceeding," and therefore amendable under the New York statute; and after it had been executed and returned the court indorsed upon it the allowance of the interrogatories and a direction as to the return, such as he would have done had he been applied to before the commission was dispatched.

In Nicks *v.* Rector, 4 Ark. 251, a commission to take testimony was held to be amendable as process.

3. **Without Prejudice to Acquired Rights.**—Process will not be amended where third parties have acquired rights which will be prejudiced thereby. Phillips *v.* Holland, 78 N. Car. 31.

Summons Changed to Attachment.—It was held in Matthews *v.* Blossom, 15 Me. 400; Ordway *v.* Wilbur, 16 Me. 263, and Carter *v.* Thompson, 15 Me. 464, that the court could permit a writ of original summons to be changed to a writ of attachment.

Description of the Justice.—An omission in a justice's summons to describe the justice as of the county for which he was elected is amendable after appearance by the defendant. Drake *v.* Berry, 42 N. J. L. 60.

Writ of Replevin.—A writ of replevin was amended on terms by changing it from *cepit* and *detinet* to *detinet* alone after its execution and appearance by defendant, where it appeared that the attorney issuing it misapprehended the facts in the case. Smith *v.* Frizell, 1 How. Pr. (N. Y.) 148.

In Jaques *v.* Sanderson, 8 Cush.

if the court has jurisdiction of the parties and of the action in which the amendment is sought to be made.[1] And defects in the process amendable in the trial court will be regarded as amended in the appellate court.[2]

b. FEDERAL, HOW FAR CONTROLLED BY STATE PRACTICE. —A federal statute provides that the practice pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the pleadings and forms and modes of

(Mass.) 271, a writ of replevin was amended by inserting an averment of the value of the property.

In Judson *v.* Adams, 8 Cush. (Mass.) 556, a writ of replevin in an action pending in Norfolk, which alleged the taking of the goods to have been in Suffolk, was amended by alleging the taking to have been in Norfolk.

The amendment of a writ of replevin, after the execution of the statutory bond, by inserting other property in the writ without the knowledge or consent of the sureties, by stipulation of the respective parties discharges the sureties from liability. Bolton *v.* Nitz, 88 Mich. 354.

Showing Summons to Be an Alias.—An original summons may be amended so as to show that it was an *alias*. Huss *v.* Central R. & B. Co., 66 Ala. 472; Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112.

Audita Querela.—In Stone *v.* Chamberlain, 7 Gray (Mass.) 206, a writ of *audita querela* improperly called in the declaration an action of tort was amended by striking out those words.

Writ of Right.—In Boston Poor Overseers *v.* Otis, 20 Pick. (Mass.) 38, it was held that a writ of right is amendable.

Writs of Mandamus.—Alternative and peremptory writs of mandamus may be amended. State *v.* Francis, 95 Mo. 44; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219.

Changing Form of Capias.—In Maine a *capias* writ may be amended by changing its form to *capias* or attachment. Cameron *v.* Tyler, 71 Me. 27.

Changing Civil to Penal Action.—In Walton *v.* Kirby, 2 Hayw. (N. Car.) 174, it was held that a writ could not be amended so as to convert a civil into a penal action.

Covenant to Debt.—And in Anonymous, 1 Hayw. (N. Car.) 401, that the writ could not be altered from covenant to debt.

1. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 523; White *v.* Hart, 35 Ga. 269; State *v.* Bryant, 5 Ind. 192; Polack *v.* Hunt, 2 Cal. 193; Culver *v.* Whipple, 2 Greene (Iowa) 365; Jones *v.* Miller, 1 Swan (Tenn.) 319. See also Anonymous, 4 Hill (N. Y.) 603; Burton *v.* Buckeye Ins. Co., 26 Ohio St. 467.

In *New York*, the Marine Court, being a court of record, has authority to amend an irregularity in a summons. Gribbon *v.* Freel, 93 N. Y. 93.

Want of Jurisdiction.—The *New York* Code Civ. Pro., § 3165, subd. 2, provides that when an order from the City Court of New York directing service of summons without the city or by publication is granted, the summons must state that the defendant is required to answer within ten days; but that if a summons requiring defendant to answer within a shorter time has been issued before an order is granted, the justice may direct that the summons be amended, and thereupon the summons published or served without the city, pursuant to the order, must correctly state the time. It was held that service of summons upon a non-resident requiring him to answer within six days, where no subsequent order of amendment was made, conferred no jurisdiction over the defendant, and that an amendment of such summons could not be made after entry of judgment on defendant's default. Bell *v.* Good (City Ct.), 19 N.Y. Supp. 893.

2. Kaufman *v.* Sampson, 9 Ind. 520.

It was held in Glisson *v.* Herring, 2 Dev. (N. Car.) 156, that where there was a fatal variance between the writ and declaration the Supreme Court had no Power of amendment.

proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.[1] Another federal statute provides for the amendment of defects in process;[2] and it has been held that while the practice in the state courts may enlarge the power of amendment in the federal courts, it cannot diminish such powers as are conferred by the statute last mentioned.[3] And where Congress has by statute pointed out a specific course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued, such legislation must be followed although opposed to the forms and modes of proceeding prevailing in the state courts and established by the state statutes.[4]

c. TITLE, CAPTION, INDORSEMENT.—**Title.**—Where the title of the action is wrong in the process it may be amended on application to the court.[5]

1. U. S. Rev. Stat., § 914. See also *supra*, III, 1, *c*.

Actions for penalties brought in the name of the United States in a federal court sitting in New York correspond with those brought by the state in the name of "the People of the State of New York," and the summons served must be indorsed with a reference to the statute by which the action for penalty is given, as required by the New York statute. This indorsement is a material part of the process, and if omitted it cannot be inserted by amendment. U. S. *v.* Rose, 14 Fed. Rep. 681, where the reference to the statute was not supplied by the præcipe; Brown *v.* Pond, 5 Fed. Rep. 31, 5 Fed. Rep. 41.

2. U. S. Rev. Stat., § 954.

3. Norton *v.* City of Dover, 14 Fed. Rep. 106. See also Tobey *v.* Claflin, 3 Sumn. (U. S.) 379.

4. Dwight *v.* Merritt, 18 Blatchf. (U. S.) 305. In that case a suit at common law was commenced in the federal Circuit Court sitting in New York by serving on the defendant a paper purporting to be a summons in the form prescribed by the statute of New York for commencing civil actions, signed by the plaintiff's attorney, but not under the seal of the court nor signed by the clerk of the court. The defendant moved before appearing generally in the suit to set aside the summons, and the plaintiff asked to be allowed to amend the summons *nunc pro tunc* by having the seal and the signature added. It was held (1) that the summons is process and did not conform to § 911 of the U. S. Rev. Stat. and was void; (2) the provisions of said § 911 are not abrogated by § 914 of the U. S. Rev. Stat., providing that the federal courts shall follow the state practice as near as may be; (3) that the summons could not be amended under the federal statutes of amendment, §§ 948 and 954 Rev. Stat., because it was not process of and had not been issued from the court; (4) that the summons must be set aside.

5. Allen *v.* Allen, 14 How. Pr. (N. Y. Supreme Ct.) 248; Dexter *v.* Hoover, 2 Cow. (N. Y.) 526; State *v.* Justice, 24 N. J. L. 413; Readington *v.* Dilley, 24 N. J. L. 209. See also Bishop *v.* Weber, 139 Mass. 411.

Partnership Instead of Corporation.—Where a summons was issued in the name of a partnership instead of a corporation, the mistake being manifest, it was properly corrected on motion after judgment. Thurber-Whyland Co. *v.* Klittner (Supreme Ct.), 16 N. Y. Supp. 828.

Corporation Instead of Voluntary Association.—Where an action was brought against a defendant described as a corporation which was in fact a voluntary association, the title of the summons was amended by inserting the names of the members. Evoy *v.* Expressmen's Aid Soc. (Supreme Ct.), 21 N. Y. Supp. 641.

Striking Out Deceased Party.—The summons may be amended by striking out the name of a party plaintiff who died before the summons was served. Fink *v.* Mahattan R. Co. (C. Pl.), 29 N. Y. St. Rep. 153.

Caption.—Where the process does not run in the name of the proper authority it is amendable.[1]

Indorsement.—The indorsement on a writ may be amended.[2]

d. THE DIRECTION.—The omission to insert a proper direction in a writ is not fatal if it is served by the proper officer [3] in a regular manner,[4] and an objection based thereon may be obvi-

1. An original summons not running in the name of the state may be amended even after plea in abatement. Mitchell *v.* Conley, 13 Ark. 414. See also Johnson *v.* Provincial Ins. Co., 12 Mich. 216; McFadden *v.* Fortier, 20 Ill. 509; Harris *v.* Jenks, 2 Scam. (3 Ill.) 475.

An Order of Arrest of the defendant in a suit is a writ or process within the meaning of the constitution and should run in the name of the state; but such style is matter of form, and may be amended on motion. Ilsley *v.* Harris, 10 Wis. 95.

See also *infra*, V., 5.

2. So as to Add Special Counts.—It is not error to permit the plaintiff to amend the indorsement on his writ so that he may add special counts to his declaration. Moore *v.* Smith, 19 Ala. 774.

Date of Copy of Note.—Where the date of the note in the copy indorsed upon the process differed from the note upon which the action was brought the plaintiff was allowed to amend. Kennedy *v.* Holden, 3 Strobh. (S. Car.) 175.

To Conform to the Declaration.—It is not a defense in an action on a recognizance of special bail that the plaintiff was permitted to amend the indorsement on the writ to correspond with the facts and the declaration, the amendment only changing the description and not the cause of action. Enos *v.* Aylesworth, 8 Ohio St. 322. See also Miller *v.* Gages, 4 McLean (U. S.) 436.

3. Campbell *v.* Stiles, 9 Mass. 217; Hearsey *v.* Bradbury, 9 Mass. 95; Woods *v.* Ross, 11 Mass. 276; Chadwick *v.* Divol, 12 Vt. 499, where the writ was directed to the sheriff of the wrong county, but properly served by the sheriff of another county; Smets *v.* Wethersbee, R. M. Charlt. (Ga.) 537; Mitchell *v.* Long, 74 Ga. 94; Telford *v.* Coggins, 76 Ga. 683; State *v.* Hall, 78 Me. 37; Simcoke *v.* Frederick, 1 Ind. 54; Brown *v.* Dudley, 33 N. H. 511; Parker *v.* Barker, 43 N. H. 35, where it was said that "the motion to amend could be properly granted only upon its being shown by affidavit that it might properly have been so made originally, unless that appears on the face of the writ and return."

Showing Disqualification of Regular Officers.—Where a writ was directed to the coroner instead of the sheriff, the plaintiff was allowed to amend, after a motion to quash, by stating, as a reason why it was so directed, that the sheriff was disqualified on account of interest. Moss *v.* Thompson, 17 Mo. 405; Thompson *v.* Bremage, 14 Ark. 59; Oliphant *v.* Dallas, 15 Tex. 138; Gay *v.* State, 20 Tex. 504.

Amendment Cannot Create Authority.—Where a writ returnable to the County Court was directed by the magistrate who signed it in these words, "To any sheriff or constable in the state, or to E. K. G., constable of G.," omitting to state therein the statute reasons for making a special authorization, and the writ was served by G. out of the town of which he was constable, it was held that the service by him was void and that the court had no power to permit the magistrate who signed the writ to amend the direction, after the case had been entered in court, by inserting therein the statute reasons for making the authorization—"there was neither a general nor special authority when the service was made, and without a judicial act of the magistrate no authority could be conferred." Dolbear *v.* Hancock, 19 Vt. 388.

4. Direction Concerning Replevin Bond.—An officer who was directed by a writ of replevin to take certain goods provided the plaintiff should give a bond to the defendant "with sufficient *surety or* sureties in the sum of —— dollars, being twice the value of the said goods," took a bond with two sureties and served the writ. It was held that the plaintiff might amend his writ by striking out the words "surety or," and that the service was

ated by amendment.[1]

e. MISNOMER.—**The Common Law** does not sanction the use of anything else than the true Christian and surnames of the parties to the suit;[2] and a mistake in either is fatal to the validity of legal process where no statutory power of amendment exists, unless there is something in the record to amend by.[3]

By Statute.—But under the statutes of amendment all kinds of misnomer are generally amendable where the change does not result in an unauthorized alteration of the real parties.[4]

valid. Poyen *v.* McNeill, 10 Met. (Mass.) 291.

Direction to Attach the Body.—If a writ erroneously contain a direction to arrest the defendant, but is served by summons, it may be amended. Harvey *v.* Cutts, 51 Me. 604, without terms; Clement *v.* Clement, 18 N. H. 611. See also Turner *v.* Friend, 59 Me. 290; Matthews *v.* Blossom, 15 Me. 400.

Inserting Defendant's Name.—Where the writ directed the officer to "attach the goods or estate of ——, and for want thereof to take the body of the said W. D.," it was held amendable by inserting the defendant's name in the blank space. McGuire *v.* Davis, 8 Cush. (Mass.) 356.

1. Cases cited in the preceding notes.

In Anthony *v.* Beebe, 7 Ark. 447, it was held that an amendment could not be made after a plea in abatement filed on account of the defect. But that case is overruled by Mohr *v.* Sherman, 25 Ark. 7.

See also *infra*, V., 5.

2. Barber *v.* Smith, 41 Mich. 138.

3. Crafts *v.* Sikes, 4 Gray (Mass.) 194. See also Final *v.* Backus, 18 Mich. 218; Albers *v.* Whitney, 1 Story (U. S.) 310; Lake *v.* Morse, 11 Ill. 587.

In Thanhauser *v.* Savins, 44 Md. 410, the plaintiff having declared in the name of "B. Savins" was not allowed to amend by inserting "Benjamin Savins," his full name, the *Maryland* statute providing only for amendment in case of misnomer of a defendant.

In Furniss *v.* Ellis, 2 Brock. (U. S.) 14, a mistake in the name of one of the plaintiffs was amended by the præcipe.

4. Final *v.* Backus, 18 Mich. 218; Elliott *v.* Clark, 18 N. H. 422.

Massachusetts. — A writ against Charles Langmaid actually served upon Chase Langmaid was amended, after default of the defendant and without notice to Chase, by substituting Chase for Charles. Langmaid *v.* Puffer, 7 Gray (Mass.) 378.

In Crafts *v.* Sikes, 4 Gray (Mass.) 194, a writ sued out in the name of Justus Crafts was amended by substituting therefor the name of Justus Stark.

In Wight *v.* Hale, 2 Cush. (Mass.) 486, "Wight" was substituted for "Wright," as the name of one of the plaintiffs, without affecting the attachment.

In Diettrich *v.* Wolffsohn, 136 Mass. 335, a writ against "William Robinson" was amended by inserting the words "otherwise called William J. Robinson" without affecting the lien of an attachment.

An amendment of a writ of attachment by changing the name of the plaintiff from "Mary Cain" to "Ann Cain" does not vacate an attachment of funds in the hands of a person summoned as trustee so as to give an assignment to a third person, made before the amendment, priority over the attachment. Cain *v.* Rockwell, 132 Mass. 193.

Indiana.—Misnomer of the plaintiff was held to be amendable in Woodward *v.* Wous, 18 Ind. 296, provided the real plaintiff is not changed.

In Nimmon *v.* Worthington, 1 Ind. 376, the writ was amended by inserting the plaintiff's Christian name so as to conform to the præcipe.

And in Beck *v.* Williams, 5 Blackf. (Ind.) 374, by changing the plaintiff's surname, the same being right in the præcipe.

In Weaver *v.* Jackson, 8 Blackf. (Ind.) 5, misnomer of the defendant's Christian name was corrected by amendment after plea in abatement.

A like amendment was allowed in

Inserting Christian Names.—It has been held that a writ in favor of persons whose surnames only were given in the writ, but who were otherwise identified on the face of the process, could be amended by inserting the full names of the plaintiffs.[1]

Shackman *v.* Little, 87 Ind. 181, after a motion to quash the summons.

In Haines *v.* Bottorff, 17 Ind. 348, the Christian name of the plaintiff in the summons was amended by the complaint.

In Chicago, etc., R. Co. *v.* Johnston, 89 Ind. 88, misnomer of the defendant corporation was amended.

New York.—Misnomer of the defendant was amended in Evoy *v.* Expressmen's Aid Soc. (Supreme Ct.), 21 N. Y. Supp. 641.

In Reilly *v.* World Pub. Co. (Supreme Ct.), 14 N. Y. St. Rep. 390, misnomer of the defendant was amended after his appearance.

Where a summons was issued in the name of a copartnership instead of a corporation, there being a manifest mistake, it was amended on motion after judgment. Thurber-Whyland Co. *v.* Klittner (Supreme Ct.), 16 N. Y. Supp. 828.

In Brace *v.* Benson, 10 Wend. (N. Y.) 214, mesne process in a justice court, the Christian name of one of the plaintiffs was amended from "Joseph" to "Jasper."

Georgia.—Misnomer of the defendant was amended in Baldwin *v.* McMichael, 68 Ga. 828.

Misnomer was amended by the indorsement in Smith *v.* Morris, 29 Ga. 339.

Misnomer of the plaintiff was amended in Scudder *v.* Massengill, 88 Ga. 245.

North Carolina.—Misnomer of the defendant was amended in Lane *v.* Seaboard, etc., R. Co., 5 Jones (N. Car.) 25.

In process of attachment the defendant was described as "C. E. Thorburn" and "Charles E. Thorburn;" his full name was substituted by amendment. Hall *v.* Thorburn, Phill. (N. Car.) 158.

Michigan.—Misnomer of the plaintiff was amended in Final *v.* Backus, 18 Mich. 218, a well-considered case.

Misnomer of the defendant in replevin was amended in Parks *v.* Barkham, 1 Mich. 95.

In Other States—*West Virginia.*—Misnomer of the plaintiff's Christian name was amended in Hoffman *v.* Dickinson, 31 W. Va. 142.

Wisconsin.—Misnomer of a garnishee was amended in Bushnell *v.* Allen, 48 Wis. 460, the process having been properly served upon the real garnishee, who appeared and answered.

Where the defendant was described as the "W. S. Railway Co." instead of the "W. S. Railroad Co." an amendment was allowed. Parks *v.* West Side R. Co., 82 Wis. 219, a case precisely like Chicago, etc., R. Co. *v.* Johnston, 89 Ind. 88.

Nebraska.—Misnomer of the plaintiff's Christian name was amended in Martin *v.* Coppock, 4 Neb. 173.

Ohio.—In Burton *v.* Buckeye Ins. Co., 26 Ohio St. 467, a suit against a corporation, where the name of another corporation was inserted in the summons by mistake, an amendment was allowed by substituting the real defendant, who had entered a general appearance, the mistake being evident from the indorsement and entitling of the summons.

Misnomer of the plaintiff's Christian name was held not to be amendable in Lyons *v.* Donges, 1 Disney (Ohio) 142, where it was said to be different before the Code.

Tennessee.—In Jones *v.* Miller, 1 Swan (Tenn.) 319, process issuing from a justice of the peace, the surname of the plaintiff was omitted and supplied by amendment.

New Hampshire.—Misnomer of a corporation defendant was corrected in Burnham *v.* Savings Bank, 5 N. H. 573.

Texas.—In Tryon *v.* Butler, 9 Tex. 553, misnomer of a plaintiff was held curable by amendment where the defendant failed to appear after being duly served.

Illinois.—After appearance by the defendant, a misnomer of the Christian name of the plaintiff was amended. Moss *v.* Flint, 13 Ill. 570.

Vermont.—Misnomer of a defendant corporation was amended after appearance in Hosford *v.* New York, etc., R. Co., 47 Vt. 533.

1. Barber *v.* Smith, 41 Mich. 138, *distinguishing* Smith *v.* Canfield, 8 Mich.

The Want of an Appearance by the defendant does not deprive the court of the power to make such amendments if process has been legally served upon him.[1]

Retroactive Effect.—The amendment of a summons by correcting a misnomer of the plaintiffs relates back to the time of service.[2]

f. IN RESPECT OF PARTIES.—**A Misdescription** of a party[3], or of the character in which he sues or is sued, may be amended where the real parties remain the same. Thus the plaintiff may amend by striking out the representative capacity in which he

493. See also Bentley *v.* Smith, 3 Cai. (N. Y.) 170; Pate *v.* Bacon, 6 Munf. (Va.) 219; Totty *v.* Donald, 4 Munf. (Va.) 430; Barnett *v.* Watson, 1 Wash. (Va.) 372.

Use of Partnership Name.—In Martin *v.* Godwin, 34 Ark. 682, it was held that a summons against several partners in the partnership name may be amended by inserting the names of the individual partners.

Michigan Comp. Laws, § 5307, permits a partnership suit to be instituted in the firm name if the names of the partners are not known, and allows an amendment at any time before the pleadings are closed by inserting the names of the partners. It was held that this statute can apply only in cases of actual partnership; and where a writ of replevin was issued in a partnership name and the amendment showed that there was only one plaintiff, the action failed. Stirling *v.* Heintzman, 42 Mich. 449.

1. Langmaid *v.* Puffer, 7 Gray (Mass.) 378, and Chicago, etc., R. Co. *v.* Johnston, 89 Ind 88. in both of which cases a misnomer of the defendant was cured by amendment.

Contra.—In Atwood *v.* Landis, 22 Minn. 358, the defendant was named William A. Landers in the summons. No appearance was entered, and an amendment was allowed by changing his name to William A. Landis. It was held that the judgment rendered therein was void. The same ruling was made in McGill *v.* Weil (Co. Ct.), 10 N. Y. Supp. 246. See also Farnham *v.* Hildreth, 32 Barb. (N. Y.) 277.

2. Martin *v.* Coppock, 4 Neb. 173.

3. **Charging Partners Individually.**—In Johnson *v.* Somerville Dyeing, etc., Co., 15 Gray (Mass.) 216, it was held that a writ against a manufacturing corporation summoning in two persons under the Mass. Stat., 1851, c. 315, as copartners might be amended by charging them individually, both of them being served and before the court.

Striking Out Allegation of Partnership.—In Babcock *v.* Fowles, 32 Me. 592, the plaintiffs were allowed to amend by striking out the averments that they were partners in trade.

Charging Estate of Intestate.—Where a writ describes the defendant as administrator, but declares against him personally, and the verdict is that the defendant's intestate promised, it is proper to allow an amendment to support the verdict. Perkins *v.* Hix (Me., 1888), 13 Atl. Rep. 131.

Suits By or Against Corporations.—In Barnet *v.* School Directors, 6 W. & S. (Pa.) 46, where a præcipe and writ were in the individual names of public officers when they should have been sued in the name of the corporation, an amendment was allowed.

In Lebanon *v.* Griffin, 45 N. H. 558, a writ in favor of "the inhabitants of the town of L." was held to be amendable so as to describe the corporation properly.

In a suit against a corporation the writ commanded the officer to summon "the proper officer of" the corporation, and it was held to be amendable by striking out the words quoted. Stone *v.* Travelers' Ins. Co., 78 Mo. 655.

Place of Residence.—In Patten *v.* Starrett, 20 Me. 145, it was held that a misdescription of the place of residence of a defendant in a writ was curable by amendment.

And the description or addition of the plaintiff may be amended. Gooch *v.* Bryant, 13 Me. 386.

Suit by Assignee.—In Thompson *v.* Malone, 13 Rich. (S. Car.) 252, it was held that in an action by the assignee on a non-negotiable note the plaintiff must style himself in the writ assignee of the payee, and if he does not he cannot amend, for there is nothing to amend by.

sues.[1] An infant suing in his own name may amend by inserting the name of a guardian or next friend.[2] A writ against a defendant individually may be amended so as to charge him in the capacity of an administrator;[3] and a writ against a defendant as executor may be amended by describing him as surviving executor.[4] Where a defendant who was sued as administrator pleaded in abatement that he was executor instead of administrator, the plaintiff was permitted to amend.[5]

Entire Omission of Party.—But a writ which is not in the name of any plaintiff is not amendable either at common law or by statute.[6]

Adding Parties.—Under the Codes a summons may be amended by adding a new party or parties.[7]

g. THE RETURN TIME OR PLACE.—A mistake as to the time or place at which a writ or summons is made returnable may be amended on motion after a general appearance by the defendant;[8]

1. First Freewill Baptist Church *v.* Bancroft, 4 Cush. (Mass.) 281; Metcalf *v.* Yeaton, 51 Me. 198; Winningham *v.* Crouch, 2 Swan (Tenn.) 170; National Ben. Assoc. *v.* Jackson, 114 Ill. 533.

2. Blood *v.* Harrington, 8 Pick. (Mass.) 552, after plea in abatement on account of the defect; Young *v.* Young, 3 N. H. 345; Wheeler *v.* Smith, 18 Wis. 651.

3. Lester *v.* Lester, 8 Gray (Mass.) 437. See also *In re* Estate of Soule, 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 171.

4. Barnes *v.* Scott, 29 Fla. 285.

5. Randolph *v.* Barrett, 16 Pet. (U. S.) 138.

6. Jones *v.* Sutherland, 73 Me. 157. But in Galbreath *v.* Mitchell, 32 Ark. 278, an action of forcible entry and detainer, the names of the parties were properly set out in the complaint and wholly omitted from the writ, and the plaintiff was permitted to amend.

7. Hancock *v.* Oxford First Nat. Bank, 93 N. Y. 82; Arthur *v.* Allen, 22 S. Car. 432; Plemmons *v.* Southern Improvement Co., 108 N. Car. 614.

It was held in *North Carolina* at an early date, under a statute authorizing amendments of process either in form or substance, that a writ could be amended by adding new plaintiffs, Green *v.* Deberry, 2 Ired. (N. Car.) 344; but that such amendment could not be made in the appellate court. Wilcox *v.* Hawkins, 3 Hawks (N. Car.) 84.

Something to Amend by.—The court has a discretion to allow a writ to be amended by the insertion of the name of a party as defendant, even after plea in abatement for want of proper parties, the name being suggested in the plea. Coombs *v.* Low, R. M. Charlt. (Ga.) 395.

Necessitates Amendment of Complaint.—Where new parties are brought in by amendment of the complaint the summons must be amended accordingly; otherwise the amended complaint may be struck out on motion, and such motion may be made by the original defendant. Follower *v.* Laughlin, 12 Abb. Pr. (N. Y.) 105.

Striking Out Parties.—In Pickett *v.* King, 4 N. H. 212, it was held that a writ of entry could not be amended by striking out one of the defendants. *Compare* Chadbourne *v.* Rackliff, 30 Me. 354.

In *Maine* an amendment of a writ by striking therefrom one or more of several plaintiffs will not be allowed, especially where the relations of the parties and the character of the claim have not been changed since the suit was brought. Roach *v.* Randall, 45 Me. 438. *Compare* Treat *v.* Strickland, 23 Me. 234; Chadbourne *v.* Rackliff, 30 Me. 354.

Leave to amend by striking out the name of a party will be refused where the writ would be defective after the amendment. Jones *v.* Sharpton, 7 Rich. (S. Car.) 343.

8. Lawrence *v.* Chase, 54 Me. 196; Ames *v.* Weston, 16 Me. 266; Barker *v.* Norton, 17 Me. 416, where the writ was made returnable on the fourth Tuesday of the month, the court being holden on the first Tuesday. Guptill *v.* Horne, 63 Me. 405; Pattee *v.* Lowe, 35 Me. 121, holding that a plea of the

and, according to some of the authorities, even after a special general issue waives the defect; Dunkle *v.* Elston, 71 Ind. 585, a summons, but properly indorsed; Harrison *v.* Agricultural Bank, 2 Smed. & M. (Miss.) 307; Wellover *v.* Soule, 30 Mich. 481; Jackson *v.* McLean, 90 N. Car. 64; Cheatham *v.* Crews, 81 N. Car. 343; Thomas *v.* Womack, 64 N. Car. 65-, Fisher *v.* Collins, 25 Ark. 97.

In Covington *v.* Cothrans, 35 Ga. 156, an attachment returnable to the "inferior" court was amended by inserting the word "county" instead of "inferior."

In Pitcher *v.* Pierce, 2 Cow. (N. Y.) 586, a certiorari returnable out of term, but returned by the justice, was amended.

In Simmons *v.* Norfolk, etc., Steamboat Co. (N. Car.),16 S. E. Rep. 117, it was held that where a summons in a special proceeding was improperly made returnable to the superior court in term, the court could remand the proceedings with directions to amend by making the summons returnable before the clerk on a day certain. See also Cheatham *v.* Crews, 81 N. Car. 343.

Writ Returnable on Sunday.—Where a writ is made returnable on Sunday it may be amended if the defendant appears. Norton *v.* Dover, 14 Fed. Rep. 106, decided in the United States Circuit Court for New Hampshire, but controlled by the federal statute of amendments.

In McEvoy *v.* School Dist. No. 8, 38 N. J. Eq. 420, a subpœna to answer a bill in equity was made returnable on Sunday, but was served the required number of days before the return day. The defendant did not appear, and the plaintiff was permitted to amend by making the subpœna returnable on the following Monday, and a decree *pro confesso* was sustained.

Wrong Place.—Where a writ was by mistake made returnable at Salem instead of Ipswich, and before the expiration of the time of service the plaintiff caused the defendant to be notified of the mistake and to be served with a new summons in which the mistake was corrected, and the action was legally entered, it was held that the writ might be amended. Kimball *v.* Wilkins, 2 Cush. (Mass.) 555.

A summons issued by the clerk of the circuit court of Lowndes county, with the county of Lowndes inserted in the margin, was held sufficient to support a judgment by default when the body of the summons recited that the defendant was required "to appear at the next term of the circuit court of Montgomery" to be held for said county at the place of holding the same, the words "of Montgomery" being treated as surplusage. Relfe *v.* Valentine, 45 Ala. 286.

Mesne Process Against the Body returnable out of term was held not to be amendable in Miller *v.* Gregory, 4 Cow. (N. Y.) 504. See also Kelly *v.* Gilman, 29 N. H. 385.

Something to Amend by.—In Dean *v.* Swift, 11 Vt. 331, the writ contained a wrong return day, but was returnable to the right term, and thecourt allowed an amendment on the ground that there was something to amend by.

In Mossman *v.* Higginson, 4 Dall. (U. S.) 12, a writ of error regularly attested with a blank for the return day was amended where the term to which it was returnable and the time when it was filed in the court below appeared by indorsement on the writ.

A declaration prayed for process requiring the defendant to appear at the August term. The process attached was dated July 16, and required the defendant to appear at the court next to be holden "on the first Tuesday in July" in the same year. The defendant appeared at the regular term on the first Tuesday of August and moved to dismiss. The plaintiff was allowed to amend. Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203.

Conflicting Authorities.—A writ tested on the 12th of May and made returnable on the 17th of May next was held to be a nullity and not amendable. Bunn *v.* Thomas, 2 Johns. (N. Y.) 190.

In Wood *v.* Hill, 5 N. H. 229, it was held that a writ returnable upon a day out of term was void and could not be amended. See the comments on this case in Norton *v.* Dover, 14 Fed. Rep. 106.

In Hoxie *v.* Payne, 41 Conn. 539, where the year of the return term was wrong, it was held that the defect was not amendable, as the court had no jurisdiction.

In Kyles *v.* Ford, 2 Rand. (Va.) 1, it was held that a *scire facias* returnable to a day which was not a proper return day was void and could not be amended.

appearance by the defendant solely for the purpose of moving to quash the process on account of the defect.[1] But if the defendant does not appear, it has been held that the court acquires no jurisdiction over the person and has no authority to allow an amendment in the return day or term.[2]

h. THE AD DAMNUM.—A writ in which the amount of the plaintiff's damages is wholly omitted may be amended by leave of the court by filling the blank with the proper sum.[3] And where the court to which the writ is returnable has jurisdiction of the parties and the subject-matter, and the *ad damnum* is for an amount exceeding the jurisdiction of the court, it may be amended by making the necessary reduction.[4] Under similar conditions the *ad damnum* may be increased by amendment.[5]

i. THE TESTE—**In General.**—The general rule is that the teste in process is matter of form only and may be amended.[6]

1. Hamilton *v.* Ingraham, 121 Mass. 562, where the word "current" was substituted for the word "next." See also People *v.* Brotherhood of Stationary Engineers, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 175; Jones *v.* Williams, 4 Hill (N. Y.) 34, a *capias ad respondendum* returnable at the wrong place; McIniffe *v.* Wheelock, 1 Gray (Mass.) 600.

2. Bell *v.* Austin, 13 Pick. (Mass.) 90; Brainard *v.* Mitchell, 5 R. I. 111, where the writ was made returnable to a term to be holden on the second Monday of February, the regular term beginning on the third Monday of February.

The foregoing cases were distinguished from those where there was an appearance in Norton *v.* Dover, 14 Fed. Rep. 106.

Contra.—See McEvoy *v.* School Dist. No. 8, 38 N. J. Eq. 420, cited in the last note but one.

3. Cragin *v.* Warfield, 13 Met. (Mass.) 215; Lamphere *v.* Cowen, 42 Vt. 175; Flanders *v.* Atkinson, 18 N. H. 167, an excellent case in view of the conflicting authorities cited below; State *v.* Hood, 6 Blackf. (Ind.) 260, and Campbell *v.* Chaffee, 6 Fla. 724, where it was amended by the præcipe.

Contra.—Where the amount of the *ad damnum* determines the jurisdiction of the court and is wholly omitted, it has been held that the court has no authority to amend it. Hoit *v.* Molony, 2 N. H. 322; Deveau *v.* Skidmore, 47 Conn. 19. These cases were distinguished in Campbell *v.* Chaffee, 6 Fla. 724, and Eaton *v.* Case, 17 R. I. 429.

In regard to amendment of the *ad damnum* in the declaration or complaint, see *supra*, III, 10.

4. Hart *v.* Waitt, 3 Allen (Mass.) 532; Converse *v.* Damariscotta Bank, 15 Me. 431. See also Holloway *v.* School Dist. No. 9, 62 Mich. 153.

A writ brought in the police court with the *ad damnum* beyond its jurisdiction cannot be amended in the court of common pleas on appeal. McQuade *v.* O'Neil, 15 Gray (Mass.) 52, where the court refrained from deciding whether it could have been amended in the police court.

5. Danielson *v.* Andrews, 1 Pick. (Mass.) 156; Messervey *v.* Beckwith, 41 Ill. 452, amended by the præcipe. See also Fowlkes *v.* Webber, 8 Humph. (Tenn.) 530; Thompson *v.* Turner, 22 Ill. 389; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648; Ellis *v.* Ridgway, 1 Allen (Mass.) 501; State *v.* Broughton, 7 Ired. (N. Car.) 96.

In Deane *v.* O'Brien, 13 Abb. Pr. (N. Y. Super. Ct.) 11, the *ad damnum* was increased, the cause of action being single and entire, although the effect was to defeat the statute of limitations as to the additional claim.

After Verdict.—In Porteous *v.* Givens, 2 McCord (S. Car.) 49, the *ad damnum* was increased so as to cover the verdict.

Where a verdict was rendered for more than the amount claimed in the writ in a case where the measure of damages was certain and there was no sure criterion by which to show a mistake or misapprehension, it was held improper to allow an amendment of the writ by increasing the damages. Ashe *v.* Derosset, 8 Jones (N. Car.) 240.

6. Reynolds *v.* Damrell, 19 N. H. 394; Ripley *v.* Warren, 2 Pick (Mass.)

Name or Style.—A mistake in the name or style of the authority in whose name the process is tested may be corrected by amendment.[1]

Place of Teste.—A mistake as to the place at which the process was tested is amendable.[2]

The Date of the process may be amended.[3]

Signature.—The omission of the signature to an original writ by the clerk of the court is a defect which may be amended,[4] even where the constitution requires that all process shall be so signed.[5] And where the clerk of a court by mistake signed a writ returnable to that court as "deputy clerk," he was allowed to amend after plea in abatement by annexing to his signature the word "clerk."[6] The signature of an attorney to a summons may also be amended.[7]

592; Converse *v.* Damariscotta Bank, 15 Me. 431.

It was held in Andrews *v.* Ennis, 16 Tex. 45, that the omission by the clerk of the attestation clause in a citation was a mere formal defect and curable by amendment.

1. Harris *v.* Jenks, 3 Ill. 475; Converse *v.* Damariscotta Bank, 15 Me. 431.

A *capias ad respondendum* may be amended by correcting the teste as to the name of the chief justice, by substituting the name of another chief justice who was then in office. Brown *v.* Aplin, 1 Cow. (N. Y.) 203.

In Converse *v.* Damariscotta Bank, 15 Me. 431, an amendment was allowed where the writ was tested in the name of a judge who had resigned. Likewise in Reynolds *v.* Damrell, 19 N. H. 394.

A summons issued out of the United States District Court and bearing the seal of that court but the teste of the chief justice, instead of the district court judge, as required by U. S. Rev. Stat., § 911, is amendable. U. S. *v.* Turner, 50 Fed. Rep. 734.

2. Raymond *v.* Hinman, 4 Cow. (N. Y.) 41, where a *capias ad respondendum* was tested at Utica when it should have been tested at Albany.

3. Fay *v.* Hayden, 7 Gray (Mass.) 41, where the writ was antedated one year Jackson *v.* Bowling, 10 Ark. 578, where the same error was amended; McGlarren *v.* Thurman, 8 Ark. 313; Haines *v.* McCormick, 5 Ark. 663, and Austin *v.* Clapp, 5 Tex. 130, where the process was dated on Sunday; Mathews *v.* Bowman, 25 Me. 157, where the process was not dated. Gardiner *v.* Gardiner, 71 Me. 266; Bray *v.* Libby, 71 Me. 276; McIniffe *v.* Wheelock, 1 Gray (Mass.) 600; Huss *v.* Central R. & B. Co., 66 Ala. 472.

A writ may be amended by altering its date to a subsequent date, although prior to the amendment the action appeared to have been commenced before the cause of action accrued. Bragg *v.* Greenleaf, 14 Me. 395.

A writ of certiorari may be amended by inserting the date. Jackson *v.* Crane, 1 Cow. (N. Y.) 38; Brink *v.* Fulton, 1 Cow. (N. Y.) 41. See also Bartholemew *v.* Chautauqua County Bank, 19 Wend. (N. Y.) 99; Parkman *v.* Crosby, 16 Pick (Mass.) 297. *Compare* Lynch *v.* Mechanics' Bank, 13 Johns. (N. Y.) 127; Ellis *v.* Ewbanks, 4 Ill. 190.

Mesne process against the body tested out of term cannot be amended. Chandler *v.* Brecknell, 4 Cow. (N. Y.) 49. But see People *v.* New York, 18 Wend. (N. Y.) 675; Parke *v.* Heath, 15 Wend. (N. Y.) 301.

4. Austin *v.* Lamar F. Ins. Co., 108 Mass. 338; Pepoon *v.* Jenkins, Col. & Cai. (N. Y.) 60. See also Norton *v.* Dow, 10 Ill. 459.

5. Austin *v.* Lamar F. Ins. Co., 108 Mass. 338.

6. Johnson *v.* Nash, 20 Vt. 40.

7. **Amendment of Summons After Judgment.**—Where a summons in an action is signed by the firm name of two attorneys who are in partnership, and the complaint served with the summons is signed with the individual name of one of such attorneys only, and all subsequent notices and papers in the action are signed by such indi-

j. BY AFFIXING A SEAL.—At common law a writ issuing from a court must, in order to be considered as regular and authentic, be attested by the seal of the court from which it issues.[1] Some of the cases hold that a writ lacking the seal of the court is absolutely void;[2] but the omission has been more generally regarded as a defect merely which is curable by amendment.[3]

k. AMENDMENT OF SCIRE FACIAS.—By the ancient practice it was considered that a *scire facias* was not in general amendable.[4] But it is now the practice to allow the writ and declaration to be amended even after plea of *nul tiel record*,[5] or after error

vidual name, the court has power after judgment to amend the summons by substituting the individual name of the attorney. Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673.

Amending Old Summons.—Where a summons signed by a nonresident attorney was set aside, it was not prejudicial to the defendant to allow the summons to be amended and served anew, with the signature of resident attorneys thereto. Prentice *v.* Stefan, 72 Wis. 151.

1. Williams *v.* Vanmetre, 19 Ill. 293; State *v.* Flemming, 66 Me. 142; Wheaton *v.* Thompson, 20 Minn. 196; Reeder *v.* Murray, 3 Ark. 450; Ætna Ins. Co. *v.* Hallock, 6 Wall. (U. S.) 556; Jones *v.* Frost, 42 Ind. 543; Hinton *v.* Brown, 1 Blackf. (Ind.) 429; Sanford *v.* Sinton, 34 Ind. 539; State *v.* Davis, 73 Ind. 359.

2. Original writs lacking a seal were held not to be amendable in Witherel *v.* Randall, 30 Me. 168; Bailey *v.* Smith, 12 Me. 196, Tibbetts *v.* Shaw, 19 Me. 204, and Witherel *v.* Randall, 30 Me. 168, where the writ bore the seal of the wrong court; Hall *v.* Jones, 9 Pick. (Mass.) 446.

In Shaffer *v.* Sandwall, 33 Iowa 579, it was held that a writ of attachment issuing from one court, with the seal of a different court impressed thereon, could not be amended. And in Foss *v.* Isett, 4 Greene (Iowa) 76, the want of a seal to a writ of attachment was held incurable. But see Murdough *v.* Pherrin, 49 Iowa 479, decided after a change in the statute.

3. Potter *v.* Smith, 7 R. I. 55, *disapproving* the Maine and Massachusetts cases cited in the preceding note and citing Foot *v.* Knowles, 4 Met. (Mass.) 386, as indicating that in the latter state the earlier cases therein decided would not be followed. Clark *v.* Hellen, 1 Ired. (N. Car.) 421; Henderson *v.* Graham, 84 N. Car. 496; Jump *v.* Batton, 35 Mo. 193; Strong *v.* Catlin, 3 Pin. (Wis.) 121; Cartwright *v.* Chabert, 3 Tex. 261.

Indiana.—The Indiana Rev. Stat., 1876, p. 49, provides that "no summons or service shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him in court."

Under that statute it was held that after judgment and the term passed a summons sufficient in substance could be amended *nunc pro tunc* by affixing the seal of the clerk. State *v.* Davis, 73 Ind. 359.

The same amendment was allowed in Boyd *v.* Fitch, 71 Ind. 306; Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213, after a judicial sale of property on a writ not attested by the seal of the court.

Mississippi.—Under the Mississippi Code of 1871, § 712, a writ issued without a seal was held to be amendable. Spratley *v.* Kitchens, 55 Miss. 578.

New York.—In People *v.* Steuben, 5 Wend. (N. Y.) 103, where the seal attached to a certiorari was not the seal of the court out of which the writ issued, an amendment by affixing the right seal was allowed.

In Jackson *v.* Brown, 4 Cow. (N. Y.) 550, a venue for the circuit was amended by adding a seal.

4. 2 Tidd Pr. 1036; Johnston *v.* Hubbell, Wright (Ohio) 69; Condit *v.* Gregory, 21 N. J. L. 429.

In Vavasor *v.* Baile, 1 Salk. 52, and in Hillier *v.* Frost, 1 Str. 401, such motions were denied. See also Kyles *v.* Ford, 2 Rand. (Va.) 1.

5. Condit *v.* Gregory, 21 N. J. L. 429; Williams *v.* Lee, Term (N. Car.) 146; White *v.* Stanton, 3 Jones (N. Car.) 41; Pounds *v.* State, 60 Miss.

brought,[1] so as to conform to the record;[2] and when a *scire facias* is used as a declaration it may be amended in the same way as other pleadings are amended.[3] But a *scire facias* which issues from a court other than that which has the record is a nullity and cannot be amended so as to read as if it issued from the proper court.[4]

l. APPLICATION AND LEAVE TO AMEND—**Leave Necessary.**—Process cannot be amended without leave of the court.[5]

Waiver of Objection.—But an irregularity in serving an amended summons without leave first obtained may be waived by defendant's retaining the amended summons, or it may be cured in answer to a motion to strike out the amended summons by granting a cross-motion for leave to amend it.[6]

925; Smith *v.* Brisbane 1 Brev. (S. Car.) 455; Borlin *v.* Highberger, 104 Pa. St. 143, and Rainey *v.* Com., 10 Watts (Pa.) 343, where it was amended to conform to the præcipe; Miller *v.* Hower, 2 Rawle (Pa.) 56; Sweetland *v.* Beezley, Barnes 4; Perkins *v.* Pettit, 2 Bos. & Pul. 440; Rex *v.* Scott, 4 Price 181. See Bucksom *v.* Hoskins, 1 Salk. 52, and the cases cited in the next note but one.

1. Burrows *v.* Heysham, 1 Dall. (U. S.) 133.

2. *Scire facias* on a recognizance may be amended so as to recite the date or term of the court at which the judgment *nisi* was taken. Marx *v.* State, 61 Miss. 478. Or otherwise to conform to the judgment *nisi*. Gwynn *v.* State, 64 Miss. 324; Pounds *v.* State, 60 Miss. 925; Sartin *v.* Weir, 3 Stew. & Port. (Ala.) 421.

The Caption may be amended so as to run in the name of the people of the state. McFadden *v.* Fortier, 20 Ill. 509.

After Jury Sworn.—After the jury were sworn the court permitted the writ to be amended to avoid a variance between it and the record of the recognizance. State *v.* Spicer, 4 Houst. (Del.) 100. See also Maus *v.* Maus, 5 Watts (Pa.) 315; Whitworth *v.* Thompson, 8 Lea (Tenn.) 480.

3. Johnston *v.* Hubbell, Wright (Ohio) 69; Jackson *v.* Tanner, 18 Wend. (N. Y.) 526; Peacock *v.* People, 83 Ill. 331; Lowry *v.* Newson, 51 Ala. 570; Orput *v.* Hardy, 6 Blackf. (Ind.) 456; Berry *v.* McDonald, 7 Blackf. (Ind.) 371; Clark *v.* Perkins, 3 N. H. 339. See Willink *v.* Renwick, 22 Wend. (N. Y.) 608, where the plaintiff was not permitted to amend by adding new parties after the statute of limitations had attached in their favor; Carter *v.* Thompson, 15 Me. 464, where an amendment was denied in the exercise of discretion, as also in Farnum *v.* Bell, 3 N. H. 72.

In Phelps *v.* Ball, 1 Johns. Cas. (N. Y.) 31, a *scire facias* was amended after it had been returned satisfied.

4. Osgood *v.* Thurston, 23 Pick. (Mass.) 110.

5. Allen *v.* Allen, 14 How. Pr. (N. Y. Supreme Ct.) 248; Maine Bank *v.* Hervey, 21 Me. 38; Childs *v.* Ham, 23 Me. 74.

Presumptive Date of Order for Amendment.—Independently of any showing of the date on which an order for the amendment of process is procured it will be taken to have been on the last day of the term. Burns *v.* First Nat. Bank, 45 Vt. 269.

Not Amendable of Course.—The plaintiff cannot amend a summons of course. Walkenshaw *v.* Perzel, 32 How. Pr. (N. Y. Super. Ct.) 310; Diblee *v.* Mason, 1 Code Rep. (N. Y.) 37; McCrane *v.* Moulton, 3 Sandf. (N. Y.) 736; Follower *v.* Laughlin, 12 Abb. Pr. (N. Y. Supreme Ct.) 105; Billings *v.* Baker, 6 Abb. Pr. (N. Y. Supreme Ct.) 213; Russell *v.* Spear, 5 How. Pr. (N. Y. Supreme Ct.) 142, 3 Code Rep. (N. Y.) 189.

Amendment by Another Court.—Leave to amend original process issued out of the Circuit Court will not be granted in the Supreme Court. Hildreth *v.* Hough, 19 Ill. 403; Ellis *v.* Ewbanks, 4 Ill. 190.

6. Mapes *v.* Brown, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 94.

Failure to Take Proper Objection.—In Bray *v.* Libby, 71 Me. 276, it was

Leave Discretionary.—The allowance or refusal of leave to amend process is discretionary with the trial court, and will be reviewed only for an abuse of discretion [1] or where the ruling was based upon an erroneous view as to the power of the court.[2]

Notice of Motion.—An application for leave to amend a summons should be upon notice, where there has been a general appearance.[3]

2. Of Executions—To Conform to Judgment.—An execution may be amended to conform to the judgment if it can be so identified with the judgment and the record on which that judgment is founded that the court can find data by which to make the amendment.[4]

held that the defendant will be held to have waived his rights depending upon an unauthorized and irregular change of the writ, unless he takes advantage of the same by plea in abatement or when the defects appear of record by motion seasonably filed; and when the defendant thus waives his right the court will not dismiss the writ unless it perceives that justice requires it. See also Maine Bank *v.* Hervey, 21 Me. 38.

1. Kagay *v.* School Trustees, 68 Ill. 75.

2. A refusal of leave to amend a summons on the ground of want of power may be reviewed on appeal. Henderson *v.* Graham, 84 N. Car. 496.

3. Hewitt *v.* Howell, 8 How. Pr. (N. Y. Supreme Ct.) 346.

Under Prayer for General Relief.—On a motion to add parties defendant and for an injunction and receiver the plaintiff can obtain leave to amend the summons under the general prayer "for such other order or relief as the court shall see fit to grant." Walkinshaw *v.* Perzel, 7 Robt. (N. Y.) 606.

Leave Granted on Motion to Quash.—It is proper to give leave to amend upon the hearing of a motion to quash for the defect. Shackman *v.* Little, 87 Ind. 181, where a misnomer was amended.

And in Jones *v.* Williams, 4 Hill (N Y.) 34, on a motion to set aside a *capias ad respondendum*, because of its being returnable at a wrong place the plaintiff was allowed to amend without a cross-motion for that purpose, and the court said that it was "settled practice to allow trifling mistakes of this kind to be amended on the motion to set aside."

Without Motion.—It was said in Kahn *v.* Kuhn, 44 Ark. 404, that a mistake in not making the process run in the name of the state ought to be corrected by the court without a motion.

4. Dewey *v.* Peeler (Mass., 1894), 36 N. E. Rep. 800; Fries *v.* Woodworth, 31 N. J. L. 273; Black *v.* Wistar, 4 Dall. (U. S.) 267; Sanders *v.* Kentucky Ins. Co., 4 Bibb (Ky.) 471, where the execution issued for one cent more than the judgment; Kentucky Bank *v.* Lacy, 1 T. B. Mon. (Ky.) 7; Johnston *v.* Lynch, 3 Bibb (Ky.) 334; Bender *v.* Askew, 3 Dev. (N. Car.) 150; Holmes *v.* Williams, 3 Cai. (N. Y.) 98, a *ca. sa.* in which the costs were larger than the amount actually entered; Tasker *v.* Wallace, 6 Daly (N. Y.) 364, after the execution had been served and returned; De Lancey *v.* Piepgras (Supreme Ct.), 26 N. Y. Supp. 806; Hall *v.* Clagett, 63 Md. 57, a *venditioni exponas* amended to conform to the record; Jones *v.* Dove, 7 Oregon 467, after a sale on the execution; Andress *v.* Roberts, 18 Ala. 387; Sheppard *v.* Melloy, 12 Ala. 561; McCollum *v.* Hubbert, 13 Ala. 282; Goodman *v.* Walker, 38 Ala. 142, by striking out the name of a defendant; Hunt *v.* Loucks, 38 Cal. 372; Durham *v.* Heaton, 28 Ill. 264, and Lewis *v.* Lindley, 28 Ill. 147, the two cases last cited holding it to be amendable after as well as before a sale, where the execution called for too much money; Vogt *v.* Ticknor, 48 N. H. 242; Jones *v.* Parker, 60 Ga. 500; Gross *v.* Mims, 63 Ga. 563; Saffold *v.* Wade, 56 Ga. 174; Lamar *v.* Grier, 3 Ga. 121; Smith *v.* Keen, 26 Me. 411; Caldwell *v.* Blake, 69 Me. 458; Corthell *v.* Egery, 74 Me. 41; Chase *v.* Gilman, 15 Me. 64; Silner *v.* Butterfield, 2 Ind. 24, holding

The execution may be thus amended so as to conform to a judgment which has been amended.[1]

To Conform to Præcipe.—In like manner an execution may be amended by the præcipe.[2]

The Caption of an execution is amendable.[3]

Direction.—An error in the direction may be amended.[4]

that a justice of the peace has power to amend an execution issued by him; Hutchens *v.* Doe, 3 Ind. 528; Tatem *v.* Potts, 5 Blackf. (Ind.) 534; M'Call *v.* Trevor, 4 Blackf. (Ind.) 496; Doe *v.* Rue, 4 Blackf. (Ind.) 263, where the execution and judgment differed in amount; Owen *v.* Simpson, 3 Watts (Pa.) 87; Mohn *v.* Heister, 6 Watts (Pa.) 53.

Error in Name.—An error in the name of the plaintiff in an execution, there being enough in the record to amend by, may be corrected after a delivery bond taken in the proper name and execution issued on it. Kentucky Bank *v.* Lacy, 1 T. B. Mon. (Ky.) 7.

In Tasker *v.* Wallace, 6 Daly (N. Y.) 364, an error in the name of a party was corrected in the judgment and a corresponding change then made in the execution after it had been served and returned. In Porter *v.* Goodman, 1 Cow. (N. Y.) 413, a *fi. fa.* was corrected by adding the name of a party.

In Gross *v.* Mims, 63 Ga. 563, an error in the Christian name of the defendant was amended. Also in Vogt *v.* Ticknor, 48 N. H. 242, *not followed* in Battle *v.* Guedry, 58 Tex. 111, where it was held that an execution against J. B. Clements was not supported by a judgment against J. P. Clements, and that a sale under the execution did not pass title. The case last cited was not approved in Morris *v.* Balkham, 75 Tex. 111.

In Andress *v.* Roberts, 18 Ala. 387, an execution was amended by striking out the name of a person not a party to the judgment, the change being also held not to affect the lien.

To Correct a Mistake.—In *New York* an execution inadvertently issued for too small an amount by failing to include interest may even after satisfaction and return be amended so as to include interest, § 723 of the Code declaring that the court may on the trial or any other time before or after judgment amend any process, pleading, or proceeding by correcting a mistake. Kokomo Strawboard Co. *v.* Inman, 67 Hun (N. Y.) 648, 21 N. Y. Supp. 705.

Void Execution—Nothing to Amend By.—An execution issued out of the circuit court upon a judgment recovered in the Court of Common Pleas is absolutely void and cannot be amended in the common pleas. Clarke *v.* Miller, 18 Barb. (N. Y.) 269.

Mistake in Sheriff's Deed.—The execution being a record of the court may be amended, but a mistake in the sheriff's deed being matter *in pais* cannot be amended. Murphy *v.* Price, Cheves (S. Car.) 14.

1. De Lancey *v.* Piepgras (Supreme Ct.), 26 N. Y. Supp. 806; Tasker *v.* Wallace, 6 Daly (N. Y.) 364. See also Jones *v.* Parker, 60 Ga. 500; Gross *v.* Mims, 63 Ga. 563.

2. In Shoemaker *v.* Knorr, 1 Dall. (U. S.) 197, the teste and return of an alias *venditioni exponas* were amended by the præcipe.

Venditioni exponas is amendable by the præcipe by inserting the name of one of the defendants during the trial of an ejectment under the sheriff's deed, and a sale under such writ passes the title. Sickler *v.* Overton, 3 Pa. St. 325.

3. Although the constitution requires that all process shall run in the name of the people of the state, yet the insertion of the word "territory" instead of state in an execution was held to be amendable. Carnahan *v.* Pell, 4 Colo. 190.

4. Benedict, etc., Mfg. Co. *v.* Thayer, 20 Hun (N. Y.) 547; Cheney *v.* Beall, 69 Ga. 533, where the execution should have been directed to "all and singular the sheriffs of said state and their lawful deputies," but was directed simply to "all and singular the sheriffs of said state."

Omission of Direction.—If an execution be executed by one having official power for the purpose, an omission of the direction to the officer may be supplied by an amendment. Rollins *v.* Rich, 27 Me. 557.

The omission in a *levari facias* of

Return Day, Term, or Place.—An error in respect of the return day or term may be amended,[1] or where the execution is returnable at a wrong place.[2]

The Teste of an execution may be amended;[3] and where the *testatum* clause was omitted in a *ca. sa.* on which the defendant had been taken, the court allowed it to be inserted by amendment.[4]

Signature.—The want of a signature by the clerk may be cured by an amendment,[5] and the defect will be treated as amended whenever the process is collaterally assailed.[6]

Want of Seal.—The want of a seal in an execution issued by a court of record[7] does not render it void, and the defect may be cured by amendment.[8]

the command to levy the debt may be amended. Peddle *v.* Hollinshead, 9 S. & R. (Pa.) 277.

After Sale.—In Treasurer *v.* Bordeaux, 3 McCord (S. Car.) 142, an execution was amended after a sale of lands had been made under it, the usual words of authority to the sheriff having been omitted.

Review in Federal Court.—Where a state court has amended an execution by inserting a direction to the proper officer, the ruling will not be reviewed in a federal court. Kent *v.* Roberts, 2 Story (U. S.) 591.

1. Goode *v.* Miller, 78 Ky. 235.

Where an execution is upon its face returnable at a time anterior to the term to which by law it should have been made returnable, it may be amended; but until amended the security of the deputy sheriff is not liable for money collected on it by such deputy after the day on which it was on its face returnable, and which he has failed to pay over. Forward *v.* Marsh, 18 Ala. 645.

2. On a motion to set aside a *ca. sa.* for irregularity, on the ground that it was returnable at a wrong place, the court allowed it to be amended without giving notice of a cross-motion for the purpose. Inman *v.* Griswold, 1 Cow. (N. Y.) 199.

3. Baker *v.* Smith, 4 Yeates (Pa.) 185, where an erroneous teste in a *fi. fa.* was amended after it had been executed. Berthon *v.* Keeley, 4 Yeates (Pa.) 205, where the teste of a *fi. fa.* was amended by the præcipe; Cherry *v.* Woolard, 1 Ired. (N. Car.) 438, where an execution was tested on the wrong day.

A *fi. fa.* tested out of term is not absolutely void, but may be amended. Den *v.* Lecony, 1 N. J. L. 111.

Where an execution is tested on Sunday it is amendable. Williams *v.* Hogeboom, 22 Wend. (N. Y.) 648.

The omission in an execution of a teste in the name of a judge of the court or of a direction as to the time of its return may be amended or disregarded. Douglas *v.* Haberstro, 88 N. Y. 611.

In Porter *v.* Goodman, 1 Cow. (N. Y.) 413, a *fi. fa.* was amended by correcting the name of the place at which it was tested after an action of trespass brought for a levy under it.

4. McIntyre *v.* Rowan, 3 Johns. (N. Y.) 144.

5. Whiting *v.* Beebe, 12 Ark. 421.

6. Jett *v.* Shinn, 47 Ark. 373.

7. A justice of the peace has no authority after a sale and return of execution and action commenced against the officer to allow an amendment of an execution by affixing a seal. Toof *v.* Bentley, 5 Wend. (N. Y.) 276; Porter *v.* Haskell, 11 Me. 177, which holds that there is a distinction in respect of the power to allow the amendment by a justice of the peace and that of courts where process is issued by the clerks; that in the latter case the court orders the clerk to correct his errors, but that in justice courts it is not permissible.

8. Rose *v.* Des Moines Valley R. Co., 47 Iowa 420; Purcell *v.* McFarland, 1 Ired. (N. Car.) 34; Taylor *v.* Courtnay, 15 Neb. 190; Bridewell *v.* Mooney, 25 Ark. 524; Corwith *v.* State Bank, 18 Wis. 560; Arnold *v.* Nye, 23 Mich. 289; Sawyer *v.* Baker, 3 Me. 29, where the execution was amended after it had been extended on lands and the extent recorded. See also Clark *v.* Hellen, 1 Ired. (N. Car.) 42.

And the amendment will relate back to the date of the process. Hall *v.*

Amendment Discretionary.—The amendment of an execution so as to cure defects therein is a matter addressed to the sound discretion of the court, and will be allowed or disallowed according as it is or is not in furtherance of justice;[1] and an allowance or refusal will not be reviewed by an appellate court unless in a case of flagrant abuse of discretion,[2] or where the decision was based upon an erroneous view as to the power of the court.[3]

Retroactive Effect of Amendment.—An amendment of an execution *nunc pro tunc* makes it as between the parties as if the defect had never existed.[4]

Regarded as Amended.—When a defect in final process is amendable it will be regarded as amended in proceedings involving the validity of acts done by virtue of it, unless the rights of third parties have intervened or injustice will be done thereby.[5]

V. In Attachment Proceedings—1. In General.—Allowing amendments is incidental to the exercise of all judicial power; and where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others.[6]

Lackmond, 50 Ark. 113; Taylor *v.* Courtnay, 15 Neb. 190.

1. Hayford *v.* Everett, 68 Me. 505.

In *Maine* the statute requires that an execution against a town shall run against the real estate therein, and against the personal property of its inhabitants. If it is issued only against real and personal property owned by the inhabitants of the town, the land of a nonresident cannot be legally sold thereon. But where the land of a nonresident was sold under an execution running against the inhabitants only, and the owner knew nothing of the sale until it was too late to redeem therefrom, and the value of the land greatly exceeded the price bid for it, and the purchaser and seller could be restored substantially to their former condition if the sale were not upheld, the court refused to allow the execution to be amended so as to run against the land of the nonresident. Hayford *v.* Everett, 68 Me. 505. See also Cape Fear Bank *v.* Williamson, 2 Ired. (N. Car.) 147.

In Hunt *v.* Pasman, 4 M. & S. 329, the court refused to allow the plaintiff to amend a *fi. fa.*, because the defendant had become a bankrupt before the sale of goods under it was made and the rights of third parties had intervened; but it was intimated that had the application been made earlier, the favor of the court might have been extended to him.

Defect in Recital.—Where an execution issued against the person of a judgment debtor is defective in that it fails to specify by name the county to which the execution against the property has been issued and returned unsatisfied, the defect may be cured by an amendment under the general provision relating to amendments. § 723 of the Code; Walker *v.* Isaacs, 36 Hun (N. Y.) 233.

Amendment of Indorsement.—Where after land has been sold under an execution there is found a discrepancy between the amount indorsed on the execution and the amount really due, such indorsement may be amended. Lane *v.* Potter (N. J., 1892), 23 Atl. Rep. 420.

2. Lamar *v.* Grier, 3 Ga. 121.

3. Hayford *v.* Everett, 68 Me. 505.

In McCollum *v.* Hubbert, 13 Ala. 282, it was held that the refusal of the court to permit a sheriff to amend an execution pending the trial of a cause cannot be assigned for error upon the judgment in the cause; and in Casky *v.* Haviland, 13 Ala. 314, that if a party is prejudiced by the refusal, his remedy is by mandamus.

4. Adams *v.* Higgins, 23 Fla. 14; Saffold *v.* Wade, 56 Ga. 174.

It was held in Jones *v.* Hawkins, 60 Ga. 52, that if a *fi. fa.* be amended after levy, the levy falls; but that if the order granting leave to amend be not carried out and the *fi. fa.* proceed without amendment, it does not. See also Jones *v.* Parker 60 Ga. 500.

5. Corthell *v.* Egery, 74 Me. 41.

6. Tilton *v.* Cofield, 93 U. S. 163.

2. Of the Declaration or Complaint—For the Same Cause of Action.—Any proper amendment may be made provided the action be still for the same demand upon which it was brought; and neither bail, nor receiptors, nor subsequent attaching creditors have any right to complain when the amendment does not in fact prejudice their rights, by increasing the responsibility of bail or receiptors, or tend to diminish the surplus property to which such subsequent attaching creditor may be entitled, according to the conditions of the action at the time of the attachment.[1]

See also Page *v.* Jewett, 46 N. H. 441; Nelson *v.* Webb, 54 Ala. 436; Guckenheimer *v.* Day, 74 Ga. 1; Phillips *v.* Taber, 83 Ga. 565; Christal *v.* Kelly, 88 N. Y. 285; Muth *v.* Erwin (Mont., 1894), 36 Pac. Rep. 43; Sweetzer *v.* Claflin, 82 Tex. 513; Pearce *v.* Bell, 21 Tex. 688; Tarkinton *v.* Broussard, 51 Tex. 550; Mendes *v.* Freiters, 16 Nev. 388; Tully *v.* Herrin, 44 Miss. 626; McCarn *v.* Rivers, 7 Iowa 404; Murphy *v.* Adams, 71 Me. 113; Suksdorff *v.* Bigham, 13 Oregon 369; Dalton *v.* Barnard, 150 Mass. 473; Townsend Nat. Bank *v.* Jones, 151 Mass. 454; Henderson *v.* Stetter, 31 Kan. 56; Crerar *v.* Milwaukee, etc., R. Co., 35 Wis. 67; Jayne *v.* Platt, 47 Ohio St. 262; Constable *v.* White, 1 Handy (Ohio) 44; Hathaway *v.* Davis, 33 Cal. 168; Hammond *v.* Starr, 79 Cal. 556.

Answer by Garnishee.—The garnishee should be allowed to amend his answer whenever it appears that he has committed a mistake or fallen into an error which could not reasonably be avoided. Smith *v.* Brown, 5 Cal. 118.

In Simon *v.* Ash, 1 Tex. Civ. App. 202; Crerar *v.* Milwaukee, etc., R. Co., 35 Wis. 67; Hennen *v.* Forget, 27 La. Ann. 381, and Buford *v.* Welborn, 6 Ala. 818—in the latter case even after the issue had been tried between the plaintiff and one to whom the debt was supposed to have been transferred—the garnishee was allowed to amend a defective answer.

Application for Writ.—An application for a writ of attachment may be amended. Langstaff *v.* Miles, 5 Mont. 554.

1. Page *v.* Jewett, 46 N. H. 445; Laighton *v.* Lord, 29 N. H. 257; Smith *v.* Brown, 14 N. H. 67; Tilton *v.* Cofield, 93 U. S. 163.

The Rule Restated.—In Townsend Nat. Bank *v.* Jones, 151 Mass. 454, where it was contended that the surety in a bond to dissolve an attachment was discharged by an amendment of the complaint, the court held that "unless the effect of the amendment would be to impose a greater liability than he had originally assumed by letting in a new cause of action, he is not released because of its allowance." The following cases support the same rule: Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Wood *v.* Denny, 7 Gray (Mass.), 540; Lord *v.* Clark, 14 Pick. (Mass.) 223; Kellogg *v.* Kimball, 142 Mass. 124; Doran *v.* Cohen, 147 Mass. 342; Lanahan *v.* Porter, 148 Mass. 596; Miller *v.* Clark, 8 Pick. (Mass.) 412; Haven *v.* Snow, 14 Pick. (Mass.) 33; Ball *v.* Claflin, 5 Pick. (Mass.) 303; Wentworth *v.* Sawyer, 76 Me. 434; Merrick *v.* Greely, 10 Mo. 106; Wright *v.* Brownell, 3 Vt. 435.

Pending Motion to Dissolve.—If the complaint can be made good by amendment, the plaintiff should be allowed to amend pending a motion to dissolve the attachment. Hathaway *v.* Davis, 33 Cal. 168.

Amendment of One Count. — The amendment of one of two counts in a declaration does not discharge a surety on a bond given to dissolve the attachment from liability for the amount sued for in the count not affected by the amendment. Warren *v.* Lord, 131 Mass. 560.

Insufficient Amendment. — An allegation in an amended petition that the defendants were "then" about to dispose of their property with intent, etc., was held insufficient to support a writ of attachment issued at the commencement of the action. Wadsworth *v.* Cheeny, 10 Iowa 257.

And in Bundy *v.* McKee, 29 Iowa 253, it was held that an amendment which does not refer to the time when the action was commenced does not cure a defect of substance therein. See also Crouch *v.* Crouch, 9 Iowa 269.

Demurrable Complaint.—A complaint so defective as to be bad on general demurrer may be amended so as to support the attachment where it is accompanied by an affidavit in proper form.[1]

New Cause of Action.—An amendment introducing a new cause of action should not be allowed.[2]

1. Tarkinton *v.* Broussard, 51 Tex. 550.

2. Furness *v.* Read, 63 Md. 1; Smead *v.* Chrisfield, 1 Handy (Ohio) 573; Peck *v.* Sill, 3 Conn. 157; Green *v.* Jackson, 66 Ga. 250; and the cases cited in the following notes.

Curing defective allegations is not introducing a new cause of action and does not discharge bail. Brown *v.* Howe, 3 Allen (Mass.) 528. Nor does a merely formal amendment. Lord *v.* Clark, 14 Pick. (Mass.) 223. Nor the correction of a mere clerical error. Putnam *v.* Hall, 3 Pick. (Mass.) 445.

In Massachusetts an attachment is discharged as to a subsequent purchaser by an amendment made without notice to him which adds a new cause of action. Freeman *v.* Creech, 112 Mass. 180.

In Texas, where an instrument shows upon its face that it had not matured when suit was brought, the petition may be amended without prejudice to the attachment by alleging its maturity pending the suit. Panhandle Nat. Bank *v.* Still, 84 Tex. 339.

Adding New Count.—An amendment adding to a declaration on the money counts a count on a guaranty of a debt of a third person discharges bail. Wood *v.* Denny, 7 Gray (Mass.) 540.

But it was held in the same case that bail are not discharged by allowing a declaration on the money counts to be amended by adding counts upon promissory notes which were in fact, though not so appearing on the record, the same cause of action. *Compare*, on the last point, Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Willis *v.* Crooker, 1 Pick. (Mass.) 204.

In Mendes *v.* Freiters, 16 Nev. 388, it was held that an amendment changing the form of action merely or adding a new count for the same cause of action would not dissolve the attachment as to interveners.

Special Contract and Common Count.—An amendment to a declaration for use and occupation under a special contract of renting by adding a common count for use and occupation is not a new cause of action. Nelson *v.* Webb, 54 Ala. 436.

Mere Amplification.—An amendment merely amplifying the averments in the original complaint does not discharge a bond substituted for the attachment. Jaynes *v.* Platt, 41 Ohio St. 262.

Description of Notes.—Plaintiffs in an attachment suit upon several claims described one note as having been "made, executed, and delivered and indorsed to said plaintiffs," and "indorsed as follows, to wit, Dreben & Lewis." By amendment the plaintiffs alleged that the note of Dreben & Lewis was made payable to themselves and was thereafter indorsed by them in blank to Isaac Lewis, and that it was afterward indorsed and delivered by said Lewis to plaintiffs. The original and amendment contained an accurate description of the note. Upon motion by an intervenor to set aside the attachment, it was held that the amended and original petition were for the same cause of action, and the motion was denied. Sweetzer *v.* Claflin, 82 Tex. 513.

Setting Out Title.—Where the complaint was based upon a note and account assigned to the plaintiff, but did not set out the assignment and alleged ownership in the plaintiff, it was held to be amendable. McCarn *v.* Rivers, 7 Iowa 404.

Making more Specific.—Amendments which simply make the causes for attachment more specific are permissible. Gourley *v.* Carmody, 23 Iowa 212.

Defects of Substance.—In Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, it was held, upon a motion to dissolve an attachment and a motion by the plaintiff to amend, that an amendment after issue joined setting forth substantial averments not contained in the original pleadings could not be allowed.

And in Gordon *v.* Maureau, 9 La. Ann. 586, it was held that an amendment cannot cure a complaint defective for want of a prayer for attachment.

Title Acquired Pending Suit.—If the plaintiff at the date of commencing the suit does not own the claim upon which it is brought, he cannot afterwards purchase the claim and set it up by amendment against the property seized under the attachment.[1]

Tort to Contract and Vice Versa.—A complaint plainly in tort cannot be changed by amendment into a complaint on contract,[2] nor *vice versa*.[3] But where a complaint was so indefinite and uncertain that it could not be determined whether it was in tort or contract, but the facts alleged were such as would sustain an action on contract, an amendment was allowed and the proceedings upheld as against a subsequent attachment.[4]

Effect of Improper Amendment.—Where an amendment is made which introduces a new and additional cause of action, if in the end judgment be taken only upon the demand originally included in and covered by the first declaration, the attachment will not be dissolved;[5] but if judgment be taken for the original and new demand, the attachment is vacated, that part of the judgment which is good being vitiated by that which is bad.[6]

Change of Parties.—An amendment by changing some of the parties to the suit does not necessarily affect the attachment.[7]

After Trial of Case.—Where a right to an attachment under one section of the statute has been determined against the plaintiff he cannot amend his complaint so as to change his ground and retry his case. Jaffray *v.* Wolfe, 1 Okla. 312.

1. Farwell Co. *v.* Wright, 38 Neb. 445.

An amendment will not be allowed on the trial by adding a claim for a debt not due at the commencement of the suit, but due at the time of the proposed amendment. Correll *v.* Georgia Const., etc., Co., 37 S. Car. 444.

2. Suksdorff *v.* Bigham, 13 Oregon 369.

3. Lane *v.* Beam, 19 Barb. (N. Y.) 51, where it was held that such an amendment would discharge the sureties in the bond to dissolve the attachment.

4. Suksdorff *v.* Bigham, 13 Oregon 369.

5. Page *v.* Jewett, 46 N. H. 441; Seeley *v.* Brown, 14 Pick. (Mass.) 177.

6. Page *v.* Jewett, 46 N. H. 446; Fairfield *v.* Baldwin, 12 Pick. (Mass.) 398; Peirce *v.* Partridge, 3 Met. (Mass.) 49; Quillen *v.* Arnold, 12 Nev. 234.

Collateral Attack.—It was held in Hammond *v.* Starr, 79 Cal. 556, that an objection that an amendment stated a different cause of action from that declared on in the original complaint could not be urged for the first time in a collateral suit on a bond given to release the attachment.

It is perhaps doubtful whether one who purchases property under attachment can contest the validity of the lien although a new cause of action was introduced by amendment and judgment rendered thereon. See Tilton *v.* Cofield, 93 U. S. 163.

7. **Striking Out a Plaintiff.** — An amendment by striking out the name of a plaintiff improperly joined will not vitiate the attachment. Johnson *v.* Huntington, 13 Conn. 47.

Adding a Defendant. — In Christal *v.* Kelly, 88 N. Y. 285, it was held that the sureties in an undertaking given to discharge an attachment in an action originally commenced against two defendants as copartners to recover on a firm note were liable to pay the judgment subsequently recovered on the note against the original defendants and another person, a partner in the firm, who was brought in after plea in abatement.

Nominal Change of Parties.—In Tully *v.* Herrin, 44 Miss. 626, where the plaintiff declared in his own name on a chose in action of which he was the equitable owner, he was allowed to amend by adding the name of the person holding the legal title.

Misnomer of the Parties may be cured by amendment;[1] but not where it would prejudice the rights of third parties acquired in good faith before the amendment was made, and where the misnomer was of such a character as to mislead them.[2]

Increasing Ad Damnum.—An amendment increasing the amount claimed will not affect the attachment if the error in stating the amount was merely clerical;[3] but if it does not clearly appear

The amendment was held not to introduce a new cause of action.

An amendment by substituting the names of the real parties for the nominal parties will not discharge the sureties on a bailbond. Phillips *v.* Taber, 83 Ga. 565.

Discontinuing as to One Defendant.—If one partner is arrested in a suit against the partnership and gives a bail-bond, the surety thereon is not discharged by a discontinuance of the action as to another partner. Sanderson *v.* Stevens, 116 Mass. 133.

A discontinuance as to one of several defendants will not discharge the obligees in a bond to dissolve the attachment. Dalton *v.* Barnard, 150 Mass. 473.

Striking Out a Defendant. — Where the statute allows the name of one of two or more defendants in an action to be struck out, such amendment may be made in an attachment suit without discharging the receiptor. Smith *v.* Brown, 14 N. H. 67.

Nonjoinder of necessary parties defendant may be cured by amendment. Sullivan *v.* Langley, 128 Mass. 235, holding that the garnishee was not discharged.

Misjoinder. — In Denny *v.* Ward, 3 Pick. (Mass.) 199, it was held that an amendment by inserting the name of a party so as to cure a misjoinder will vacate the attachment as against an intervening attaching creditor.

Adding a Plaintiff.—In Moulton *v.* Chapin, 28 Me. 505, an action of assumpsit, it was held that an amendment by adding a coplaintiff dissolved the attachment.

Entire Change of Parties.—In Quillen *v.* Arnold, 12 Nev. 234, a change of parties under the circumstances therein set forth was held to constitute a new cause of action, and the sureties in an undertaking to dissolve the attachment were not bound by the judgment.

Amendments in Respect of Parties Generally, see *supra*, III, 5.

1. Barmon *v.* Clippert, 58 Mich. 377, and Anglo-Amer. P. & P. Co. *v.* Turner Casing Co., 34 Kan. 340, misnomer of the plaintiff. But see Flood *v.* Randall, 72 Me. 439, where it was held that an attachment to enforce a lien for wages was lost by an amendment changing the Christian name of the plaintiff from Edward to Edmund.

A person having funds of S. R. in his hands may be charged as trustee in an action brought originally against S. R., but after the trustee's answer changed by amendment into an action against "S. R., otherwise called L. R.," and the liability of the trustee is not affected by an assignment by the defendant after the service of the writ and before the amendment. Vermilyea *v.* Roberts, 103 Mass. 410.

The omission in a complaint and proceedings upon attachment against a corporation defendant of the word "company" from its corporate name is amendable without affecting the attachment lien. Hammond *v.* Starr, 79 Cal. 556.

2. In Terry *v.* Sisson, 125 Mass. 560, a writ was sued out against S. S., and a savings bank summoned as trustee. The process was in fact served on S. F. S., and was afterward amended accordingly. After service on the bank and before the amendment, the bank, acting in good faith and with no notice or knowledge that the person intended to be sued was S. F. S., paid over to the latter the funds in its hands belonging to him. It was held that although the misnomer was curable as between the plaintiff and defendant, the bank was not chargeable as trustee.

In Moore *v.* Davis, 58 Mich. 25, it was held that an amendment in garnishment proceedings by substituting Jonathan for John in the name of the principal defendant discharged the attachment as against an intervening claimant.

3. Suksdorff *v.* Bigham, 13 Oregon 369. See also Page *v.* Jewett, 46 N. H. 441.

that the error was a mere clerical mistake, the lien of the attachment as against a subsequent attachment will extend only to the amount originally claimed.[1]

A Defective Verification.—A defective verification in a complaint may be amended.[2]

3. Of Affidavits—In the Absence of Express Statute.—In some of the states where there is no statute specifically providing for the amendment of affidavits, they cannot be amended to cure defects in substance.[3]

Where the complaint fails to claim an amount within the jurisdiction of the court, but the affidavit and writ of attachment issued thereon are regular and sufficient in that respect, the attachment may be validated by an amendment of the complaint to conform to the affidavit and writ. Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634.

1. Suksdorff *v.* Bigham, 13 Oregon 369, decided on a rehearing. See also Page *v.* Jewett, 46 N. H. 441; Clough *v.* Monroe, 34 N. H. 381.

In Townsend Nat. Bank *v.* Jones, 151 Mass. 454, it was held that an increase in the *ad damnum* so as to recover accrued interest on a draft which was the subject of the suit did not discharge the surety on a bond to dissolve the attachment.

2. Lowenstein *v.* Monroe, 52 Iowa 231.

3. **In Texas** an affidavit for an attachment cannot be amended. Marx *v.* Abramson, 53 Tex. 204; Sydnor *v.* Chambers, Dall. (Tex.) 601.

California. — The California Code Civ. Pro., § 558, provides that if upon an application to discharge a writ of attachment it appears that the writ was improperly or irregularly issued, it must be discharged. Under this statute the affidavit cannot be amended. Winters *v.* Pearson, 72 Cal. 553.

In Maryland the affidavit cannot be amended in a substantial matter. Halley *v.* Jackson, 48 Md. 254, where the court refused to allow the name of one of the defendants to be struck out of the affidavit.

The omission of the word "dollars" in the justices' certificate of the affidavit may be treated as a clerical misprision when the warrant for the attachment supplies the omission. De Bebian *v.* Gola, 64 Md. 262.

In Michigan there is no statute now in force permitting amendments to attachment affidavits, and such amendments have never been deemed admissible under the statute of amendments (How. Stat., Mich., § 7631), which provides that "the court in which any action shall be pending shall have power to amend any process, pleading, or proceeding in such action either in form or substance for the furtherance of justice." Freer *v.* White, 91 Mich. 74. In that case it was held that the omission of the word "not" from the statutory averment that the defendant is a non-resident and has *not* resided in this state for one year next preceding the date of the affidavit renders the affidavit a nullity.

In Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498, it was held that where the original affidavit is void and is amended under a statute, the attachment will be postponed to an intervening mortgage made by the defendant.

In Louisiana it seems that the Christian name of the defendant as contained in the petition, affidavit, and bond cannot be changed by amendment. Purdee *v.* Cocke, 18 La. 482.

In Florida material defects in an affidavit in attachment cannot be amended. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391; Work *v.* Titus, 12 Fla. 628.

Ohio.—Where plaintiff's affidavit was insufficient because fraud was sworn to on belief without stating the facts, an amended affidavit was held to be of no avail. Garner *v.* White, 23 Ohio St. 192. See also Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481.

Tennessee.—The Tennessee Code, § 3477, allows amendments in affidavits only for "defect in form," and a substantial defect cannot be amended. Lillard *v.* Carter, 7 Heisk. (Tenn.) 604. *A fortiori*, where there is no affidavit

Under General Statute of Amendments.—In others it is held that the statutes providing for the amendment of the pleadings, process, or proceeding in civil actions apply to attachment proceedings and authorize an amendment of substantial defects in affidavits therein.[1]

a new one cannot be filed. McReynolds *v.* Neal, 8 Humph. (Tenn.) 12.

Georgia.—In Brown *v.* McCluskey, 26 Ga. 577, it was held that an affidavit in attachment could not be amended, the Attachment Act of 1855 evidently restricting the right to amend to the "attachment," "bond," "declaration," and "warrant."

Wisconsin.—It was held in Slaughter *v.* Bevans, 1 Pin. (Wis.) 348, that an affidavit for attachment is not amendable under any circumstances.

West Virginia.—A mistake in the date of an affidavit may be amended. Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

1. **Nebraska.**—An affidavit for attachment may be amended even after a motion to quash the proceedings because of that particular defect. Struthers *v.* McDowell, 5 Neb. 491, holding also that the court may permit the officer before whom the affidavit was made to attach a venue according to the fact. The latter point was also decided in Rudolf *v.* McDonald, 6 Neb. 163.

An objection that the affiant's name was omitted from the body of the affidavit, he having duly signed it, may be obviated by amendment. Rudolf *v.* McDonald, 6 Neb. 163.

While an amendment of an affidavit for an attachment may be permitted when in furtherance of justice even on the hearing of the case, yet no new cause of attachment which existed when the action was brought can be brought in by amendment. Brookmire *v.* Rosa, 34 Neb. 227.

North Carolina.—Under the North Carolina Code it is settled that the affidavit may be amended even though the first affidavit were wholly insufficient. Brown *v.* Hawkins, 65 N. Car. 645; Pope *v.* Frank, 81 N. Car. 180; New Hanover Bank *v.* Blossom, 92 N. Car. 695; Penniman *v.* Daniel, 93 N. Car. 332; Cushing *v.* Styron, 104 N. Car. 338; Sheldon *v.* Kivett, 110 N. Car. 408; Clark *v.* Clark, 64 N. Car. 150.

In the case last cited the proceedings were begun before a justice of the peace, and the affidavit against a nonresident failed to state that the debt was due and that the defendant could not after due diligence be found in the state.

Under § 251 of the Code such amendments may be allowed by the clerk of the court. Cushing *v.* Styron, 104 N. Car. 338.

Where the affidavit and process in a case of original attachment described the defendant as "C. E. Thorburn," his name in full being "Charles E. Thorburn," the court allowed them to be amended. Hall *v.* Thorburn, Phill. (N. Car.) 158.

In **Montana** the affidavit may be amended without prejudice to the attachment. Muth *v.* Erwin (Mont., 1894), 36 Pac. Rep. 43.

An affidavit which sets forth in the language of the statute fraudulent intent in disposing of the property may be amended on the trial so as to set forth the facts relied on. Josephi *v.* Mady Clothing Co. (Mont., 1893), 33 Pac. Rep. 1.

In **Arkansas**, under a statute providing that "the court must in every stage of the action disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party," an affidavit made on belief only is amendable and therefore not assailable by an intervener in the action. Sannoner *v.* Jacobson, 47 Ark. 31.

And an amendment was allowed in Rogers *v.* Cooper, 33 Ark. 406, where the attachment was issued by a justice of the peace upon an affidavit which stated none of the grounds for attachment prescribed by the statute. See also Nolen *v.* Royston, 36 Ark. 565; Fletcher *v.* Menken, 37 Ark. 206; Sherill *v.* Bench, 37 Ark. 560; Fortenheim *v.* Claflin, 47 Ark. 49, where it was held that the omission of a jurat was amendable, and the court declared that the want of plaintiff's signature would be amendable.

Kansas.—The following cases were decided under the general provisions

By Express Statute.—In many jurisdictions affidavits are amendable under express statutory authority.[1]

of the Code for amendments of any process or proceeding in furtherance of justice:

In Robinson *v.* Burton, 5 Kan. 293, it was held that if the plaintiff, after having ample time and opportunity to amend a defective or informal affidavit, fail to comply with an order of the court requiring the same to be done, the court may then dissolve the attachment; also that an amended affidavit which does not relate back to the time of filing the original, and the averments in which are in the present tense, does not cure the defects in the original.

An affidavit may be amended so as to state formally and definitely what is therein stated informally and indefinitely. Burton *v.* Robinson, 5 Kan. 287.

Where the statement of the nature of the plaintiff's claim in an affidavit for an attachment is not sufficiently definite and certain, a motion to dissolve the attachment for such cause should state wherein and in what particulars such statement is insufficient, so as to give the plaintiff an opportunity to amend the affidavit. Ferguson *v.* Smith, 10 Kan. 397.

An affidavit for attachment made by one who is in fact the agent or attorney of the plaintiff, but which fails to show that the party making it is the agent or attorney, may be amended so as to show that fact. Tracy *v.* Gunn, 29 Kan. 509; Cassidy *v.* Fleak, 20 Kan. 54.

Where the grounds for the attachment are not sufficiently stated in the affidavit it is error to discharge the attachment without giving the plaintiff an opportunity to amend. Baker Wire Co. *v.* Kingman, 44 Kan. 270; Wells, Fargo & Co. *v.* Danford, 28 Kan. 487.

New York.—It was held in Furman *v.* Walter, 13 How. Pr. (N. Y. Supreme Ct.) 348, that an affidavit in an attachment under the provisions of the revised statutes was jurisdictional, and that a defect therein could not be amended; but that the contrary rule prevails in attachments under the Code, the attachment and original affidavits being proceedings in an action within the general statute of amendments which authorizes the amendment of any pleading or proceeding by the insertion of material allegations therein.

1. **Mississippi.**—The Mississippi Code, § 2464, provides for the filing of a new affidavit or bond where the original is defective or insufficient in any respect.

In an attachment sued out in the county where the debtor resided and his property was found, the affidavit and writ alleged a debt due, whereas the declaration was for a debt in part not due. The defendant moved to quash the affidavit and writ, whereupon the plaintiff moved to amend by inserting the amount not due and dismissing as to the part due. The grounds alleged were those applicable to either. *Held*, that the amendment should have been allowed and the motion to quash denied, the fault in the affidavit being only a "defect" within the meaning of the Code. Dalsheimer *v.* McDaniel, 69 Miss. 339.

A misrecital of the defendant's Christian name in one part of an affidavit for attachment is a mere clerical error and amendable. Davidson *v.* Martin, 33 Miss. 530.

In Shaw *v.* Brown, 42 Miss, 309, the bond and affidavit were amended so as to bring in the proper parties, but the interests of third parties were not involved.

The affidavit may be amended by adding a new ground for attachment. Fitzpatrick *v.* Flannagan, 106 U. S. 648, a case controlled by the Mississippi Code.

Colorado.—The Colorado Code, § 117, provides that "no attachment shall be quashed on account of any informality or insufficiency of the original affidavit if the plaintiff shall file a sufficient affidavit in the case." Hence a defect in an affidavit will not sustain a collateral attack on the proceedings by a stranger. Leppel *v.* Beck, 2 Colo. App. 390.

In Skinner *v.* Beshoar, 2 Colo. 383, it was held that the affidavit might be amended by affixing a jurat, but that if there was no affidavit made or filed before the writ issued it should be quashed on motion.

Iowa.—The Iowa statute provides that "the attachment law shall be liberally construed, and the plaintiff

4. Of Bonds.—In one state at least attachments are regarded as having so little affinity with remedies at common law that material defects in a bond cannot be amended.[1] But according

before or during the trial shall be permitted to amend any defect of form in the affidavit, bond, attachment, or other proceeding."

An affidavit for an attachment may be amended in substance as well as in form. Langworthy *v.* Waters, 11 Iowa 432; Stout *v.* Folger, 34 Iowa 71, where the affidavit was signed but not sworn to or certified; Shaffer *v.* Sundwall, 33 Iowa 579; Wadsworth *v.* Cheeney, 13 Iowa 576; Bunn *v.* Pritchard, 6 Iowa 58, where it was held reversible error to refuse to allow an amendment by inserting a single word omitted by the mere oversight of counsel. Graves *v.* Cole, 1 Greene (Iowa) 405, holding that orders to dissolve an attachment and also to amend the defect for which it is dissolved are not consistent. On the last point, see Stadler *v.* Parmlee, 14 Iowa 175.

In Lowenstein *v.* Monroe, 52 Iowa 231, the verification of the grounds of attachment having been made upon belief only, the affidavit was amended against the protest of an intervener.

Illinois.—Under the Illinois statute providing specifically for the amendment of affidavits in attachment, it is the duty of the court, however defective the original affidavit may be, to permit a sufficient affidavit to be filed. Campbell *v.* Whetstone, 4 Ill. 361; Bailey *v.* Valley Nat. Bank, 127 Ill. 332.

An affidavit for an attachment before a justice of the peace asserting on "information and belief" that the defendant is not a resident of the state is amendable where an indebtedness is positively sworn to. Booth *v.* Reed, 26 Ill. 45.

Where an attachment is brought in aid of a suit at law, but is docketed separately, there is no error in allowing an amendment of the affidavit showing the attachment to be in aid of the suit at law and thus avoid a motion to dismiss the attachment for want of a separate declaration at the return term. Roberts *v.* Dunn, 71 Ill. 46.

Alabama.—§ 2998 of the Alabama Code authorizes the amendment of affidavits in form or substance.

A plaintiff corporation having stated its name correctly in the original affidavit may file an amended affidavit avering its corporate character. Rosenberg *v.* Claflin (Ala., 1892), 10 So. Rep. 521.

Under the statute prior to the one quoted above, affidavits were amendable only to cure defects of form. Sims *v.* Jacobson, 51 Ala. 186; Hall *v.* Brazelton, 46 Ala. 359; Tommey *v.* Gamble, 66 Ala. 469, where a statement that the defendants "are or will be justly indebted," etc., was amended by striking out the words "or will be," the defect being regarded as one of form; Shield *v.* Dothard, 59 Ala. 595; Staggers *v.* Washington, 56 Ala. 225; Hall *v.* Brazleton, 40 Ala. 406; Flexner *v.* Dickerson, 65 Ala. 129; Watts *v.* Womack, 44 Ala, 605, where the party who made the affidavit was permitted to subscribe his name to it in open court although the judge of the court was not the officer or judge before whom it was originally sworn to.

Missouri.—Rev. Stat., Missouri, 1879, § 445, provides that when the affidavit for attachment is adjudged insufficient, the attachment shall not be dissolved if the plaintiff shall file a good and sufficient affidavit.

It was held in Musgrove *v.* Mott, 90 Mo. 107, that the affidavit on which an attachment proceeding was instituted before a justice of the peace may be amended pending an appeal in the Circuit Court; that an amended affidavit may embrace the same and other grounds of attachment; and that if the affidavit be defective, the plaintiff need not wait until it is held insufficient, but may amend in advance. See also Henderson *v.* Drace, 30 Mo. 358; Middleton *v.* Frame, 21 Mo. 412; Hackney *v.* Williams, 3 Mo. 455.

It is error to dissolve an attachment without giving the plaintiff a reasonable opportunity to file a new affidavit. Claflin *v.* Hoovee, 20 Mo. App. 314.

1. Roulhac *v.* Rigby. 7 Fla. 336; Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

It was held in Houston *v.* Belcher, 12 Smed. & M. (Miss.) 514, that if an attachment bond given by the plain-

to the prevailing rule, sanctioned in some cases by the general statutes of amendments and in others by express statutory provisions, bonds in attachment are amendable both in form and substance.[1]

tiff, on suing out the attachment, be insufficient, the substitution of another bond afterward, under an order of the court to which the attachment is returnable, will not cure the defect; nor, it seems, will the waiver of the parties to the bond of an alleged defect in it be efficacious in upholding the attachment.

§ 2464 of the *Mississippi* Code now provides for amendment of bonds to cure a defect or insufficiency in any respect.

1. **Missouri.**—An insufficient bond may be amended regardless of the character of the defect. Van Arsdale *v.* Krum, 9 Mo. 397. See also Middleton *v.* Frame, 21 Mo. 412; Claflin *v.* Hoover, 20 Mo. App. 314; Henderson *v.* Drace, 30 Mo. 358.

A bond executed by a firm in the partnership name is not a nullity, and it is error not to allow a sufficient bond to be filed. Tevis *v.* Hughes, 10 Mo. 380.

In an attachment suit commenced in the names of the members of the firm of "Wood, Bacon & Co." the attachment bond purported to be the bond of "Wood, Bacon & Co." as principals and "Northrup & Co." as sureties, and was signed thus: "Wood, Bacon & Co. [seal] by their attorney, P. S. Brown [seal]; Northrup & Co. by H. M. Northrup [seal]." It was held that the bond was not a nullity, and could be amended. Wood *v.* Squires, 28 Mo. 528.

New York.—In Kissam *v.* Marshall, 10 Abb. Pr. (N. Y. Supreme Ct.) 424, it was held that an undertaking given on the issuing of the warrant for an attachment which is insufficient in amount may be amended by filing a new one—under the statute providing for the amendment of pleadings and proceedings in general—and that such amendment may be made on the hearing of a motion to vacate the attachment on the ground of the defect.

A justice of the peace has authority to allow an amended undertaking to be filed. Riley *v.* Skidmore, 2 Silv. (N. Y. Supreme Ct.) 573.

In Alabama there is no difference between a void and a defective bond in attachment, and in either case it is the duty of the court to permit the plaintiff to substitute a sufficient bond. Jackson *v.* Stanley, 2 Ala. 326; Alford *v.* Johnson, 9 Port. (Ala.) 320. See also Code of 1886, § 2998.

But if the plaintiff when required by the court to amend declines to do so, the attachment may be quashed. Lowry *v.* Stowe, 7 Port. (Ala.) 483.

In Illinois an insufficient bond may be amended under the provisions of the Attachment act. Bailey *v.* Valley Nat. Bank, 127 Ill. 332.

In Georgia, under the Attachment act of 1856, a bond in attachment was amendable in matters of form. Oliver *v.* Wilson, 29 Ga. 642. And the plaintiff with the assent of his sureties was allowed to amend his bond by increasing it. Irvin *v.* Howard, 37 Ga. 18.

In Iowa, if the bond is not filed for a sufficient amount it may be cured by filing a new bond, the authority being conferred by a specific provision in the statute. Van Winkle *v.* Stevens, 9 Iowa 264; Cheever *v.* Lane, 9 Iowa 193; Gourley *v.* Carmody, 23 Iowa 212.

When a new bond is substituted it will be treated as if filed when the action was commenced. Branch Bank *v.* Morris, 13 Iowa 136.

Where an attachment bond recited that the proceedings were had in the district court of a county which was not the one in which the suit was actually commenced, it was held that the defect could be cured by an amended bond. Holmes *v.* Budd, 11 Iowa 186.

In Montana, where the bond is defective or even void a new bond may be filed without prejudice to the attachment, under the statute authorizing an amendment of any pleading or proceeding for the correction of any mistake in furtherance of justice. Pierse *v.* Miles, 5 Mont. 549.

In Michigan the statute permits a new bond to be filed where the original is defective. Kidd *v.* Dougherty, 59 Mich. 240.

In Tennessee, where the bond is defective it may be amended. Alexander *v.* Lisby, 2 Swan (Tenn.) 107.

An attachment based upon an undertaking not signed by the plaintiff is void and cannot be cured by subsequent amendment.[1]

5. Of the Writ—In General.—A writ of attachment cannot be amended in such a manner as to change essentially the nature of the action ;[2] and an amendment of the writ by substituting entirely different parties will operate as a discharge of bail.[3] But in other respects it is in general amendable to the same extent as a writ in ordinary actions,[4] and without affecting the attachment.[5]

In Minnesota the court may permit a bond to be amended *nunc pro tunc.* Blake *v.* Sherman, 12 Minn. 420.

In Arkansas bonds in attachment are amendable under the general statute of amendments. Mandel *v.* Peet, 18 Ark. 236.

In Colorado a defective bond may be amended and the proceeding then becomes valid from the beginning. McCraw *v.* Welch, 2 Colo. 284.

1. Wagener *v.* Booker, 31 S.Car. 375.

2. Changing Form of Action.—An amendment of the writ by altering the form of action, where the nature of the action is thereby changed, will discharge bail. Bradhurst *v.* Pearson, 10 Ired. (N. Car.) 55.

3. Smith *v.* Shaw, 8 Ired (N. Car.) 233. In that case the writ was issued in the name of A. B. & Co., and the names of A. B., C. D., and E. F., composing the firm, were substituted by amendment.

In Moulton *v.* Chapin, 28 Me. 505, the attachment was dissolved by adding another person as coplaintiff.

4. See *supra*, IV.

5. Indorsement.—It is not a defense in an action on a recognizance of special bail that the plaintiff was permitted to amend the indorsement on the writ to correspond with the facts and the declaration, where the amendment only changed the description and not the cause of action. Enos *v.* Aylesworth, 8 Ohio St. 322.

Recital of Grounds.—An attachment recited as the ground thereof that defendant, "a resident of this state, has departed therefrom with intent to defraud his creditors." It appeared, however, that he had left the state to escape imprisonment for a crime of which he had been convicted, and had permanently taken up his residence in another country. It was held under the *New York* Code Civ. Pro., §§ 721–723. providing for the correction by amendment of irregularities in any process, pleading, or other proceeding, that the plaintiff would be allowed to amend the attachment by stating defendant's nonresidence as the ground. Thames, etc., Ins. Co. *v.* Dimmick (Supreme Ct.), 22 N. Y. Supp. 1096.

Inserting Name of Trustee.—An amendment of a writ by inserting the name of a trustee may be allowed against the objection of subsequent attaching creditors when it is shown that the trustee was duly served and he appears and answers and is adjudged chargeable, and that a part of the funds for which he is chargeable has been paid over to the plaintiff without objection from the creditors, and when neither the defendant nor the trustee objects to the amendment. Johnson *v.* Abbott, 60 N. H. 150.

Changing Garnishee.—Where a member of a firm is a garnishee, the writ cannot be amended after it is entered in court so as to reach a debt due from the firm. Knapp *v.* Levanway, 27 Vt. 298.

A Mere Clerical Error in the writ may be amended. Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30; McCoy *v.* Boyle, 10 Md. 391, an error in the date of the writ manifest from an inspection of the record of the court.

Void Attachment.—An attachment of real estate invalid when made cannot be rendered valid by an amendment of the writ. Drew *v.* Alfred Bank, 55 Me. 450.

Amendment Discretionary.—The application to amend the writ is within the discretion of the court; and where an application to amend the original writ in a suit by attachment is resisted by the defendant and no notice of the application is given to the garnishee, it is not an abuse of discretion to refuse leave to amend. Thompson *v.* McHenry, 18 Ark. 537.

Essential Defects.—In Barber *v.* Swan, 4 Greene (Iowa) 352, it was

Direction, and Return Time or Place.—The direction of the writ may be amended,[1] and under some circumstances an error in the time, place, or court to which the writ is returnable.[2]

Caption.—A writ not running in the name of the state is amendable[3] and should be amended by the court of its own motion.[4]

Misnomer of the parties may be cured by amendment.[5]

held that a writ of attachment essentially defective could not be amended.

1. Warren *v.* Purtell, 63 Ga. 428.

Where an attachment was directed to the "sheriff of the county of Chatham" instead of "to all and singular the sheriffs and constables of this state," it was held that it might be amended, it having been addressed to one of the individuals entrusted by law with its execution, and there being something, therefore, to amend by. Smets *v.* Wethersbee, R. M. Charlt. (Ga.) 537.

Where the office of sheriff and coroner are both vacant, or where there is no coroner and the sheriff is interested in the suit and process is directed to a constable in accordance with a statute, the fact of such vacancy or disqualification ought to be suggested and recited in the writ. But the omission of such recital does not make the writ void, and it may be supplied by amendment. Thompson *v.* Bremage, 14 Ark. 59.

Contra.—A writ which contained no direction to the sheriff to *summon* the defendant as required by the statute was held to be void and not amendable so as to affect the rights of third persons. Whitney *v.* Brunette, 15 Wis. 61.

2. **Time.**—Where the return day in a writ is amended with the consent of the defendant and the trustee, the latter cannot be discharged on motion of the defendant upon the ground that there has been no valid attachment. Barry *v.* Hogan, 110 Mass. 209.

A mistake in the year when it was returnable was amended by other parts of the record. McClanahan *v.* Brack, 50 Miss. 246.

A writ returnable on a wrong day was amended in Tapley *v.* Doane, 3 Colo. 22, and in Archibald *v.* Thompson, 2 Colo. 388, where it was returnable to the wrong term.

In Moss *v.* Herring, 2 Miles (Pa.) 93, the writ was amended by the præcipe in respect of the return day.

Where an attachment is sued out as an auxiliary to a suit commenced in the ordinary mode, a mistake in the writ of attachment of the time when the court is held in which the original suit is pending is amendable. Scott *v.* Macy, 3 Ala. 250.

Court.—In Mohr *v.* Chaffe, 75 Ala. 387, the writ, which was originally made returnable to the circuit court, was amended after appearance of the defendant in the city court by making it returnable to the latter court.

An attachment issued on the 3d of April, 1866, returnable to the "inferior" court is amendable by inserting the word "county" instead of "inferior." Covington *v.* Cothrans, 35 Ga. 156.

3. Livingston *v.* Coe, 4 Neb. 379.

4. Kahn *v.* Kuhn, 44 Ark. 404.

5. **Christian Names Omitted.**—In Barber *v.* Smith, 41 Mich. 138, the plaintiffs' surnames only were given in the writ, but they were identified by description, and an amendment was allowed by inserting their full names.

Changing Surname.—A writ on which an attachment has been made may be amended by substituting Wight for Wright, as the name of one of the plaintiffs, without affecting the attachment. Wight *v.* Hale, 2 Cush. (Mass.) 486.

Inserting Alias.—An amendment of a writ against "William Robinson" by inserting the words, "otherwise called William J. Robinson" does not vacate an attachment so as to give an intervening mortgagee priority. Diettrich *v.* Wolffsohn, 136 Mass. 335, *distinguishing* Terry *v.* Sisson, 125 Mass. 560.

Changing Middle Initial in the name of the defendant will not dissolve an attachment of personal property when no rights of third parties have intervened. Wentworth *v.* Sawyer, 76 Me. 434.

Misnomer of Garnishee.—Where the firm of "J. Allen & Bro." consisted of Joseph and John Allen, and upon an affidavit that "John Allen & Bros." were indebted, etc., a summons in garnishment was served upon one

Ad Damnum.—An inadvertent error in stating the amount of the indebtedness in a warrant of attachment may be amended without vacating the attachment. But where an amendment is allowed, the attachment will be vacated on motion of a junior attachment creditor unless the utmost good faith on the part of the plaintiff is established.[1]

Signature, Seal, Date. — The want of a signature,[2] or a defect therein,[3] or the want of a seal,[4] may be cured by amendment. Where the date in the attestation was left in blank it was amended by other parts of the writ.[5]

Teste.—If the writ is not properly attested it is amendable.[6]

member of the firm, and the firm appeared and answered by one of its members—*held*, that the misnomer of the garnishee in the affidavit and summons was of no importance, and an amendment in that respect was properly allowed. Bushnell *v.* Allen, 48 Wis. 460.

If the trustee is served by a wrong name in the writ, which is afterwards amended, and instead of pleading in abatement he answers to the merits, the objection is waived. Sears *v.* Columbian Ins. Co., 12 Allen (Mass.) 367.

Allowed by Justice of the Peace.—A justice of the peace may allow an amendment to cure a misnomer of the defendant. Morse *v.* Barrows, 37 Minn. 239.

Names of Partners. — *North Dakota* Comp. Laws, §4940, provides that "when the plaintiff shall be ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly." It was held that a summons otherwise in due form, in which the defendants were designated only by their firm-name, was amendable so as to show the names of the parties, and an attachment issued thereon was sustained. Gans *v.* Beasley (N. Dak., 1894), 59 N. W. Rep. 714.

Misdescription of Defendant.—The description of the defendant may be changed from "The R. Grocery Co., a corporation," to "E. R., a married woman doing business," by the duly recorded consent of her husband, "under the name and style of the R. Grocery Co.," where the identity of the defendant is not changed. *Ex p.* Nicrosi (Ala., 1894), 15 So. Rep. 507.

1. Peiffer *v.* Wheeler (Supreme Ct.), 27 N. Y. Supp. 771, where the attachment was vacated for want of a sufficient showing of good faith. See also Gourley *v.* Carmody, 23 Iowa 212; Atkins *v.* Womeldorf, 53 Iowa 150.

2. A warrant of attachment issued under the Code as a provisional remedy may be amended by supplying the omission of the signature of the attorney. Kissam *v.* Marshall, 10 Abb. Pr. (N. Y. Supreme Ct.) 424.

3. Where a justice of the peace in issuing an attachment neglects to add to his signature words or letters denoting his office, they may be added on motion after proof that he was duly authorized to issue attachments, that he had signed in his official capacity and had omitted the words of addition accidentally. Dickson *v.* Thurmond, 57 Ga. 153.

4. See *supra*, IV, 1, *j*.

In Foss *v.* Isett, 4 Greene (Iowa) 76, it was held that the want of a seal to a writ of attachment could not be supplied by amendment.

So where the writ bore the seal of the wrong court. Shaffer *v.* Sundwall, 33 Iowa 579.

But in Murdough *v.* McPherrin, 49 Iowa 479, decided after the statute was changed so as to authorize a defect of form in the affidavit to be amended, it was held that a writ of attachment issued under the seal of one court while the action was pending in another was amendable by attaching the proper seal.

In Whittenberg *v.* Lloyd, 49 Tex. 633, a seal was allowed to be affixed after motion to quash the writ was sustained, the latter order being set aside.

5. Brack *v.* McMahan, 61 Tex. 1.

6. Skinner *v.* Beshoar, 2 Colo. 383.

VI. In Criminal Proceedings—1. Of Indictments—*a.* At Common Law—(1) *In Substance.*—An indictment cannot, except in cases where the law has specially authorized such proceeding and in matters of form which are not matters of substance, be amended by the court without the concurrence of the grand jury,[1] even with the consent of the accused.[2] But an order of the court sustaining a demurrer to a count cannot be treated as an amendment to the indictment.[3]

Lost Indictment.—If an indictment is lost at any time before the trial, though after arraignment and plea, the accused cannot be tried upon it.[4]

1. *Ex p.* Bain, 121 U. S. 1; United States *v.* Davis, 6 Fed. Rep. 682; Hawthorn *v.* State, 56 Md. 530; Patrick *v.* People, 132 Ill. 529; Allen *v.* State, 5 Wis. 329; State *v.* McCarty, 2 Pin. (Wis.) 513; Hite *v.* State, 9 Yerg. (Tenn.) 198; State *v.* Squire, 10 N. H. 558; State *v.* Sexton, 3 Hawks (N. Car.) 184; State *v.* Springer, 43 Ark. 91; People *v.* Herman, 45 Hun (N. Y.) 175; State *v.* Chamberlain, 6 Nev. 257; Com. *v.* Seymour, 2 Brewst. (Pa.) 567; State *v.* McCormack, 22 Tex. 297. See also Com. *v.* Drew, 3 Cush. (Mass.) 279.

"At common law clerical errors only in an indictment could be amended." State *v.* Lyon, 47 N. H. 416.

In the Federal Courts.—In *Ex p.* Bain, 121 U. S. 1, it was held that in the courts of the United States no part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being resubmitted to them for their approval.

After a Writ of Error the appellate court cannot amend an indictment, even to correct a clerical error. Cruiser *v.* State, 18 N. J. L. 206.

Rex *v.* Darley, 4 East 174, and the case referred to in the note to that case, were upon removals of the indictments by certiorari before judgment and not in error.

Remand for Purpose of Amendment.—Amendments must be made during the progress of the trial and before the case is submitted to the jury. It cannot be remanded by the appellate court upon reversal of the conviction with authority to amend. State *v.* Joseph, 40 La. Ann. 5.

2. People *v.* Campbell, 4 Park. Cr. Rep. (N. Y.) 387.

In a Capital Case it was held that the indictment could not be amended even with the consent of the accused. Com. *v.* Mahar, 16 Pick. (Mass.) 120, an indictment for arson, where the prisoner's counsel consented that the name of the owner of the house should be inserted.

Changing Forgery to False Pretences.—The court has no authority even with the defendant's consent to direct an indictment for forgery to be changed to obtaining money by false pretenses and trial to be had thereon. Com. *v.* Adams, 92 Ky. 134.

Consenting to Change of Date.—Where the defendant, to obviate the necessity of returning the indictment to the grand jury for a correction of the date at which the offense was alleged as having been committed, consented to the correction in open court and to a waiver of record of all objection and then pleaded to the indictment, and afterwards moved to quash on account of the correction, it was held that the motion should be overruled. McCorkle *v.* State, 14 Ind. 39.

Record Must Show Consent.—Under the *Alabama* Code of 1886, sec. 4389, providing that an indictment may be amended with the consent of the defendant when the name "of the defendant is incorrectly stated," it is reversible error to allow an indictment to be amended so as to correct a misnomer set up by the defendant's plea in abatement where the record does not show affirmatively that defendant consented to the amendment. Shiff *v.* State, 84 Ala. 454.

3. State *v.* McKiernan, 17 Nev. 224.

4. Bradshaw *v.* Com., 16 Gratt. (Va.) 507, *following* Ganaway *v.* State, 22 Ala. 772 (decided by a divided court), and Harrison *v.* State, 10 Yerg.

Recommitting for Amendment.—An indictment may be withdrawn by leave of the court and recommitted for amendment to the grand jury by which it was found,[1] and returned by them into court.[2] But there is no authority for withdrawing an indictment at a term of the court subsequent to that at which it was found and recommitting it to a different grand jury.[3]

(2) *In Matters of Form.*—In a few instances it has been held that the court may, at common law and before the commencement of the trial, amend an indictment in matters of form without the concurrence of the grand jury.[4]

(Tenn.) 542, and holding that the provision of the *Virginia* Code authorizing a lost record or paper to be substituted by an authentic copy or proof of its contents applies only to civil actions and does not extend to records or papers in criminal proceedings.

Harrison *v.* State, 10 Yerg. (Tenn.) 542, holds that a lost indictment may be supplied during the term by making a copy from the recollection of the judge.

Nunc Pro Tunc Entry.—The defendant in a criminal prosecution cannot be put upon trial on a *nunc pro tunc* entry made by order of the court showing the return into court by the grand jury of an indictment against the defendant, and that it has been destroyed. But under the *Indiana* statute, where a record has been made of an indictment which has been destroyed, the defendant may be put to trial on a certified copy of the same. Buckner *v.* State, 56 Ind. 208.

1. State *v.* Withrow, 47 Ark. 551.

Inserting Word "Dollars."—Where in an indictment the word "dollars" was omitted, it is competent for the grand jury at the same term of the court at which the indictment was returned by them to come into court and amend the indictment by inserting the word "dollars." Garvin *v.* State, 52 Miss. 207.

2. Lawless *v.* State, 4 Lea (Tenn.) 173; State *v.* Davidson, 2 Coldw. (Tenn.) 184.

The record must verify the fact of the return into court of the amended indictment. McKinley *v.* State, 8 Humph. (Tenn.) 72.

3. State *v.* Davidson, 2 Coldw. (Tenn.) 184. See also Anger *v.* State, 42 Miss. 642.

Rev. Code of *Mississippi*, 615, art. 257, provides that "the indictment may be amended with the consent of the grand jury or of the court, or afterwards by the consent of the defendant, with the permission of the court." It is error for the court to allow a material amendment at a subsequent term. Kline *v.* State, 44 Miss. 317.

4. Cain *v.* State, 4 Blackf. (Ind.) 512; Hawthorn *v.* State, 56 Md. 530. See also Hite *v.* State, 9 Yerg. (Tenn.) 198.

Consent in Advance.—"It is the common practice for the grand jury to consent, at the time they are sworn, that the court shall amend matters of form, altering no matter of substance; and mere informalities may therefore be amended by the court before the commencement of the trial." 1 Chitty Crim. Law, 297.

In Cain *v.* State, 4 Blackf. (Ind.) 512, it was said that "the settled practice when an amendment is returned into court is to obtain the consent of the grand jury that the court may amend it in matters of form, not altering the substance."

This practice has not been adopted in *New Hampshire*, where "an indictment once found is unalterable" by the court. State *v.* Squire, 10 N. H. 558.

And Mr. Bishop inclines to the opinion that the practice is not supported by sound reason. 1 Bishop Cr. Pro. (3d ed.) § 710.

Signature of Foreman.—In State *v.* Squire, 10 N. H. 558, it was held that where an indictment was returned into court, but the signature of the foreman was by accident omitted, it could not afterwards be affixed by the foreman or amended, except on recommitment to the jury.

Recommitment, When Prudent.—Where the prosecuting attorney moves to amend and the court decides against him, he should recommit the matter to the grand jury. Where appeals are

(3) *The Caption.*—The caption of an indictment is no part of the finding of the grand jury, and may be amended at any time before the case is removed to a higher court.[1] It may be amended by the minutes of the court or by what appears on the bill itself, even after conviction and after motion in arrest of judgment.[2]

(4) *What Constitutes Substance*—**In General.**—Matter that is essential to be set forth or to show that an offense has been committed is matter of substance, and cannot be amended without the concurrence of the grand jury.[3]

allowed in behalf of the state in criminal cases, they are discouraged by the appellate courts in cases involving the mere right to amend. State *v.* Withrow, 47 Ark. 551.

1. U. S. *v.* Thompson, 6 McLean (U. S.) 56; Moody *v.* State, 7 Blackf. (Ind.) 424; State *v.* Gilbert, 13 Vt. 647; State *v.* Williams, 2 McCord L. (S. Car.) 301, where it was amended after conviction; State *v.* Moore, 24 S. Car. 150; State *v.* McCarty, 2 Pin. (Wis.) 513; State *v.* McCarty, 2 Chand. (Wis.) 199; State *v.* Emmett, 23 Wis. 632; Allen *v.* State, 5 Wis. 329, where the caption was amended so as to show that the actual presentment of the indictment was subsequent to the date on which the offense was charged to have been committed. State *v.* Society, etc., 42 N. J. L. 504. See also State *v.* Jones, 9 N. J. L. 2; Osborne *v.* State, 23 Tex. App. 431, 24 Tex. App. 398; Bosshard *v.* State, 25 Tex. Supp. 207; Banks *v.* State, 7 Tex. App. 591; Walker *v.* State, 7 Tex. App. 52; Sharp *v.* State, 6 Tex. App. 650. *Compare* State *v.* Davidson, 36 Tex. 325.

In State *v.* Jenkins, 64 N. H. 375, an erroneous statement in the caption of an indictment of the year in which it was found was amended.

After Removal by Certiorari.—The caption may be amended after the case has been removed into the Supreme Court by certiorari, and the amendment may be made upon proper evidence of the facts and entries on the minutes of the oyer and terminer; or the certiorari may be returned to that court and the amendment made there. In this case the record was returned for that purpose. State *v.* Jones, 9 N. J. L. 357.

Nunc Pro Tunc.—Where the journals of the court furnish something to amend by, the caption may be amended at any time *nunc pro tunc.* Vandyke *v.* Dare, 1 Bailey (S. Car.) 66, where it was said that "it has become so much a matter of course that it is usually left in blank until some occasion occurs which renders its perfection necessary, and then leave is obtained for filling it up as a matter of course."

What Constitutes the Caption.—Starkie Cr. Pl., p. 258, describing what is meant by the phrase "caption of an indictment," says: "Where an inferior court, in obedience to a writ of certiorari, from the king's bench, transmits the indictment to the crown office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the crown office. The history of the proceedings, as copied or extracted from the schedule, is called the *caption*, and is entered of record immediately before the indictment."

2. State *v.* Creight, 1 Brev. (S. Car.) 169.

Erroneous Title.—In Brown *v.* Com., 78 Pa. St. 122, an indictment was found in the quarter sessions, but entitled as in the oyer and terminer, where it was tried. *Held*, that the caption might be amended after trial, conviction, sentence, and writ of error, but before the record had been returned.

3. State *v.* Startup, 39 N. J. L. 423; State *v.* Lyon, 47 N. H. 416.

Single Material Word.—Where an indictment omits a material word, although it be but a preposition or a helping verb, the court will not from a knowledge of the language supply the missing word so as to support the probable intention of the grand jury, but will sustain a judgment quashing

Date of Offense.—The allegation of the date at which the offense was committed is emphatically matter of substance.[1]

Names.—The name of the accused is matter of substance,[2] and the name of the owner of goods in an indictment for larceny.[3]

Value of Goods.—And the allegation of the value of the goods where the distinction between grand and petit larceny is determined by the value is material.[4]

Venue of Offense.—Under a statute which was construed to au-

the indictment. State *v.* Daugherty, 30 Tex. 360; State *v.* Hutchinson, 26 Tex. 11, in both of which cases the word "did" was omitted in charging the commission of the offense.

After going to trial an indictment for robbery cannot be amended by inserting the word "feloniously" before the word "rob." State *v.* Durbin, 20 La. Ann. 408.

Striking Out Material Words.—Where the defendant was indicted, in the language of the statute, for an "attempt to set at liberty or rescue" a person, it was error to allow the state's attorney after the argument to strike out the words "or rescue" and to enter *nol. pros.* on that charge. Patrick *v.* People, 132 Ill. 529.

Name of Owner of House.—An indictment for burglary of the house of Jeremiah B. Fuller cannot be amended to conform to proof that the owner's name was Jedediah B. Fuller, unless in the presence and with the concurrence of the grand jury or with the consent of the accused, under Rhode Island Pub. Stat., c. 248, § 4. It is matter of substance. State *v.* McCarty, 17 R. I. 370.

Time of Death.—An indictment for murder which charges that "of said mortal wounds said A. did immediately languish, and languishing did die," is defective in not specifically alleging when and how long after the wounding the death occurred. The defect is not cured by the statute of jeofails and will authorize the quashing of the indictment. State *v.* Sides, 64 Mo. 383.

1. Sanders *v.* State, 26 Tex. 119; State *v.* Davidson, 36 Tex. 325; Dickson *v.* State, 20 Fla. 800. See also State *v.* Beckwith, 1 Stew. (Ala.) 318; Com. *v.* Seymour, 2 Brewst. (Pa.) 567; State *v.* Roach, 2 Hayw. (N. Car.) 352; State *v.* Sexton, 3 Hawks (N. Car.) 184. *Compare* State *v.* Elliot, 34 Tex. 148; State *v.* Pierre, 39 La. Ann. 915.

Mere Clerical Error.—Under the *Iowa* Code, § 4538, which provides that on appeal the court must, without regard to technical errors not affecting substantial rights, render judgment, where, by a clerical error, an indictment charged the defendant with larceny on a day in 1890 which was an impossible date, a conviction was not disturbed for allowing an amendment placing the date in 1888, as it was sufficiently alleged in another part of the indictment. State *v.* Brooks (Iowa, 1892), 52 N. W. Rep. 240.

In New Hampshire.—An indictment charging the commission of a burglary on a day subsequent to the time of finding the indictment may be amended under the statute on demurrer or on motion so as to state the true date; and if not thus amended, it will be cured by verdict. State *v.* Blaisdell, 49 N. H. 81.

2. Com. *v.* Buzzard, 5 Gratt. (Va.) 694, where it was held not to be amendable, although the record of the court and the indorsement on the indictment showed the correct name. See State *v.* New Jersey Turnpike Co., 16 N. J. L. 222.

In McGuire *v.* State, 35 Miss. 366, it was held that the court has no power to amend an indictment by correcting a mistake in the Christian name of the defendant without the consent of the grand jury which found the indictment. The case was decided before the enactment of the *Mississippi* statute of amendments.

3. State *v.* Lyon, 47 N. H. 416, holding that a defect therein could not be amended under the *New Hampshire* statute authorizing amendments "where the person or cause may be rightly understood by the court," "or for defect or want of form or addition only."

4. State *v.* Goodrich, 46 N. H. 186. See also State *v.* Chamberlain, 6 Nev. 257; Collins *v.* State, 6 Tex. App. 647.

thorize amendments of form only, an amendment by inserting the name of the county in which the offense was committed was held to be erroneous.[1]

(5) *What Constitutes Form*—**In General.**—A defect that does not affect the merits of the case or the evidence necessary to be given to maintain the indictment can be regarded as only formal.[2]

Defective Introduction.—Where an indictment read, "The grand jurors impaneled and sworn," etc., "upon their—— present," the attorney for the state was properly given leave to amend by inserting the word "oath."[3]

Informal Conclusion.—An indictment "against the peace of the state" may be so amended by the prosecuting attorney, with leave of the court, as to read "against the peace and dignity of the state" so as to conform to the constitution.[4] So the entire omission of that conclusion may be remedied by amendment, although the clause is required by the constitution of the state.[5]

Name of Person Defraudod.—An indictment for forgery with intent to cheat and defraud a certain person may be amended by striking out the name of the person.[6]

Signature of District Attorney.—Where there is no law requiring the district attorney to sign a bill of indictment, an amendment by affixing his signature is regarded as merely formal.[7]

b. By Statute—(1) *Constitutionality of Acts*—**Changing the Crime.**—It is plain that the legislature cannot constitutionally authorize an amendment in substance which will change an indictment found by a grand jury so as to substitute one crime for another charged therein;[8] nor, if the indictment fail to set out any crime,

1. State *v.* Armstrong, 4 Minn. 335.

2. State *v.* Arnold, 50 Vt. 731. See also State *v.* Hilton, 41 Tex. 565; Long *v.* State, 1 Tex. App. 466.

Unnecessary Amendment.—Allowance of an amendment which was not necessary is not error. Hammond *v.* State, 14 Md. 135.

3. The amendment was of no consequence. State *v.* Moore, 1 Ind. 548.

Under the *Louisiana* statute of 1855 providing against the crime of arson, the state will be allowed to amend the indictment in all matters relating to the form thereof.

After the jury was impaneled and the trial commenced, the district attorney moved to amend the indictment by inserting the words "the aforesaid barn and stable being," which was allowed by the court. *Held*, that the amendment did not alter the substance of the indictment or create a new or different charge. State *v.* Elder, 21 La. Ann. 157.

On the trial of an indictment for adultery the prosecution was properly allowed to amend the indictment which described the *particeps* as Roxcena Whitney, by inserting after that name the words "otherwise called Rosa Whitney," and it was held to be only formal. State *v.* Arnold, 50 Vt. 731.

4. State *v.* Cain, 4 Blackf. (Ind.) 512.

5. State *v.* Amidon, 58 Vt. 524.

6. Hawthorn *v.* State, 56 Md. 530.

7. State *v.* Crenshaw, 45 La. Ann. 496.

In *Texas*, Paschal's Dig., art. 2977, provides that "when the exception to an indictment is merely on account of form, the same shall be amended if decided to be defective, and the cause proceed upon such amended indictment."

It seems that if an indictment does not show on its face that it was found in the "district court" of the proper county, the defect is merely formal and may be cured by amendment. Mathews *v.* State, 44 Tex. 376; Walker *v.* State, 7 Tex. App. 52; Long *v.* State, 1 Tex. App. 466.

8. State *v.* Startup, 39 N. J. L. 432.

can the court so amend it as to charge the crime which it is supposed the jury intended.[1]

Variance in Particulars.—But statutes have been declared constitutional which provide that when a variance between the allegation contained in the indictment and the proof shall arise in respect to time or in the name or description of any place, person, or thing, the court may direct an amendment according to the proof, if it shall be of opinion that the defendant cannot be prejudiced thereby in his defense on the merits.[2] A similar statute was held to apply to indictments pending at the time of its enactment, and not to be an *ex post facto* law.[3]

Misnomer of Accused.—A statute directing that where the accused is indicted under a wrong name and he gives his true name when arraigned, it shall be so entered on the minutes, and he shall be tried under his true name, is constitutional.[4]

Allegation of Former Conviction.—The validity of a statute allowing the amendment of an allegation of a former conviction was upheld.[5]

Amendment in Defendant's Absence.—The absence of the accused, when the hearing of a motion for amendment is had, will not vitiate the proceedings.[6]

(2) *Names, Dates, Descriptions, etc.*—In many of the states the statute provides for an amendment to correct an error in names, dates, or descriptions of persons or things,[7] or to cure variances

See also *Ex p.* Bain, 121 U. S. 1; State *v.* Springer, 43 Ark. 91.

A statute allowing amendments in those cases where the "defendant will not be unjustly prejudiced thereby" was construed to confine amendments to matters of form. State *v.* Armstrong, 4 Minn. 335.

1. State *v.* Startup, 39 N. J. L. 423.

2. People *v.* Johnson, 104 N. Y. 213; People *v.* Herman, 45 Hun (N. Y.) 175; Peebles *v.* State, 55 Miss. 434.

3. State *v.* Manning, 14 Tex. 402.

4. People *v.* Kelly, 6 Cal. 210. See also Morris *v.* State, 4 Tex. App. 589.

The *Missouri* statute providing that if a defendant be indicted by a wrong name and he does not declare his true name before pleading, he shall be proceeded against by the name in the indictment, and if he allege that another name is his true name it must be entered on the minutes of the court, and after such entry the trial and all other proceedings shall be had against him by that name, referring also to taht name by which he is indicted, etc,, is constitutional. State *v.* Schricker. 29 Mo. 265.

5. Com. *v.* Holley, 3 Gray (Mass.) 458, holding that it was not a violation of the 12th article of the Declaration of Rights, which directs that no subject shall be held to answer for any crime or offense until the same is fully, plainly, substantially, and formally described to him.

6. State *v.* Dominique, 39 La. Ann. 323.

7. **New York.**—By § 293 of the New York Code of Criminal Procedure power is given to the court to allow certain amendments to obviate the difficulties presented by a "variance between the allegations therein and the proof," viz., (1) "in respect to time or (2) in the name or description of any place, person, or thing."

In a prosecution for burglary the court properly allowed an amendment to cure a variance between the names of the owners of the property entered and the proof, and also in the description of such persons. People *v.* Richards, 44 Hun (N. Y.) 278.

The name of the owner of property stolen was changed in People *v.* Herman, 45 Hun (N. Y.) 175.

Where an indictment for seduction under promise of marriage is defective

in not giving the correct surname of the female, the court on the trial has power to cure the defect by directing an amendment. People *v.* Johnson, 104 N. Y. 213, *aff'g* 4 N. Y. Ct. Rep. 591.

New Jersey.—Under a statute providing that any defect of form or substance apparent on the face of the indictment may be amended, an indictment charging that the defendant did send *and* convey an indecent letter, etc., is amendable by inserting send *or* convey so as to accord with the language of the statute creating the offense. Larison *v.* State, 49 N. J. L. 256.

Alabama.—The Alabama Code providing for amendments of indictments in certain particulars with the consent of the defendant was construed to forbid any amendment even in an immaterial matter without the defendant's consent. Gregory *v.* State, 46 Ala. 151; Johnson *v.* State, 46 Ala. 212.

An indictment containing a single count charged that the defendant feloniously took and carried away three one-dollar bills and also two five-dollar bills, and the proof showed that he took two five-dollar bills and three ten-dollar bills, but no one-dollar bills It was held to be a case of a misdescription within the meaning of the Code, and amendable with the consent of the defendant, or that the prosecution might be dismissed on his refusal to consent, as provided by the Code. Reynolds *v.* State, 92 Ala. 44.

An indictment for larceny or for receiving stolen goods may be amended with the consent of the defendant in the averment of the Christian name of the person to whom the goods belong; and the fact that the defendant objected to the amendment, and only consented to it in order to avoid being bound over to answer a new indictment at the next term, does not render the allowance of the amendment improper. Ross *v.* State, 55 Ala. 177.

Missouri.—A mistake in an indictment which stated that the defendant with a knife did feloniously assault and wound one Dunlop, by means of which wounding the life of the said Craighead was then and there endangered, etc., is cured by § 27, art. 4 of the act of Practice in Criminal Cases, Rev. Code, 1170, the mistake being merely clerical and in no way tending to prejudice the substantial rights of the defendant. State *v.* Craighead, 32 Mo. 561.

Florida.—Under the Florida statute the inserting of a middle letter in the name of the accused may be struck out. Burroughs *v.* State, 17 Fla. 643.

Pennsylvania.—The statute provides for an amendment to correct a variance "in the name or description of any person or persons * * * stated or alleged to be the owner or owners of any property * * * which shall be the subject of any offense charged therein."

An indictment laid the property stolen as the property of A. and B. On the trial, the evidence showing that the property was stolen at the same time and place, it was not error to amend by laying special portions as the goods of A. and other portions as the goods of B. Rosenberger *v.* Com., 118 Pa. St. 77.

An indictment may be amended by striking out the name of the alleged owner of stolen goods and inserting the words "some person unknown." Com. *v.* O'Brien, 2 Brewst. (Pa.) 566.

In an indictment for selling liquor, the name of the person to whom the liquor was sold was left blank. On the trial, after a witness had been examined, the court allowed a name to be inserted, and the decision was sustained under a statute providing that "It shall and may be lawful for the court before whom the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced in his defense, upon such merits to order such indictment to be amended according to the proof." Rough *v.* Com., 78 Pa. St. 495.

After the jury are impaneled on the trial for a homicide, an amendment changing the time laid in the indictment may be made. Myers *v.* Com., 79 Pa. St. 308.

Louisiana.—The statute authorizes the correction of a variance in the statement of the ownership of property. An indictment for larceny may be amended in this respect, not merely in the name but in the ownership itself. State *v.* Dominique, 39 La. Ann. 323; State *v.* Ware, 44 La. Ann. 954; State *v.* Hanks, 39 La. Ann. 234.

An indictment for burglary and larceny may be repeatedly amended during the trial of the case, in order to set forth the names of the real owners

of the property charged to have been stolen. State *v.* Christian, 30 La. Ann. (Pt. I.) 367.

Where a party indicted as E. Buchanan is arraigned and pleads as Amos Buchanan, which is his true name, the state, during the progress of the trial, may amend the indictment by setting out the true name under the express terms of Louisiana Rev. Stat., § 1047. State *v.* Buchanan, 35 La. Ann. 89.

Where an indictment correctly contains the defendant's name, but there is a variance on the endorsement, the latter may be corrected at any time to conform to the description in the body of the indictment. No advantage can be taken of the defective endorsement corrected and amended with the consent of the defendant in open court, aided and assisted by his counsel. State *v.* Anderson, 45 La. Ann. 651.

An indictment for forgery containing the purport or tenor of the instrument stated to have been forged, and setting forth the words of such instrument, may be amended during the trial by substituting the word "oblige" for the word "charge" at the conclusion thereof. Variance not material. Section 1047, R. S. Laws, provides for amendments to correct variances "in the name or description of any matter or thing, if such a variance is not material, or the defendant is not prejudiced," etc. State *v.* Sullivan, 35 La. Ann. 844.

Virginia.—Code, § 3999, gives the court authority to correct a misnomer.

An indictment against "S. C." may be amended so as to be against "S. S., *alias* S. C." Shifflett *v.* Com. (Va., 1894), 18 S. E. Rep. 838.

Vermont.—The statute provides that when a variance appears between the averments and evidence offered in proof in the name of any person alleged to be the owner of any property which forms the subject of the offense charged, etc., the court, if it considers such variance not material to the merits, and the amendment cannot be prejudicial, may order an amendment.

An indictment for the larceny of a trunk which was part of an estate, as first presented, alleged ownership thereof in the administrator of the estate, who was taking it to the person to whom it had been assigned. The administrator was a passenger, and the trunk baggage, on the train of a railroad company, in whose possession the trunk was when stolen. It was held that the court properly allowed the indictment to be amended by substituting as owner the name of the railroad company for that of the administrator, Acts 1882 permitting amendments in such cases when the trial court considers the amendment not prejudicial to the defendant. State *v.* Casavant, 64 Vt. 405.

Mississippi.—The Mississippi Code of 1880, § 3081, provides that "Whenever, on the trial of an indictment for any offense, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any person alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein, it shall be lawful for the court, if it shall consider such variance not material to the merits of the case and that the defendant will not be prejudiced thereby in his defense on the merits, to order such indictment to be amended according to the proof on such terms, as to postponing the trial, as such court shall think advisable." Under this statute, an indictment for going upon the land of another may be amended by striking out the name of the owner of the land as therein stated and inserting that of the true owner as developed by the proof. Knight *v.* State, 64 Miss. 802.

The name of the owner of stolen property may be amended. Haywood *v.* State, 47 Miss. 1; Garvin *v.* State, 52 Miss. 207. See also Murrah *v.* State, 51 Miss. 675.

An amendment of an indictment for selling liquor by striking out "and to divers other persons" is allowed. Rocco *v.* State, 37 Miss. 357.

If, on a trial for murder, the defendant discloses that the Christian name of the deceased is erroneously written in the indictment, the court, upon motion of the district attorney, may order it amended by substituting the real Christian name, and the trial should proceed unless the amendment causes surprise and consequent prejudice to the defendant. Miller *v.* State, 68 Miss. 221.

The name of the person assaulted may be changed, provided it is the same person. Miller *v.* State, 53 Miss. 403; Wood *v.* State, 64 Miss. 761.

in other respects where the defendant will not be prejudiced on the merits.[1] Where the identity of the particular individual is material and made a part of the offense charged—as, for instance, the name of the female in an indictment for rape,[2] or the name of the person to whom liquor was sold in an indictment for an unlawful sale[3]—a change in the name of the person has not been permitted.

2. Of Informations—Distinguished from Indictments.—Criminal informations which are not found upon the oath of a jury may be amended by the court, and even by a single judge at chambers, at any time before trial;[4] and the reason assigned for the difference between indictments and informations in this respect is that the latter are originally framed by an officer of the government, while the former are the accusations of a number of men sworn to inquire and decide according to the evidence.[5]

The mere omission of the word "manner" after the words "rude, angry, and threatening," in an indictment for exhibiting a deadly weapon, is a formal defect and the subject of amendment. Gomblin *v.* State, 45 Miss. 658, decided under a statute providing that "After objection has been made by demurrer or motion to quash for any formal defect, the court may, if thought necessary, cause the indictment to be forthwith amended."

1. English Authorities.—Statutory provisions of a similar description are contained in chap. 100 of 14 and 15 Vic. sec. 1, and chap. 45 of 12 and 13 Vic. sec. 10. And under these provisions in Reg. *v.* Fullarton, 6 Cox C. C. 194, where the title to stolen property was laid in the wrong person, it was held that the indictment might be amended in this respect upon the trial. This practice was also followed in Reg. *v.* Vincent, 2 Den. C. C. 464. There the change was made from the name of Matthew Archard to London Dock Company. And a somewhat similar change was allowed in Reg. *v.* Pritchard, 8 Cox C. C. 461, under a still earlier statute enacted during the reign of George IV. This practice was also followed in the case of an indictment with intent to kill in Reg. *v.* Welton, 9 Cox C. C. 297. And the addition of the word "trustees" to the names of the persons mentioned in the indictment was permitted in Reg. *v.* Marks, 10 Cox C. C. 367. And in the description of the offices of certain justices named in an indictment for perjury in Reg. *v.* Western, 11 Cox C. C. 93.

2. State *v.* Morgan, 35 La. Ann. 1139.

3. Blumenberg *v.* State, 55 Miss. 528.

4. State *v.* White, 64 Vt. 372, where, after plea and jury sworn, the defendant moved to dismiss on the ground that the prosecution was barred by the statute of limitations, and the court allowed the information to be amended by changing the date of the alleged offense.

After Plea in Abatement.—In State *v.* Washington, 15 Rich. (S. Car.) 39, it was held, upon a construction of statutory provisions, that an information for larceny was amendable after plea in abatement for misnomer by inserting the real name.

After Plea in Bar.—Under the English practice, amendments of informations are allowed after a plea in bar. Rex *v.* Wilkes, 4 Burr. 2527. And even after objection by plea in abatement. Rex *v.* Seaward, 2 Ld. Raym. 1472.

On the Trial.—Although it is the general rule that no amendment of an information can be allowed after the trial has begun, it is the practice in *Connecticut* to allow an amendment in such a case after the trial has commenced, the court in its discretion allowing reasonable delay if requested by the defendant. State *v.* Stebbins, 29 Conn. 463.

5. Rex *v.* Wilkes, 4 Burr. 2527; State *v.* Weare, 38 N. H. 314; Thomas *v.* State, 58 Ala. 365.

Information to Remove Attorney.—An information in proceedings to remove an attorney is amendable the same as

Amendments Discretionary.—In the absence of statutory provisions regulating amendments of informations, the court may permit them to be amended to any extent consistent with the orderly conduct of judicial business, with the public interests, and with private rights.[1] But the court may refuse leave to amend;[2] and appeals by the state from adverse rulings are frowned upon in the appellate court, because the prosecuting officer may expedite the trial by submitting to the decision and instantly framing a new information.[3]

a complaint in a civil action. Thomas *v.* State, 58 Ala. 365.

1. Bishop Cr. Pro. (3d ed.) § 714, quoted in State *v.* Terrebonne, 45 La. Ann. 25, and State *v.* Doe, 50 Iowa 541.

Trivial Amendments.—An information charging the illegal sale of liquor may be amended by inserting the word "liquor" in the clause alleging a prior conviction when the information would be sufficient without it. State *v.* Nulty, 57 Vt. 543.

In State *v.* Weare, 38 N. H. 314, an information for neglect to build a highway was amended by changing the alleged termini of the highway.

On Appeal from a Justice.—In State *v.* Merchant, 38 Iowa 375, it was held proper to amend an information by affixing the signature of the prosecuting witness after trial before a justice and appeal to and before trial in the district court. And in State *v.* Doe, 50 Iowa 541, after conviction in the justice court and after a demurrer to the information had been sustained by the district court on appeal.

After Motion to Quash.—In Com. *v.* Lodge, 6 Gratt. (Va.) 699, an information for perjury was amended so as to conform to the presentment of the grand jury on which it was founded after the appearance of the defendant and motion to quash.

After Verdict an information cannot be amended so as to allege the material facts constituting the offense. State *v.* Butcher, 79 Iowa 110.

Date of Offense.—Where the original information laid the date of the offense on a day subsequent to the date of the information and the latter was amended by alleging the correct date, a trial under the amended information without arraignment or plea was held to be erroneous, as no issue was joined. People *v.* Moody, 69 Cal. 184.

In a prosecution for a misdemeanor commenced in the county court and transferred to the circuit court at the instance of the defendant, the statement of the cause of complaint which the solicitor is required to make and which is analogous to an information at common law may be amended by leave of the court by averring the time when the offense was committed. Tatum *v.* State, 66 Ala. 465, after plea of the statute of limitations.

Price of Liquors Sold.—An information for selling liquors without a license was amended by inserting an allegation of the price for which the liquors were sold. Miles *v.* State, 5 Ind. 215.

2. State *v.* Terrebonne, 45 La. Ann. 25.

After Offense Barred by Limitation.—In Stale *v.* Rowley, 12 Conn. 101, it was held that an information is not amendable by adding a new count for the offense already charged after the statute of limitations has run against such offense.

Additional Charges. — In Com. *v.* Rodes, 1 Dana (Ky.) 595, the court refused to allow an information to be amended by making additional charges.

Of Affidavits.—An amendment of affidavits made as a part of criminal informations cannot be allowed. U. S. *v.* Tureaud, 20 Fed. Rep. 621.

Where no Offense Charged.—If the offense charged in the presentment does not amount to a misdemeanor, the court ought not to allow information to be amended. Com. *v.* Williamson, 4 Gratt. (Va.) 554.

Changing Name of Alleged Owner.—In State *v.* Van Cleve, 5 Wash. 642, it was held that the Christian name of the owner of property alleged to have been stolen could not be changed from "Wm." to "Walter."

3. State *v.* Terrebonne, 45 La. Ann. 25. See, however, State *v.* Merchant,

Filing New Information. — The prosecutor may be permitted to withdraw an information and file a new one irrespective of any question of amendment.[1]

By Statute.—In several states the amendment of informations is regulated by statute.[2]

38 Iowa 375, where the refusal to allow an amendment was reversed upon appeal by the state.

1. State *v.* Gile, 8 Wash. 12.

2. **Texas.**—The Texas statute provides that no matter of substance can be amended. Whether the substance can be amended by consent of the defendant, *quære*. Brown *v.* State, 11 Tex. App. 451.

Failure to Allege Offense.—An information which fails to state an offense cannot be amended. Bates *v.* State, 12 Tex. App. 26.

Date of Offense. — An amendment changing the alleged date of the offense cannot be allowed. Goddard *v.* State, 14 Tex. App. 566; Huff *v.* State, 23 Tex. App. 291.

Complaint.—If the complaint upon which the information is based is defective, a new one cannot be filed so as to sustain the information without bringing a new information. Paschal *v.* State, 9 Tex. App. 205.

Showing the Court.—If the information does not show that it was presented in a court of competent jurisdiction, as the statute requires, the defect is curable by amendment. Bowen *v.* State, 28 Tex. App. 498.

Indorsement. — Where by inadvertence the county attorney indorsed on a substituted information a different number from that by which the case was originally entered upon the docket and the defense objected to the substitute, it was held that the mistake should have been corrected upon motion or by the court upon its own motion. Stiff *v.* State, 21 Tex. App. 255.

Kansas.—The Kansas Code Crim. Pro., § 72, provides that "any information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form at the discretion of the court when the same can be done without prejudice to the rights of the defendant. No amendment shall cause any delay of the trial unless for good cause shown by affidavit." See State *v.* Spencer, 43 Kan. 114.

Implied Leave.—An amendment filed without leave may by reason of subsequent motions and orders be considered as having the leave of the court. State *v.* Spendlove, 47 Kan. 160.

Date of Offense.—It was held proper, after the jury had been impaneled and sworn, to permit an amendment of the information charging the offense as committed at a date prior to the date of the information instead of subsequently thereto as in the original information, the information thus amended being reverified and refiled. State *v.* Cooper, 31 Kan. 505.

Name of Accused.—The court may allow an information to be amended by inserting the name of the defendant in the body of the same before the defendant pleads thereto. State *v.* McLain, 43 Kan. 439.

Verification.—In State *v.* Gould, 40 Kan. 258, it was held not to be error to permit a slight amendment to be made to the verification of the information.

Where the clerk fails to attach his signature and seal to the jurat of an affidavit verifying an information, and the defendant pleads not guilty to the information while so defective, it is not error for the court to permit the clerk, before the jury is called, to perfect the jurat by attaching his signature and seal; and this, notwithstanding the only evidence that the county attorney in fact swore to the affidavit subscribed by him before the filing of the information is the oral statement of the clerk, not under oath, that such was the fact. State *v.* Adams, 20 Kan. 311.

Michigan.—By express statute the defendant in an information has the same rights as to all proceedings therein as if prosecuted for the same offense upon indictment. Howell's Ann. Stat., 1882, §§ 9550, 9551.

The statute allows amendments to cure variances in the name of any county or place, * * * in the name or description of any person or body stated to be the owner of any property which is the subject of the offense charged or alleged to have

3. Complaints, Warrants, etc.—A complaint of a grand juror may be amended by leave of the court, where an indictment

been injured by the commission of the offense, or the Christian or surname of any person, the name or description of any thing, or the ownership of any property, and in all cases whenever the variance is not material to the merits of the case; and also where misnomer has been pleaded. Howell's Ann. Stat., 1882, § 7537.

Describing Offense.—An amendment which only renders the charge more specific by describing the acts constituting the same offense is proper. People *v.* McCullough, 81 Mich. 25.

Intent.—An information for embezzling may be amended upon objection being raised before plea by charging the statutory intent. People *v.* Schultz, 85 Mich. 114.

Date of Death.—In an information for murder an amendment showing the true date of the death of the deceased is permissible. People *v.* Hamilton, 76 Mich. 212.

Description of Property.—In an information for larceny a more particular description of the property stolen may be set forth by amendment. People *v.* Price, 74 Mich. 37.

Place of Offense.—And an information charging larceny in one township may be amended by charging it to have been committed in another township in the same county. People *v.* Waller, 70 Mich. 237.

Description of Note.—In People *v.* Mott, 34 Mich. 81, certain words omitted in the description of a note which was alleged to have been fraudulently obtained were added by amendment.

Former Marriage in Bigamy.—In People *v.* Perriman, 72 Mich. 184, an information for bigamy was amended by changing the name of the county where the first marriage was alleged to have taken place.

Date of Offense.—An information charging the commission of an offense at a date subsequent to the filing of the information is cured by the statute which provides that no indictment shall be insufficient which states among other things that the offense was committed on an "impossible day." Cole *v.* People, 37 Mich. 544.

Charging Different Offense.—Where the accused waives a preliminary examination and is informed against for one offense, the information cannot be amended so as to charge him with a different offense subject to a different penalty. People *v.* Handley, 93 Mich. 46.

After Evidence Closed.—And an information alleging no offense of which the court has jurisdiction cannot be amended, after the proofs are in, so as to charge a cognizable offense. Byrnes *v.* People, 37 Mich. 515.

After Verdict.—An information charging a statutory offense cannot be amended after verdict so as to include another offense found by the jury. Turner *v.* Muskegon Circuit Judge, 88 Mich. 359.

After Judgment.—An information which does not allege an offense known to the law cannot after judgment be so amended as to charge one and sustain a conviction. Bickford *v.* Pec le, 39 Mich. 209.

Wisconsin—*To Conform to Proof.*—An information charging the defendant with stealing a certain sum, the property of A., may be amended at the trial so as to charge the theft of a different sum, the property of A. and B., under Wisconsin Rev. Stat., § 4703, authorizing amendments of informations to conform to the proof where the variance is immaterial or relates to the ownership of property described. Baker *v.* State (Wis., 1894), 59 N. W. Rep. 570.

Name of Thief.—The failure in an information for receiving stolen goods to aver who stole the property, or to negative knowledge on that subject, may be remedied by amendment. State *v.* Jenkins, 60 Wis. 599.

Amendment Ex Mero Motu.—A proper amendment of the information may be directed by the trial judge of his own motion. State *v.* Jenkins, 60 Wis. 599.

Missouri.—Under the Missouri statute an informality in the affidavit may be cured by filing a new one. State *v.* McCray, 74 Mo. 303.

Nebraska.—The statute, after enumerating certain imperfections which will not invalidate an information, concludes: "Nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Where an amendment was

or an information can be so amended.[1] But the complaint being upon the oath of the grand juror, it cannot be amended in the appellate court in substance where an indictment cannot be so amended.[2] Cases in various jurisdictions relating to the amendment of complaints, warrants, and other proceedings in inferior courts, or on appeal therefrom, are cited in the note.[3]

allowed which was unnecessary there can be no prejudice. Braithwait *v.* State, 28 Neb. 832.

Louisiana.—On the trial under an information for shooting with a dangerous weapon, to wit, a pistol, the information may be amended by substituting the word "gun" for "pistol." State *v.* Finn, 31 La. Ann. 408.

Date of Forged Bill.—An amendment changing the date of the bill alleged to have been forged was allowed during the trial. State *v.* Snow, 30 La. Ann. 401.

Indiana.—In Indiana, where a defendant is charged before a justice of the peace with the offense of receiving stolen goods and is recognized to appear in the circuit court, the state may there file an amended affidavit and information in which the accused is charged in separate counts with receiving stolen goods and with the larceny of the same goods. Kennegar *v.* State, 120 Ind. 176.

1. State *v.* Batchelder, 6 Vt. 479.

2. State *v.* Wheeler, 64 Vt. 569.

3. **In North Carolina.**—The court may amend a justice's warrant in a criminal action in form or substance, but the amendment must not change the nature of the offense. North Carolina Code, § 908; State *v.* Vaughan, 91 N. Car. 532; State *v.* Crook, 91 N. Car. 536; State *v.* Smith, 103 N. Car. 410; State *v.* Sykes, 104 N. Car. 695; State *v.* Wilson, 106 N. Car. 718; State *v.* Baker, 106 N. Car. 758; State *v.* Muse, 4 Dev. & B. (N. Car.), 319; State *v.* Cauble, 70 N. Car. 62; State *v.* Norman, 110 N. Car. 484, holding that it is not necessary that the amendment should have the concurrence of the justice or that the amended charge be resworn.

The affidavit and warrant for selling liquors without a license may be amended. State *v.* Davis, 111 N. Car. 729.

The superior courts have the power to amend a warrant by a justice of the peace against a person refusing to work the road by inserting the state as plaintiff instead of the overseer. State *v.* Cauble, 70 N. Car. 62.

Kansas. — Where a complaint before a justice was defective but was amended and trial had without verification, it was proper for the district court on appeal to permit the filing of a new and verified complaint. State *v.* Hinkle, 27 Kan. 308.

It was held in Burlington *v.* James, 17 Kan. 221, that where a defendant is tried, convicted, and sentenced by a police judge for the violation of a city ordinance and the defendant then appeals to the district court and there the original complaint is quashed, it is error for the district court to permit a new and amended complaint to be filed in that court and to allow defendant to be tried, convicted, and sentenced on the new complaint, as the district court has no original jurisdiction therein.

In Massachusetts the copies certified by a magistrate to the superior court in a criminal case may be amended by him according to the truth, after the commencement of the trial there, and the defendant may be arraigned and tried on the amended papers. Com. *v.* Magoun, 14 Gray (Mass.) 398.

In Michigan a justice may before a trial for larceny permit the amendment of a warrant so as to show the value of the property stolen; but if he does not do so, the circuit court on appeal cannot allow such amendment. People *v.* Belcher, 58 Mich. 325.

After the examination of a respondent on a charge of larceny, a variance between the complaint and warrant in stating the name of the owner of the property, he being described as Allen Bricker in the complaint and as Allen Brinker in the warrant, is properly corrected by the justice by amending the warrant to correspond with the complaint and the testimony given on the examination; and if such amendment is not made, the circuit court may make it under How. Stat., § 9537. People *v.* Hilderbrand, 71 Mich. 313.

Wisconsin.—The Wisconsin statute provides that any court of record in which the trial of an indictment or information is had may forthwith allow

Amendment of Plea in Abatement.—Following the practice in civil proceedings, it has been held that a plea in abatement in a criminal case is not amendable.[1]

an amendment in case of a variance between the statement in the indictment or information and the proof in the name or description of the person. On appeal from a conviction in a justice court for an assault the circuit court may permit the complaint, warrant, and proceedings to be amended so as to state correctly the name of the complaining witness. Rasmussen *v.* State, 63 Wis. 1.

An amendment of a misnomer in a complaint will relate back so as to protect the officer serving the warrant. Keehn *v.* Stein, 72 Wis. 196.

Mississippi. — In Rocco *v.* State, 37 Miss. 357, a prosecution for a misdemeanor, the state's attorney was permitted to withdraw his replication and file a new one after issue joined on the first.

Vermont. — Under Vermont Rev. Laws § 3857, authorizing amendments to complaints by the district attorney in either a city or county court "except as to matters of substance," a complaint in the city court charging the defendant with keeping intoxicating liquors contrary to law, and that he had been convicted for a like offense at a term of the county court "begun and holden at B. in this county on the first Tuesday" of a certain month and year, may be amended on appeal to the county court so as to correspond with the record of such conviction when introduced in evidence, which showed that the term of court was begun on the third Tuesday of that month and year. State *v.* Sutton, 65 Vt. 439.

When the complaint of a private prosecutor was sworn to before the warrant was issued, but no certificate of the oath was appended thereto, the defect was held to be one of form and amendable. State *v.* Freeman, 59 Vt. 661.

Georgia.—An accusation in a city court was amended after the jury were sworn to conform to a prior agreement for such amendment by counsel for the prisoner, the first amendment under the agreement being defective. Barlow *v.* State, 77 Ga. 448.

1. Newman *v.* State, 14 Wis. 393 King *v.* Cooke, 9 E. C. L. 263.

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AMOUNT IN CONTROVERSY.

By RICHARD F. KIMBALL.

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As to Costs Affected by Amount, see COSTS.

I. SCOPE OF SUBJECT.—While the subject of "Amount in Controversy" is exceedingly extended in its applications and rich in illustrations, it is necessarily at the same time limited to the settlement of no very large number of legal principles. To enunciate these, so far as they may be clearly deducible from reported cases, and to set forth the local and statutory provisions as appearing therein, will be the purpose of the following article, the scope of which will be found to be practically coincident with and dependent almost wholly upon a consideration of the question of the amount in controversy as affecting the jurisdiction of courts, original and appellate.

II. AMOUNT CLAIMED—1. In General.—It is the claim as presented, not the claim as decided or allowed, which primarily determines the question of jurisdiction in the trial or lower court, and hence constitutes therein the amount in controversy.[1]

1. In the leading case of Kanouse *v.* Martin, 15 How. (U. S.) 198, Curtis, J., said: "The words 'matter in dispute' * * * do not refer to disputes in the country, or the intentions or expectations of the parties concerning them, but to the claim presented on the record to the legal consideration of the court."

And in Gordon *v.* Longest, 16 Pet. (U. S.) 97, McClean, J., said: "The damages claimed by the plaintiff in his writ gives the jurisdiction to the court whether it be an original suit in the circuit court or brought here on petition from a state court." West *v.* Woods, 18 Fed. Rep. 665.

To same effect see:

United States. — Hardin *v.* Cass County, 42 Fed. Rep. 652.

California.—Jackson *v.* Whartenby, 5 Cal. 94; Lord *v.* Thomas (Cal., 1891), 27 Pac. Rep. 410.

Connecticut.—Judd *v.* Bushnell, 7 Conn. 205; Skinner *v.* Bailey, 7 Conn. 496; Nichols *v.* Hastings, 35 Conn. 546; Grether *v.* Keock, 39 Conn. 133; Hunt *v.* Rockwell, 41 Conn. 51; Sullivan *v.* Vail, 42 Conn. 90.

South Dakota.—Plunkett *v.* Evans (S. Dak., 1892), 50 N. W. Rep. 961.

Florida.—McLean *v.* State, 23 Fla. 281.

Illinois.—Bates *v.* Bulkley, 7 Ill. 389; Thompson *v.* Turner, 22 Ill. 389; Wilson *v.* McKenna, 52 Ill. 43.

Indiana.—Chandler *v.* Davidson, 6 Blackf. (Ind.) 367; Guard *v.* Circle, 16 Ind. 401.

Iowa.—Bush *v.* Elsor, Morris (Iowa) 316; Galley *v.* Tama County, 40 Iowa 49; Moran *v.* Murphy, 49 Iowa 68.

Kentucky.—Howke *v.* Buford, 8 B. Mon. (Ky.) 38; Sams *v.* Stockton, 14 B. Mon. (Ky.) 187; Burbage *v.* Squires, 3 Metc. (Ky.) 77.

Louisiana.—McDowell's Succession, 35 La. Ann. 1025.

Maine.—Cole *v.* Hayes, 78 Me. 539.

Maryland.—Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

Michigan.—Raymond *v.* Hinkson, 15 Mich. 113; Cilley *v.* Van Patten, 68 Mich. 80.

Minnesota.—Hecklin *v.* Ess, 16 Minn. 51.

Mississsippi.—May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

Missouri.—Langham *v.* Boggs, 1 Mo. 337; Henks *v.* Debertshauser, 1 Mo. App. 402.

Nebraska.—Spielman *v.* Flynn, 19 Neb. 342; Beach *v.* Cramer, 5 Neb. 98.

New Hampshire.—Haynes *v.* Brown, 36 N. H. 545.

New Jersey.—Johnson *v.* Colbaugh, 1 N. J. L. 55.

New York. — Cahill *v.* Dolph, 1 Johns. Cas. (N. Y.) 333; Stillson *v.* Sanford, 3 Cai. (N. Y.) 174; Vaughn *v.* Ely, 4 Barb. (N. Y.) 159; Shackelton *v.* Hart, 12 Abb. Pr. (N. Y. Supreme Ct.) 325, note; Jaynes *v.* Jaynes (Orleans County Ct.) 8 Civ. Proc. Rep. 99; Farley *v.* Gibbs (Supreme Ct) 4 N. Y. Supp. 353.

North Carolina. — Katzenstein *v.* Raleigh, etc., R. Co., 84 N. Car. 688; Brantley *v.* Finch, 97 N. Car. 91.

Ohio.—McKibben *v.* Lester, 9 Ohio St. 627.

Pennsylvania.—Odell *v.* Culbert, 9 W. & S. (Pa.) 66, 42 Am. Dec. 317; Curtis *v.* Kearney, 2 Pitts. (Pa.) 87.

Counterclaims and Set-offs when introduced by a defendant are as to him the amount in controversy.[1]

2. When Claim is Unliquidated.—The rule is almost without exception that the amount demanded by the plaintiff, and not the amount of his recovery, determines the question of the court's jurisdiction when the suit is for unliquidated damages, irrespective of the character of the action, whether it be in contract or in tort.[2]

South Carolina. — Goldthwaite *v.* Dent, 3 McCord (S. Car.) 296.

Texas.—Austin *v.* Jordan, 5 Tex. 130; Sherwood *v.* Douthit, 6 Tex. 224; Little *v.* State, 75 Tex. 616; Lemar *v.* Borden, 83 Tex. 620.

Tennessee.—Spurlock *v.* Fulks, 1 Swan (Tenn.) 289.

Vermont.—Doubleday *v.* Marstin, 27 Vt. 488.

Virginia.—Meff *v.* Talbot, 1 Va. Cas. 140.

Washington. — Ebey *v.* Engle, 1 Wash. Ter. 72.

Wisconsin.—Elderkin *v.* Sperbeck, 1 Chand. (Wis.) 69; McCormick *v.* Robinson, 1 Chand. (Wis.) 254; Keegan *v.* Singleton, 5 Wis. 115.

England. — Branker *v.* Massey, 2 Price 8; Oulton *v.* Perry, 3 Burr. 1592.

Amount Need Not Be in Declaration.—It may be set forth in a summons or in the writ. Clay *v.* Barlow, 123 Mass. 378; Allen *v.* Stokes, 1 Hayw. (N. Car.) 142; Morris *v.* O'Briant, 94 N. Car. 72; Brantley *v.* Finch, 97 N. Car. 92; Todd *v.* Gates, 20 W. Va. 464. Or in interrogatories filed in a garnishment proceeding. Moore *v.* Woodruff, 5 Ark. 214.

Erroneous Claim.—Even when the amount as claimed is manifestly an error, still it is determinative of the jurisdiction. Mitchell *v.* Smith, 24 Ind. 252; Wood *v.* Lovett, 1 Penny (Pa.) 51.

Amount Alternatively Stated, as, for instance, "not more than $500 or less than $400," sufficiently shows the amount claimed as being within a court's jurisdiction whose maximum is $500. Welles *v.* Allen, 41 Conn. 140.

The words "and over" in a claim "of $100 and over," *held* to be void for uncertainty, the amount in controversy, as affecting jurisdiction, being $100. Rockwell *v.* Perine, 5 Barb. (N. Y.) 573. See also Dwyer *v.* Rathbone (Supreme Ct.) 2 N. Y. Supp. 170; Deloatch *v.* Coman, 90 N. Car. 186.

Wrong Amount Claimed cannot be subsequently cured by a verdict or judgment for a correct jurisdictional amount. Hoit *v.* Molony, 2 N. H. 322; Gillett *v.* Richards, 46 Iowa 652. Nor by any subsequent act of the plaintiff *pendente lite.* Hynds *v.* Fay, 70 Iowa 433; Burbage *v.* Squires, 3 Metc. (Ky.) 77; Talbot *v.* Robinson, 42 Vt. 698.

1. Nichols *v.* Ruckells, 4 Ill. 298; Gharkey *v.* Halstead, 1 Ind. 389; State *v.* Neumeyer, 51 N. J. L. 299; Wood *v.* O'Ferrall, 19 Ohio St. 427; Holden *v.* Wiggins, 3 P. & W. (Pa.) 469; Milliken *v.* Gardner, 37 Pa. St. 456.

Sum Recovered and not the damages claimed was held to be the test of a justice's jurisdiction in an action on a *quantum meruit.* Power *v.* Rockwell, 39 Wis. 585; Darling *v.* Conklin, 42 Wis. 478; Crabtree *v.* Moore, 7 Ark. 74; Page *v.* Ellis, 9 Cal. 248; Brady *v.* Smith, 1 Rob. C. C. (N. Y.) 175.

In Maryland, in actions *ex contractu,* as distinguished from those arising *ex delicto,* it is the recovery and not the claim which determines the jurisdiction. O'Reilley *v.* Murdoch, 1 Gill (Md.) 23; Beall *v.* Black, 1 Gill (Md.) 203; Carter *v.* Tuck, 3 Gill (Md.) 248; Ott *v.* Dill, 7 Md. 251. *Compare* Bushey *v.* Culler, 26 Md. 552.

2. *Alabama.*—Carter *v.* Dade, 1 Stew. (Ala.) 18; Howard *v.* Wear, Minor (Ala.) 84; Curtis *v.* Gary, Minor (Ala.) 110; Cummings *v.* Edmunson, 5 Port. (Ala.) 145.

California.—Bradley *v.* Kent, 22 Cal. 169; Solomon *v.* Reese, 34 Cal. 28; Bailey *v.* Sloan, 65 Cal. 387; Perkins *v.* Ralls, 71 Cal. 87.

Connecticut.—Nichols *v.* Hastings, 35 Conn. 546; Andrew *v.* Babcock, 63 Conn. 109.

Georgia.—Tyler Cotton Press Co. *v.* Chevalier, 56 Ga. 494.

Kentucky.—Singleton *v.* Madison, 1 Bibb (Ky.) 342; Hume *v.* Ben, 1 Bibb (Ky.) 402; Hambell *v.* Hamilton, 3

3. In Actions Ex Delicto.—Actions *ex delicto* are from their very nature usually actions for the recovery of unliquidated and problematical damages; hence the rule already enunciated, that it is the sum demanded and not the amount of recovery which determines the jurisdiction *vel non* of the trial court, is peculiarly applicable to them.[1]

Dana (Ky.) 501; Craig *v.* Street, 2 Bibb (Ky.) 265; Johnston *v.* Louisville, 11 Bush (Ky.) 527.

Louisiana.—Groebel *v.* Risetroph, 35 La. Ann. 490.

Minnesota.—Barber *v.* Kennedy, 18 Minn. 216.

Mississippi.—May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

Nevada.—Kleni *v.* Allenbach, 6 Nev. 159.

North Carolina.—Winslow *v.* Weith, 66 N. Car. 432; Latham *v.* Rollins, 72 N. Car. 454; Burbank *v.* Beaufort County, 92 N. Car. 257; Powell *v.* Allen, 103 N. Car. 46.

Oregon.—Corbell *v.* Childers, 17 Oregon, 528.

Pennsylvania.—Kline *v.* Hood, 9 S. & R. (Pa.) 294.

Texas.—Dwyer *v.* Brenham, 70 Tex. 30; Tidball *v.* Eichoff, 66 Tex. 58.

United States.—Martin *v.* Taylor, 1 Wash. (U. S.) 1; Culver *v.* Crawford County, 4 Dill. (U. S.) 239; Lee *v.* Watson, 1 Wall. (U. S.) 339; Kanouse *v.* Martin, 15 How. (U. S.) 198; Schacker *v.* Hartford F. Ins. Co., 93 U. S. 241; Gray *v.* Blanchard, 97 U. S. 565; Schunk *v.* Moline, etc., Co., 147 U. S. 500; West *v.* Woods, 18 Fed. Rep. 665; American Fertilizing Co. *v.* Board of Agriculture, 43 Fed. Rep. 609; Hat-Sweat Mfg. Co. *v.* Porter, 46 Fed. Rep. 757.

Vermont.—Bell *v.* Mason, 10 Vt. 509; Spafford *v.* Richardson, 13 Vt. 245; Wrightman *v.* Carlisle. 14 Vt. 296; Brainard *v.* Austin, 17 Vt. 650; Joyal *v.* Barney, 20 Vt. 154; Stanley *v.* Barker, 25 Vt. 507; Powers *v.* Thayer, 30 Vt. 361; Miller *v.* Livingston, 37 Vt. 467; Scott *v.* Moore, 41 Vt. 205, 98 Am. Dec. 581; Drown *v.* Forrest, 63 Vt. 557.

Virginia.—Newsum *v.* Pendred, 2 Va. Cas. 93.

Wisconsin.—Du Bay *v.* Gould, 3 Pin. (Wis.) 468.

Compare Fortune *v.* Howard, 4 J. J. Marsh. (Ky.) 171.

Amendments Allowed.—In an action for the specific performance of a contract for the sale of land, where the bill is silent as to the value thereof, which in such a case is the amount in controversy, and the contract produced discloses such value to be only $1000, the bill can be amended so as to give a Circuit Court of the United States jurisdiction under act of March 3, 1887, which fixes minimum limit at sums in excess of $2000 by alleging present value of land to have increased to $3000. Johnson *v.* Trippe, 33 Fed. Rep. 530; State *v.* Voorhies, 34 La. Ann. 1151. So likewise where a suit in damages to property is brought in a Circuit Court of the United States subsequent to the passage of the act of March 3, 1887, and the *ad damnum* is laid at $1500, in ignorance of the change made by said act in the jurisdictional amount requisite, namely, from sums in excess of $500 to sums in excess of $2000, the plaintiff may obtain, when defendants move to dismiss the cause, leave to amend his *ad damnum* so as to give the court jurisdiction, as it does not appear but that the damages recovered might be larger than originally claimed. Davis *v.* Kansas City R. Co., 32 Fed. Rep. 863. See also Van Clief *v.* Van Vechten, 130 N. Y. 571; McDonald *v.* Truesdale (unreported), in N. Y. Superior Court in the year 1876. *Compare* McIntyre *v.* Carriere, 17 Hun (N. Y.) 64. See AMENDMENTS.

1. *Alabama.*—King *v.* Parmer, 34 Ala. 416; Mills *v.* Long, 58 Ala. 458; Haws *v.* Morgan, 59 Ala. 508; Morris *v.* Robinson, 80 Ala. 291; Memphis, etc., R. Co. *v.* Hembree, 84 Ala. 182.

Arkansas.—Little Rock, etc., R. Co. *v.* Manees, 44 Ark. 100.

California.—Solomon *v.* Reese, 34 Cal. 28; Gorton *v.* Ferdinando, 64 Cal. 11; Greenbaum *v.* Martinez, 86 Cal. 459.

Georgia.—Velvin *v.* Hall, 78 Ga. 136.

Indiana.—Short *v.* Scott, 6 Ind. 430.

Kentucky.—Singleton *v.* Madison, 1 Bibb (Ky.) 342; Hambell *v.* Hamilton, 3 Dana (Ky.) 501; Aulick *v.* Adams, 12 B. Mon. (Ky.) 104.

4. In Suits on Bonds.—In suits on bonds it is as a rule not the penalty named therein which determines jurisdiction, but the amount of the damages claimed, the penalty being considered in the nature of a collateral security for the debt.[1]

Massachusetts.—Hapgood *v.* Doherty, 8 Gray (Mass.) 373; Ladd *v.* Kimball, 12 Gray (Mass.) 139; Ashuelot Bank *v.* Pearson, 14 Gray (Mass.) 521.

Louisiana.—Oakey *v.* Aiken, 12 La. Ann. 11.

Michigan.—Rosevelt *v.* Hanold, 65 Mich. 414.

Minnesota.—Turner *v.* Holleran, 8 Minn. 451; Greenman *v.* Smith, 20 Minn. 418.

Nebraska.—Lawrence *v.* Curtis, 13 Neb. 515.

New York.—Bellinger *v.* Ford, 14 Barb. (N. Y.) 250; Yager *v.* Hannah, 6 Hill (N. Y.) 631.

North Carolina.—Bullinger *v.* Marshall, 70 N. Car. 520; McDonald *v.* Cannon, 82 N. Car. 245; Womble *v.* Leach, 83 N. Car. 84; Ashe *v.* Gray, 88 N. Car. 190; Noville *v.* Dew, 94 N. Car. 43; Harvey *v.* Hambright, 98 N. Car. 446; Edwards *v.* Couper, 99 N. Car. 421; Long *v.* Fields, 104 N. Car. 221; Bowers *v.* Richmond, etc., R. Co., 107 N. Car. 721.

Pennsylvania.—Byrne *v.* Gordon, 2 Brown (Pa.) 271; Strutzer *v.* Morgan, 2 Brown (Pa.) 38; Matlack *v.* Brown, 2 Miles (Pa.) 15; Ancora *v.* Burns, 5 Binn. (Pa.) 522; McKinney *v.* Allen, 31 Leg. Int. (Pa.) 373; Richards *v.* Gage, 1 Ashm. (Pa.) 192.

Rhode Island.—Edwards *v.* Hopkins, 5 R. I. 138.

Texas.—Bridge *v.* Ballew, 11 Tex. 269; Ellett *v.* Powers, 8 Tex. 113; Dwyer *v.* Bassett, 63 Tex. 276.

United States.—Murphy *v.* Howard, 1 Hempst. (U. S.) 205; Hynes *v.* Briggs, 41 Fed. Rep. 468; Smith *v.* Greenhow, 109 U. S. 669; Barry *v.* Edmunds, 116 U. S. 550.

Vermont.—Montgomery *v.* Edwards, 45 Vt. 75; Smith *v.* Fitzgerald, 59 Vt. 451.

Compare Froelich *v.* Southern Express Co., 67 N. Car. 1.

Thus, in an action on the case in which damages were laid at a sum sufficient to give jurisdiction to the court, the court said: "The plaintiff * * * is *prima facie* entitled to sue, * * * his demand being above that fixed by the act in such cases. But even if he should obtain a verdict for a less sum * * * it would seem to be straining the interpretation of the act to suffer the jurisdiction of the court to depend upon a rule so uncertain and capricious as the amount of damages in cases of tort." McGehee *v.* Draughon (1816–1818), 2 Law Repos. (N. Car.) 260.

Replevin.—Value as Claimed in actions of replevin, being the equivalent of the damage claimed in actions of tort, generally forms the amount in controversy as distinguished from what may be the real value of the property. Markin *v.* Jornigan, 3 Ind. 548; Bainum *v.* Small, 4 Ind. 49; Gottschalk *v.* Klinger, 33 Mo. App. 410; Malone *v.* Hopkins, 40 Mo. App. 331; Stevens *v.* Chase, 61 N. H. 340; Fenton *v.* Harred, 17 Pa. St. 158; Darling *v.* Conklin, 42 Wis. 478. *Compare* Rochester *v.* Roberts, 29 N. H. 360.

Damage Claim not Allegations of value, prevails on a question of jurisdiction. Smith *v.* Northern Pac. R. Co. (N. Dak., 1892), 53 N. W. Rep. 173. And where in an attachment for a debt affecting property it is not the value thereof but the amount of debt claimed to be satisfied thereout which forms the amount in controversy. Hoppe *v.* Byers, 39 Iowa 573. *Compare* De Camp *v.* Miller, 44 N. J. L. 617.

Damage Claim and not the Evidence thereof produced at the trial constitutes the jurisdictional amount in controversy. Henderson *v.* Desborough, 28 Mich. 170; Adams *v.* Spaulding, 64 N. H. 384; Dennis *v.* Crittenden, 42 N. Y. 542; Burr *v.* Bayne, 10 Watts (Pa.) 299; Stewart *v.* Baltimore, etc., R. Co., 33 W. Va. 88. But on the other hand, in Bazire *v.* Barry, 3 S. & R. (Pa.) 461, in which case plaintiff sued in trespass *q. c. f.* and *d. b. a.*, and the cause was arbitrated under a special act which made it unnecessary to file in such cases any declaration, and it was held that, inasmuch as no claim was therefore made by the plaintiff, he should not be thereby prejudiced, but that the amount of his demand could be shown by parol evidence of what was exhibited before the arbitrators in order to determine the jurisdiction of the court *vel non* to finally adjudicate the matter. But see Warfel *v.* Beam, 3 P. & W. (Pa.) 397.

1. Thus, for example, in Shattuck *v.*

III. AMOUNT REMITTED—1. Jurisdiction Conferred.—The rule also pretty generally obtains that one may waive a portion of the amount in controversy where that amount is greater than the court's jurisdiction in order to confer jurisdiction, provided this is done *bona fide* and with no fraudulent intent.[1]

Miller, 50 Miss. 386, where "a bond of indemnity had been given the sheriff, who had levied on personal property which was claimed by J., upon trial of the claimant's issue, the verdict and judgment were in her favor. She and her husband then brought suit before the justice of the peace on the bond (which was in the penalty of $500) for illegal levy on her property," in which suit the demand was for $150 damages, and the court said: "The amount in controversy is the principal of the amount demanded * * * the $150 as damages for the tortious act of the sheriff * * * which sum is within the justice's jurisdiction." State *v.* Luckey, 51 Miss. 528; Rawles *v.* People, 2 Colo. App. 501; Bowden *v.* Taylor, 81 Ga. 199. So also Paul *v.* Arnold, 12 Ind. 197, was "an action on a delivery bond," in which "the complainant set out a judgment for a certain sum, and then the bond and then the breach; the penalty was for an amount beyond the jurisdiction of the court, but the judgment was not," and it was held that the latter was the amount in controversy determinative of the court's jurisdiction. Washburn *v.* Payne, 2 Blackf. (Ind.) 216; Anderson *v.* Farns, 7 Blackf. (Ind.) 343; Snowhook *v.* Dodge, 28 Ill. 63; Stone *v.* Murphy, 2 Iowa 35; Murfree on Official Bonds, pars. 479, 480; Holt *v.* McLean, 75 N. Car. 347; Gray *v.* Stafford, 52 Mich. 497; Sharpless *v.* Hopkins, 1 T. & H. Pr. (Pa.) 26; Bloomer *v.* Laine, 10 Wend (N. Y.) 525; Cavender *v.* Ward 28 S. Car. 470; Fowler *v.* McDaniel, 6 Heisk. (Tenn.) 529; State *v.* Lambert, 24 W. Va. 399; U. S. *v.* McDowell, 4 Cranch (U. S.) 316; Postmaster-Gen. *v.* Cross, 4 Wash. (U. S.) 326; Buechel *v.* Buechel, 65 Wis. 532. And in Dick *v.* Gaskill, 2 Whart. (Pa.) 184, the amount in controversy, as affecting jurisdiction, was held to be the damages claimed, although these were treble the amount of the penalty named in the bond in litigation.

But on the other hand, in Morris *v.* Saunders, 85 N. Car. 138, the court said: "The principal of the bond sued on was properly the sum demanded; * * * the question of jurisdiction could not be allowed to depend upon the claim made in the plaintiff's complaint or in anywise to fluctuate according to the will of the parties or subsequent circumstances, but must be fixed at the time of the contract made." Hedgecock *v.* Davis, 64 N. Car. 650; Fell *v.* Porter, 69 N. Car. 140; State *v.* Rousseau, 71 N. Car. 194; Coggins *v.* Harrell, 86 N. Car. 317; Joyner *v.* Roberts, 108 N. Car. 174; Joyner *v.* Roberts, 112 N. Car. 111; Snowhook *v.* Dodge, 28 Ill. 63; Com. *v.* Bohon, 1 Litt. (Ky.) 22; Sims *v.* Harris, 8 B. Mon. (Ky.) 55; Bishop *v.* Freeman, 42 Mich. 533; Heath *v.* Blaker, 2 Va. Cas. 215; Pitman *v.* Dwyer, 8 Mo. App. 570; St. Louis *v.* Fox, 15 Mo. 71.

The Real Debt, Not the Claim or the Penalty.—In an action of covenant on a writing obligatory for $28 in a court whose minimum limit in amount was $100, to which there was a plea in abatement to the jurisdiction, and to this a demurrer by the plaintiff, this demurrer sustained below was upon an appeal by the defendant reversed and overruled, the appellate court holding that the amount of the debt on penalty, being a sum certain, constituted the amount in controversy. Crabtree *v.* Moore, 7 Ark. 74; Freedenbery *v.* Meteer, 4 Clark (Pa.) 182; Coates *v.* Cork, 1 Miles (Pa.) 270; Edgerton *v.* Smith, 35 Vt. 573.

Penalty Raises a Presumption of the Claim.—In a suit on a replevin bond the penalty therein raises the presumption that the value of the property is one-half the amount thereof, and this value so presumed and not the value alleged furnishes the amount in controversy. Tyler *v.* Bowlus, 54 Ind. 333.

Amount of Claim Uncertain or Not Alleged.—Where the amount of the claim is uncertain or there is a failure to set forth any claim, the penalty governs on a question of jurisdictional amount. Beard *v.* Kinney, 6 Blackf. (Ind.) 425; Forrester *v.* Alexander, 4 W. & S. (Pa.) 311.

1. *Texas.*—Alexander *v.* Thompson, 38 Tex. 533; Fuller *v.* Sparks, 39 Tex. 136.

2. Jurisdiction Unaffected.—Based upon the well-established principle that, jurisdiction having once attached, every presumption

Alabama.—King *v.* Dougherty, 2 Stew. (Ala.) 487; Crabtree *v.* Cliatt, 22 Ala. 181; Solomon *v.* Ross, 49 Ala. 198; Wharton *v.* King, 69 Ala. 365.

Georgia.—Wilhelms *v.* Moble, 36 Ga. 599; Stewart *v.* Thompson, 85 Ga. 829.

Illinois.—Bates *v.* Bulkley, 7 Ill. 389; Ellis *v.* Snider, 1 Ill. 336; Huguenin *v.* Nicholson, 2 Ill. 575; Simpson *v.* Updegraff, 2 Ill. 594; Korsoski *v.* Foster, 20 Ill. 32; Raymond *v.* Strobel, 24 Ill. 113; Carpenter *v.* Wells, 65 Ill. 451.

Indiana.—Epperly *v.* Little, 6 Ind. 344.

Iowa.—Culbertson *v.* Tomlinson, Morris (Iowa) 404; Stone *v.* Murphy, 2 Iowa 35.

Kentucky.—Tudder *v.* Warren, 6 J. J. Marsh. (Ky.) 93.

Minnesota.—Lamberton *v.* Raymond, 22 Minn. 129.

Missouri.—Hempler *v.* Schneider, 17 Mo. 258; Denny *v.* Eckelkamp, 30 Mo. 140; Matlack *v.* Lare, 32 Mo. 262; Burden *v.* Hornsby, 50 Mo. 238.

New York.—Bowditch *v.* Salisbury, 9 Johns. (N. Y.) 366; Bennett *v.* Ingersoll, 24 Wend. (N. Y.) 113.

North Carolina.—M'Rae *v.* M'Rae, 3 Dev. & B. (N. Car.) 85; Derr *v.* Stubbs, 83 N. Car. 539.

Pennsylvania.—Herbert *v.* Conrad (Pa.), 1 Am. L. Reg. 440; Baer *v.* Garrett, 2 Leg. Chron. (Pa.) 207; Cleaden *v.* Yeats, 5 Whart. (Pa.) 94; Evans *v.* Hall, 45 Pa. St. 235.

Tennessee.—Carraway *v.* Burton, 4 Humph. (Tenn.) 108.

United States.—Witt *v.* Hereth, 6 Biss. (U. S.) 474.

Vermont.—Stevens *v.* Howe, 6 Vt. 572; Herren *v.* Campbell, 19 Vt. 23; Danforth *v.* Streeter, 28 Vt. 490.

England.—Hill *v.* Swift, 10 Exch. 726; Isaacs *v.* Wyld, 15 Jur. 1135.

Contra, Tolbert *v.* Yocum, 2 Leg. Chron. (Pa.) 319.

Thus, for example, it was held in Blakenship *v.* Adkins, 12 Tex. 536, "where it becomes necessary to sue for the recovery of an amount remaining due upon an indebtedness, originally within the jurisdiction of the District Court, if the suit is upon the original cause of action, it must be brought in that court, though the debt may have been reduced by payment to a sum within the jurisdiction of a justice of the peace."

Credits or Payments admitted or proven *pendente lite*, by which the amount originally in excess of the jurisdictional limit is reduced to a sum within that limit, will cause the court's jurisdiction to attach. Baird *v.* Nichols, 2 Port. (Ala.) 186; Nichols *v.* McAbee, 30 Ga. 8; Harris *v.* Jenks, 3 Ill. 475; Seymour *v.* Seymour, 31 Ill. App. 227; Newland *v.* Nees, 3 Blackf. (Ind.) 460; Collins *v.* Shaw, 8 Ind. 516; Brown *v.* Lewis, 10 Ind. 232; Harvey *v.* Ferguson, 10 Ind. 393; Hall *v.* Biever, Morris (Iowa) 113; Cochran *v.* Glover, Morris (Iowa) 151; Glass *v.* Moss, 1 How. (Miss.) 519; State *v.* Neumeyer, 51 N. J. L. 299; Hearman *v.* Snyder (Supreme Ct.), 3 N. Y. Supp. 94; Duer *v.* Seydell, 20 Tex. 61; Bower *v.* McCormick, 73 Pa. St. 427; Felt *v.* Felt, 19 Wis. 193; Howard *v.* Mansfield, 30 Wis. 75.

Compare, contra, Askew *v.* Askew, 49 Miss 301; Martin *v.* Harden, 52 Miss. 694; Fenn *v.* Harrington, 54 Miss. 733; Stephen *v.* Eiseman, 54 Miss. 535; Milbanks *v.* Coonley (Supreme Ct.), 2 N. Y. Supp. 167; Waldo *v.* Jolly, 4 Jones (N. Car.) 173; Moore *v.* White, 11 W. N. C. (Pa.) 206; Woodward *v.* Garner, 2 Pin. (Wis.) 28; Donohoe *v.* Donohoe, 16 L. R. (Ir.) 135; Abney *v.* Whitted, 28 La. Ann. 818.

A Voluntary Credit may be entered by the plaintiff upon his cause of action for the purpose of conferring jurisdiction upon a justice of the peace. Phillips *v.* Fitzpatrick, 34 Mo. 276. See *contra*, Carey *v.* Garardville, 1 Leg. Chron. (Pa) 170; James *v.* Frick, 12 Phila. (Pa.) 443; Avards *v.* Rhodes, 8 Exch. 312.

A Discount may be made by the defendant upon a plaintiff's demand in an action *ex contractu*, and by this means the jurisdiction of a court secured. Coldwell *v.* Garmany, 3 Hill (S. Car.) 202.

Waiver of Interest.—Interest which is due and demandable may be voluntarily relinquished in order to reduce the amount to a sum within a court's jurisdiction. Simpson *v.* Updegraff, 2 Ill. 594; Bates *v.* Bulkley, 7 Ill. 389; Hopper *v.* Steelman, 3 N. J. L. 466;

of law is in favor of its continuance, is the generally accepted doctrine that where a suit is commenced for an amount within the jurisdiction of a court, although that amount be reduced below the limited sum, nevertheless the jurisdiction to hear and determine the cause remains unaffected.[1]

3. Jurisdiction Ousted.—But while the weight of authority preponderates in favor of the continuance of jurisdiction, notwith-

Saddle River *v.* Colfax, 6 N. J. L. 115; De Camp *v.* Miller, 44 N. J. L. 617; Bower *v.* McCormick, 73 Pa. St. 427; Evans *v.* Hall, 45 Pa. St. 235; Kraus *v.* Bickhart, 1 Chester Co. Rep. (Pa.) 479; Quigley *v.* Quigley, 10 W. N. C. (Pa.) 388; Varney *v.* Vosch, 3 Hill (S. Car.) 237; Parkhurst *v.* Spalding, 17 Vt. 527; Paige *v.* Morgan, 28 Vt. 565. But *compare* Hampton *v.* Dean, 4 Tex. 455.

Waiver of Amount of Recovery.—Where the judgment is in such a sum that the court cannot enforce it and can entertain no further proceedings with reference to it, the plaintiffs may relinquish the excess and restore the jurisdiction. Henderson *v.* Plumb, 18 Ala. 74; Hunter *v.* Sherman, 3 Ill. 539; Stephens *v.* Sweeney, 7 Ill. 375; Linder *v.* Monroe, 33 Ill. 388; Hill *v.* Wilkinson, 25 Neb. 103. But see, *contra*, Eacrit *v.* Keen, 4 N. J. L. 203; Putnam *v.* Shelop, 12 Johns. (N. Y.) 435. So also the court may of its own motion, in such a case, remit the excess or presume the excess to be remitted. Litchfield *v.* Daniels, 1 Colo. 268; Giles *v.* Spinks, 64 Ga. 205; Velvin *v.* Hall, 78 Ga. 136; Shaw *v.* Roberts (Supreme Ct.), 14 N. Y. Supp. 579; Porter *v.* Grimsley, 98 N. Car. 550; Bodger *v.* Nicholls, 28 L. T. N. S. 441.

Divided Debt.—In Herrin *v.* Buckelew, 37 Ala. 585, it was held that where several notes each on its face within a justice's jurisdiction, but in the aggregate in excess thereof, are made to secure the payment of a single debt, nevertheless a justice may entertain two separate suits thereon, instituted on the same day, because one may split up his debt into several demands, it being equivalent to remitting a portion of a claim. Dews *v.* Eastham, 5 Yerg. (Tenn.) 297. But see, *contra*, More *v.* Woodruff, 5 Ark. 214; Walton *v.* Vanhorn, 1 Phila. (Pa.) 377; Richards *v.* Marten, 23 W. R. 93. See also *post*, notes to VIII. AGGREGATED AMOUNT, 3. *Several Claims in one Suit*, pp. 722, 723.

Amount Reduced by Set-off.—When the amount has been reduced by a set-off successfully pleaded or admitted by the plaintiff, it was held that such reduction did not avail to confer jurisdiction. Jones *v.* Stauffer, 1 Leg. Gaz. (Pa.) 91; James *v.* Frick, 3 W. N. C. (Pa.) 291. See *post*, this article, "Jurisdiction Unaffected," and notes.

1. Sanborn *v.* Contra Costa County, 60 Cal. 425; McVey *v.* Johnson, 75 Iowa 165; Wright *v.* Potomska Mills Corp., 138 Mass. 328; Best *v.* Best, 16 Mo. 530; Funk *v.* Funk, 35 Mo. App. 246; Butcher *v.* Smith, 29 Ohio St. 604; Davis *v.* Pinckney, 20 Tex. 340. See also Goldthwaite *v.* Dent, 3 McCord (S. Car.) 296; Watts *v.* Harding, 5 Tex. 386.

Payments Pendente Lite proven or admitted do not affect a jurisdiction once acquired. Rae *v.* Grand Trunk R. Co., 14 Fed. Rep. 402; Lozano *v.* Wehmer, 22 Fed. Rep. 755; Fuller *v.* Metropolitan L. Ins. Co., 37 Fed. Rep. 163; Cilley *v.* Van Patten, 68 Mich. 80; Simmons *v.* Terrell, 75 Tex. 275. See also Bonner *v.* Watson, 6 Tex. 172.

A Set-off Successfully Interposed will not oust the jurisdiction of a court. Anonymous, 2 Hayw. (N. Car.) 275; Ross *v.* Jackson, Cooke (Tenn.) 406; Jordan *v.* Barry, 4 Hayw. (Tenn.) 103; Ferguson *v.* Highley, 2 Va. Cas. 255. *Compare* Ware *v.* Fambro, 67 Ga. 515.

A Demurrer Sustained does not affect the jurisdiction, although such a demurrer reduces the amount below the limit. Brickell *v.* Bell, 84 N. Car. 82; Ursey *v.* Suit, 91 N. Car. 406; Martin *v.* Goode, 111 N. Car. 288.

Amount Remitted on Appeal.—A plaintiff cannot, by remitting a portion of his claim, deprive the defendant of his right of appeal, when but for this remission the amount in controversy is sufficient for that purpose. Lord *v.* Parmela, 1 Root (Conn.) 158; Butler *v.* Brace, 1 Root (Conn.) 302; Mehle *v.* Bensel, 39 La. Ann. 680; North *v.* Holroyd, L. R. 3 Exch. 69; Finch *v.* Hartpence, 29 Neb. 368; State *v.* Judge, 24 La. Ann. 601.

standing the reduction of the amount in controversy, a very respectable minority support a contrary opinion.[1]

4. Jurisdiction Not Conferred on Appeal.—Where the sum recovered and in controversy exceeds the amount of which the appellate court may take cognizance, jurisdiction cannot be conferred thereupon by remitting the excess.[2]

IV. FICTITIOUS AMOUNT.—It is a well-settled rule, and of course in harmony both with reason and justice, that one cannot knowingly allege a fictitious amount for the sole purpose of bringing his case within the jurisdiction of a court, as such would manifestly be a fraud upon that jurisdiction.[3]

1. *Illinois.*—Sands *v.* Delap, 2 Ill. 168; Simpson *v.* Rawlings, 2 Ill. 28; Clark *v.* Cornelius, 1 Ill. 46; Blue *v.* Weir, 1 Ill. 372.

Pennsylvania.—Hayes *v.* Robb, 1 Clark (Pa.) 394; Meredith *v.* Pierie, 1 Clark (Pa.) 195; Williams *v.* Beatty, 1 T. & H. Pr. (Pa.) 20; Cahill *v.* Naulty, 1 T. & H. Pr. (Pa.) 19; Stroh *v.* Uhrich, 1 W. & S. (Pa.) 57; Collins *v.* Collins, 37 Pa. St. 387; Bower *v.* McCormick, 73 Pa. St. 427; Peter *v.* Schlosser, 81 Pa. St. 439.

South Carolina.—Ramsay *v.* Court of Wardens, 2 Bay (S. Car.) 180; Simpson *v.* M'Million, 1 Nott & M. (S. Car.) 192.

Compare Cox *v.* Stanton, 58 Ga. 406. See *dicta* in *Ex p.* Gale, R. M. Charlt. (Ga.) 214; Pilotage Com'rs *v.* Low, R. M. Charlt. (Ga.) 298; Tyler Cotton Press Co. *v.* Chevalier, 56 Ga. 494.

Thus, for example, where by a written instrument at the trial the plaintiff admits a portion of the claim to have been paid, by which it is reduced below the U. S. Circuit Court's jurisdictional amount, the court, on defendant's motion, must dismiss the suit. Lozano *v.* Wehmer, 22 Fed. Rep. 755; Rae *v.* Grand Trunk R. Co., 14 Fed. Rep. 402.

Amount Remitted Prevents Appeal.—Where in a suit on 119 interest coupons cut from 24 bonds of the city of Opelika, which bonds aggregated $24,000, in which suit more than $5000 was demanded, but plaintiff amended his complaint, reducing his claim to only 90 coupons, and recovered a judgment for $4755.64, it was held that the U. S. Supreme Court was without jurisdiction on a writ of error, inasmuch as the said amendment amounted to a remittitur by the plaintiff of a portion of his claim. Opelika City *v.* Daniel, 109 U. S. 108; Alabama Gold L. Ins. Co. *v.* Nichols, 109 U. S. 232; First Nat. Bank *v.* Redick, 110 U. S. 224; Wimbush *v.* Chinault, 58 Miss. 234; Singer *v.* McGuire, 40 La. Ann. 638; Guidry *v.* Garland, 41 La. Ann. 756; State *v.* Judge, 21 La. Ann. 728. See also Pritchard *v.* Bartholomew, 45 Ind. 219.

Reduction by Amendments.—Where one prior to an appeal reduces the amount by amendments there can be no appeal. Wilson *v.* Hawkeye Ins. Co., 74 Iowa 212; Martine *v.* Hopkins, 40 La. Ann. 322.

2. Vorwald *v.* Marshall, 71 Iowa 576; Schultz *v.* Chicago, etc., R. Co., 75 Iowa 240; Nevada *v.* Klum, 76 Iowa 428; Giger *v.* Chicago, etc., R. Co., 80 Iowa 492; Bateman *v.* Sisson, 70 Iowa 518; Batchelor *v.* Best, 22 Mo. 402; Boyett *v.* Vaughan, 85 N. Car. 363; Ijams *v.* McClamroch, 92 N. Car. 362; Dixon *v.* Caruthers, 9 Yerg. (Tenn.) 30; Hearn *v.* Cutberth, 10 Tex. 216; Texas, etc., R. Co. *v.* Overheiser, 151 U. S. 105. *Compare* Plunkett *v.* Evans (S. Dak., 1892), 50 N. W. Rep. 961.

3. *Alabama.*—Carter *v.* Alford, 64 Ala. 236.

Georgia.—Cox *v.* Stanton, 58 Ga. 406.

Michigan.—Fix *v.* Sissung, 83 Mich. 561.

Mississippi.—Griffin *v.* McDaniel, 63 Miss. 121.

New Jersey.—Eacrit *v.* Keen, 4 N. J. L. 203.

North Carolina.—Froelich *v.* Southern Express Co., 67 N.Car. 1; Wiseman *v.* Witherow, 90 N. Car. 140.

Pennsylvania.—Peter *v.* Schlosser, 81 Pa. St. 439.

South Carolina.—Ramsay *v.* Court of Wardens, 2 Bay (S. Car.) 180; Simpson *v.* M'Million, 1 Nott & M. (S. Car.) 192; Gracy *v.* Wright, 2 McCord (S. Car.) 278; St. Amand *v.* Gerry, 2 Nott & M. (S. Car.) 487.

Question Discretionary.—Where a plaintiff's claim is for more and his recovery for less than the statutory jurisdictional amount, it lies within the sound discretion of the court to decide the question whether his object was to evade the law requiring him to make affidavit to the *bona fides* of his claim.[1]

Texas.—Swigley *v.* Dickson, 2 Tex. 193; Austin *v.* Jordan, 5 Tex. 130; Sherwood *v.* Douthit, 6 Tex. 224; Tidball *v.* Eichoff, 66 Tex. 58; Ratigan *v.* Holloway, 69 Tex. 468; Burke *v.* Adone, 3 Tex. Civ. App. 494; Baker *v.* Guinn, 4 Tex. Civ. App. 539; Sozaya *v.* Patterson (Tex. Civ. App., 1893), 23 S. W. Rep. 745; Bent *v.* Graves, 3 McCord (S. Car.) 280, 15 Am. Dec. 632; Clapp *v.* Spokane, 53 Fed. Rep. 515.

United States.—Herbert *v.* Rainey, 54 Fed. Rep. 248; Wilson *v.* Daniel, 3 Dall. (U. S.) 401; Hilton *v.* Dickinson, 108 U. S. 166; Barry *v.* Edmunds, 116 U. S. 550; Gorman *v.* Havird, 141 U. S. 206; Peeler *v.* Lathrop, 2 U. S. App. 40.

Vermont.—Putney *v.* Bellows, 8 Vt. 272.

West Virginia.—James *v.* Stokes, 77 Va. 225; Todd *v.* Gates, 20 W. Va. 464. *Compare* Askew *v.* Askew, 49 Miss. 301; Stephen *v.* Eiseman, 54 Miss. 535. And *contra*, Wright *v.* Smith, 76 Ill. 216; Wilson *v.* Hawkeye Ins. Co., 74 Iowa 212; Hapgood *v.* Doherty, 8 Gray (Mass.) 373.

Thus in the case of Edwards *v.* Bates County, 55 Fed. Rep. 436, "where in November, 1889, H. commenced a suit in the U. S. Circuit Court for the W. D. of Missouri against a county on two bonds for the sum of $1000, and on a demurrer it was held that the court had no jurisdiction, as the amount involved did not exceed $2000, exclusive of interest and costs, as required by act of Congress; and afterward, but before the dismissal of said cause, E. commenced suit on the same coupons and also on other coupons which had matured prior to 1880, in which suit, on demurrer, it was held that said last-named coupons were barred by the statute of limitations; and then, without dismissing this suit either, E. instituted a third suit on the same bonds and all coupons from 1873 to 1886, and in addition thereto on seven funding bonds of the county for $100 each, . . . not maturing until 1905;" and it was finally held that said funding bonds were clearly added solely to bring the amount in controversy up to a sum exceeding $2000, and thus to confer a fictitious jurisdiction, and that consequently the court was without jurisdiction in the premises, for, said the court, "parties cannot make up feigned or simulated matters of controversy to give jurisdiction nor confer jurisdiction by claiming a sum *eo nomine* above $2000, where in fact the true amount in dispute is less."

It was said in Mabry *v.* Little, 19 Tex. 339, that it was questionable if plaintiff, even before suit was brought, could lessen or remit his real claim to secure jurisdiction. *Compare* Ramsour *v.* Barrett, 5 Jones (N. Car.) 409; Fuller *v.* Sparks, 39 Tex. 138.

A Fictitious Set-off cannot be pleaded by a defendant in order to deprive a justice of jurisdiction. Alexander *v.* Peck, 5 Blackf. (Ind.) 308.

Honest Mistakes, however, made in allegations of amount in actions of tort will not deprive a court of its jurisdiction. Grether *v.* Klock, 39 Conn; 133; Graham *v.* Roder, 5 Tex. 146; International, etc., R. Co. *v.* Nicholson, 61 Tex. 551; Dwyer *v.* Bassett, 63 Tex. 275; Roper *v.* Brady, 80 Tex. 588; Maxfield *v.* Scott, 17 Vt. 634; Sanborn *v.* Chittenden, 27 Vt. 171; Clark *v.* Crosby, 37 Vt. 188. But *compare* Doubleday *v.* Marstin, 27 Vt. 488.

1. Cummings *v.* Edmunson, 5 Port. (Ala.) 145. *Compare* Boggs *v.* Near, 20 Ind. 395; Miller *v.* Beal, 26 Ind. 234; Parkham *v.* Hardin, 11 Ired. (N. Car.) 219.

No Presumption of Bad Faith.—Thus where the demand amounts to more than $200 (the court's minimum jurisdictional limit), and less is recovered, the presumption is that plaintiff brought suit in good faith, and in the absence of any showing to the contrary the court will be clothed with jurisdiction. Worcester *v.* Lampson, 55 Vt. 350; Fortescue *v.* Spencer, 2 Ired. (N. Car.) 63.

Exemplary Damages Claimed.—Thus also the claiming of exemplary damages in an action for damages caused by injury to a horse from a wire fence

V. REAL AMOUNT—1. In General.—While, as has already been stated, the amount in controversy is generally deemed to be the amount as claimed where there is no bad faith on the part of the plaintiff, nevertheless a rule more perhaps in consonance with absolute justice widely prevails in the federal courts, and finds also support elsewhere, that wherever the real amount is made to appear, it is the all-controlling criterion of jurisdiction.[1] Under

where gross negligence is averred, which exemplary damages swelled the amount claimed to a sum sufficient to give the court jurisdiction otherwise inadequate, cannot raise the presumption against plaintiff that he fraudulently claimed more than he could possibly recover for the sole purpose of conferring jurisdiction. Connellee *v.* Drake (Tex. App., 1890) 16 S. W. Rep. 175. On the other hand, where the items of a plaintiff's demand were more than $200, the jurisdictional minimum, but it appeared that a note of plaintiff's in favor of the defendant had been agreed to be applied in partial liquidation of plaintiff's demand, and sufficiently so that the amount claimed would be reduced below $200, the court was held to be divested of its jurisdiction. Abbott *v.* Chase, 55 Vt. 466; Wiseman *v.* Witherow, 90 N. Car. 140.

On Appeal.—The amount in controversy cannot be increased fictitiously for the sole purpose of conferring appellate jurisdiction.

Connecticut.—Lockwood *v.* Knapp, 4 Conn. 257.

Indiana.—Williamson *v.* Brandenberg, 133 Ind. 594.

Kentucky.—Burbage *v.* Squires, 3 Metc. (Ky.) 77.

Louisiana.—Copley *v.* Ross, 1 La. Ann. 310; Vogel *v.* Retaud, 4 La. Ann. 213; Cabrara *v.* Dinkgrave, 6 La. Ann. 735; King *v.* Reed, 7 La. Ann. 492; Hagenberger *v.* Wild, 9 La. Ann. 3; Thornhill *v.* Lloyd, 10 La. Ann. 282; Rutherford *v.* Hennen, 13 La. Ann. 336; Poree *v.* Valische, 15 La. Ann. 292; Pritchard *v.* Parker, 21 La. Ann. 745; Michoud *v.* Nolan, 24 La. Ann. 117; State *v.* Judge, 24 La. Ann. 601; Pointer's Succession, 30 La. Ann. 370; Cushing *v.* Sambola, 30 La. Ann. 426; March *v.* McNeely, 36 La. Ann. 287; Hall *v.* Curtis, 39 La. Ann. 504; Muller *v.* Zuberbier, 39 La. Ann. 888; Block *v.* Kearney, 43 La. Ann. 381.

United States.—Agnew *v.* Dorman, Taney (U. S.) 386; Clay Center *v.* Farmer's L. & T. Co., 145 U. S. 224.

Virginia.—Hansbrough *v.* Stinnet, 22 Gratt. (Va.) 593; McCarty *v.* Hamaker, 82 Va. 471.

Compare Fink *v.* Denny, 75 Va. 663; and, *contra*, State *v.* Judge, 9 La. Ann. 353; Carrollton Co. *v.* Harper, 12 La. Ann. 212.

Fictitious Set-off.—A defendant cannot acquire a right of appeal by filing a set-off manifestly specious and unprovable. Societa Italiana Di Beneficenza *v.* Sulzer, 138 N. Y. 468; Manchester Paper Mills Co. *v.* Heth (Va., 1893), 18 S. E. Rep. 189. Nor will such a set-off assist a plaintiff appealing from a judgment for defendant. Schultz *v.* Holbrook, 86 Iowa 569.

1. *United States.*—Symonds *v.* Greene, 28 Fed. Rep. 834; Simon *v.* House, 46 Fed. Rep. 317; Texas, etc., R. Co. *v.* Kuteman, 54 Fed. Rep. 547; U. S. Bank *v.* Moss, 6 How. (U. S.) 31; Stinson *v.* Dousman, 20 How. (U. S.) 461; Williams *v.* Nottawa, 104 U. S. 209; Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52; Dows *v.* Johnson, 110 U. S. 223; Wabash, etc., R. Co. *v.* Knox, 110 U. S. 304; Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611.

Connecticut.—Andrew *v.* Babcock, 63 Conn. 109.

Delaware.—Guenford *v.* Loose, 5 Del. 596.

Indiana.—Murphy *v.* Evans, 11 Ind. 517; Keadle *v.* Siddens, 131 Ind. 597; Williamson *v.* Brandenberg, 133 Ind. 594.

Illinois.—Baber *v.* Pittsburg, etc., R. Co., 93 Ill. 342.

Iowa.—Marlow *v.* Marlow, 56 Iowa 299; Young *v.* McWaid, 57 Iowa 101; Madison *v.* Spitsnogle, 58 Iowa 369; Centerville *v.* Drake, 58 Iowa 564; Bradenberger *v.* Rigler, 68 Iowa 300; Thurston *v.* Lamb (Iowa, 1894), 57 N. W. Rep. 875.

Kansas. — Adams *v.* Douglass County, McCahon (Kan.) 235; Stinson *v.* Cook (Kan., 1894), 35 Pac. Rep. 1118.

Kentucky.—Cobb *v.* Com., 3 T. B Mon. (Ky.) 391; Hoskins *v.* Roberts,

this rule the real amount as shown by the evidence produced at the trial governs on a question of jurisdiction when the allegations are in conflict with it.[1] And the amount shown by the record

2 B. Mon. (Ky.) 263; Mullins *v.* Bullock (Ky., 1892), 19 S. W. Rep. 8.

Louisiana.—Williams *v.* Vance, 2 La. Ann. 908; Holland *v.* Duchamp, 12 La. Ann. 784; Gustine *v.* New Orleans Oil Co., 13 La. Ann. 510; Vicksburg, etc., R. Co. *v.* Hamilton, 15 La. Ann. 521; Vincent *v.* Schweitzer, 17 La. Ann. 199; Gayarre *v.* Hays, 21 La. Ann. 307; Espinola's Succession, 21 La. Ann. 264; Blanchard *v.* Kenison, 25 La. Ann. 385; Wilkins *v.* Gantt, 32 La. Ann. 929; Thompson *v.* Lemelle, 32 La. Ann. 932; Wood *v.* Rocchi, 32 La. Ann. 1120; State *v.* Bonny, 32 La. Ann. 1187; Gillis *v.* Clayton, 33 La. Ann. 285; Hearsay *v.* Booth, 33 La. Ann. 300; Schmidt *v.* Brown, 33 La. Ann. 416; Lemle *v.* Routon, 33 La. Ann. 1005; Guss *v.* Routon, 33 La. Ann. 1046; Meyer *v.* Logan, 33 La. Ann. 1055; Smith *v.* Merchants' Mut. Ins. Co., 33 La. Ann. 1071; Stubbs *v.* McGuire, 33 La. Ann. 1089; Loeb *v.* Arent, 33 La. Ann. 1085; Bier *v.* Gautier, 35 La. Ann. 206; Cousley's Succession, 39 La. Ann. 570; Merchants', etc., Ins. Co. *v.* Levi, 40 La. Ann. 135; Cassidy's Succession, 40 La. Ann. 827; Romero's Succession, 43 La. Ann. 975.

New Jersey.—State *v.* Neumeyer, 51 N. J. L. 299.

New York.—Abernathy *v.* Abernathy, 2 Cow. (N. Y.) 413; Williams *v.* Bitner, 1 Lans. (N. Y.) 200.

Pennsylvania. — Freedenbery *v.* Meeteer, 4 Clark (Pa.) 182; Lelar *v.* Gault, 2 Phila. (Pa.) 78; Baer *v.* Garrett, 2 Leg. Chron. (Pa.) 207.

Texas.—Marshall *v.* Taylor, 7 Tex. 235; Dyer *v.* Dement, 37 Tex. 431; Clark *v.* Brown, 48 Tex. 212; Cotter *v.* Parks, 80 Tex. 539.

Vermont.—Thompson *v.* Colony, 6 Vt. 91; Briggs *v.* Beach, 18 Vt. 115; Bank of Rutland *v.* Cramton, 28 Vt. 330.

Virginia.—Batchelder *v.* Richardson, 75 Va. 835; Whitmer *v.* Spitzer, 81 Va. 64.

West Virginia.—Morrison *v.* Goodwin, 28 W. Va. 328; Currey *v.* Lawler, 29 W. Va. 111; Berry *v.* Cunningham, 37 W. Va. 302.

England.—Mayer *v.* Burgess, 4 El. & Bl. 655, 82 E. C. L. 655.

Compare Levy *v.* Collins, 32 La. Ann. 1003.

Thus, in an action of trespass on the case to recover damages for an alleged expulsion from the cars, where plaintiff's own statement and the testimony produced by him disclose that he is not entitled to recover $2000, a U. S. Circuit Court should dismiss the case for want of jurisdiction, the court saying: "While the general rule announced in Gordon *v.* Longest, 16 Pet. (U. S.) 97, is unquestioned that in actions of tort the amount claimed in the declaration is the test of jurisdiction, this case must be construed in connection with the act of Congress of 1875, the fifth section of which makes it the duty of the court to dismiss the case when it shall appear to its satisfaction that the suit does not really * * * involve a * * * controversy properly within its jurisdiction." Maxwell *v.* Atchison, etc., R. Co. 34 Fed. Rep. 286. And in Wolcott *v.* Sprague, 55 Fed. Rep. 545, where S. gave B. a mortgage on his property to secure $4000 and then executed to the cashier of a bank a deed absolute on its face, but in reality to secure a loan of $1000. S. insured the property for $4000, and delivered the policy to B. Subsequently, a fire occurring, B. sued the insurance company on the policy, and, upon a compromise of said suit, the company purchased B.'s interest in the mortgage. Then the bank cashier instituted an action to foreclose his mortgage, making the insurance company a party, which filed a cross-bill, setting up its $4000 mortgage, in which suit, on a plea to the jurisdiction, it was held that the real amount in controversy was not only the $1000 mortgage, but also the one for $4000, and that consequently the court was clothed with jurisdiction.

1. Ballerino *v.* Bigelow, 90 Cal. 500; Williams *v.* Leeds, Kirby (Conn.) 278; Strong *v.* Meacham, 1 Root (Conn.) 525; Shelton *v.* Dutton, 2 Root (Conn.) 440; Clark *v.* Whitbeck, 14 Ill. 393; Happel *v.* Brethauer, 70 Ill. 166; Bozell *v.* Hauser, 9 Ind. 522; New Orleans *v.* McArthur, 12 La. Ann. 47; People *v.* Marine Court, 36 Barb. (N. Y.) 341; Brisbane *v.* Batavia Bank, 36 Hun (N. Y.) 17; Blake *v.* Krom, 128 N. Y. 64; Caldwell *v.* Garmany, 3 Hill (S. Car.) 202; Allen *v.* Singleton, 1 Rice

and the pleadings, taken as a whole, when these disclose the real sum in dispute, is determinative of the question of jurisdiction.[1]

(S. Car.) 289; Lipsmeier *v.* Vehslage, 29 Fed. Rep. 175; Sharon *v.* Terry, 36 Fed. Rep. 337; Greene *v.* Tacoma, 53 Fed. Rep. 562; Horst *v.* Merkley, 59 Fed. Rep. 502; Elgin *v.* Marshall, 106 U. S. 578; Bradstreet Co. *v.* Higgins, 112 U. S. 227; Quebec F. Assur. Co. *v.* Anderson, 13 Moore P. C. C. 477. *Compare* Sullivan *v.* Vail, 42 Conn. 90; The Jesse Williamson, Jr., 108 U. S. 305.

1. *Alabama.*—Wagnor *v.* Turner, 73 Ala. 197.

Connecticut.—Moultrop *v.* Bennett, Kirby (Conn.) 351; Gates *v.* Jones, 1 Root (Conn.) 238; Lord *v.* Merwin, 1 Root (Conn.) 276; Lord *v.* Waterhouse, 1 Root (Conn.) 430; Guille *v.* Brown, 38 Conn. 237; Welles *v.* Allen, 41 Conn. 140.

Illinois.—Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201; Burst *v.* Wayne, 13 Ill. 599; Mattingly *v.* Darwin, 23 Ill. 618; Cox *v.* McGuire, 26 Ill. App. 315; Seafkas *v.* Evey, 29 Ill. 178.

Indiana.—Epperly *v.* Little, 6 Ind. 344.

Iowa.—Davis *v.* Upright, 54 Iowa 752; Reed *v.* Shum, 63 Iowa 378; Ardery *v.* Chicago, etc., R. Co., 65 Iowa 723; Kurtz *v.* Hoffman, 65 Iowa 260; Brock *v.* Barr, 70 Iowa 399.

Louisiana.—Grogreve *v.* Windhorst, 21 La. Ann. 296; Crescent City Live Stock, etc., Co. *v.* Larrieux, 30 La. Ann. 798; Miller *v.* Gidiere, 36 La. Ann. 201.

Michigan.—Raymond *v.* Hinkson, 15 Mich. 113.

Minnesota.—Goncelier *v.* Foret, 4 Minn. 13; Stevers *v.* Gunz, 23 Minn. 520.

Missouri.—Kerr *v.* Simmons, 11 Mo. App. 595; Owens *v.* Branson, 28 Mo. App. 584; Colvin *v.* Sutherland, 32 Mo. App. 77; Stephenson *v.* Porter, 45 Mo. 358.

Rhode Island.—Edwards *v.* Hopkins, 5 R. I. 138.

Texas.—Lowe *v.* Dowbarn, 26 Tex. 507.

United States.—Sewall *v.* Chamberlain, 5 How. (U. S.) 6; Jenks *v.* Lewis, 3 Mason (U. S.) 503; Lee *v.* Watson, 1 Wall. (U. S.) 337; Schacker *v.* Hartford F. Ins. Co., 93 U. S. 241; Peyton *v.* Robertson, 9 Wheat. (U. S.) 527; New Jersey Zinc Co. *v.* Trotter, 108 U. S. 564; Opelika City *v.* Daniel, 109 U. S. 108; Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514; Street *v.* Ferry, 119 U. S. 385; Gibson *v.* Shufeldt, 122 U. S. 27; Cox *v.* Western Land, etc., Co., 123 U. S. 375; U. S. *v.* Hill, 123 U. S. 681; Harris *v.* Barber, 129 U. S. 366.

Vermont.—Bishop *v.* Warner, 22 Vt. 591; Paul *v.* Burton, 32 Vt. 148; Mason *v.* Hutchins, 32 Vt. 780.

Thus in the case of Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, in which plaintiffs sought damages for a refusal by defendant to receive and carry 1000 kegs of beer, the declaration contained two counts, each claiming $1200 damages. Subsequently plaintiffs amended their declaration by inserting an *ad damnum* clause in the sum of $10,000, and judgment was rendered for the defendant. Plaintiffs appealed, and although there was an agreement of counsel that only the declaration as amended should be transmitted, the Supreme Court held that it was without jurisdiction, because the mere fact that an *ad damnum* larger than the minimum limit, i.e. $5000, is filed when the record discloses that the amount in dispute is smaller, will not clothe it with jurisdiction in error.

The Amount Recovered is frequently the index of the real amount, especially in suits where the relief sought is of a liquidatable character, and in questions of appellate jurisdiction. Thus in Stevens *v.* Bafs, 1 Root (Conn.) 127, there was an action on a note for £20 and interest (£20 being the statutory minimum limit of appellate jurisdiction at the time), said note being given to oblige defendant to abide an award. The sum demanded was £30, but the recovery was only £13 5s. 5d., and it was held that there was no right of appeal. Pettibone *v.* Phelps, 2 Root (Conn.) 137; Fuller *v.* Reed, 2 Root (Conn.) 188; Bateman *v.* Sisson, 70 Iowa 518; Brillis *v.* Blumenthal, 13 Fla. 577; Turner *v.* Pash (Ky., 1891), 17 S. W. Rep. 809; State *v.* Judge, 24 La. Ann. 601; State *v.* Shakespeare (La., 1889), 6 So. Rep. 592; Myers *v.* Myers, 22 Mo. App. 94; McCauly *v.* Barnes, 1 N. J. L. 52; Petrie *v.* Adams, 71 N. Y. 79; McMillan *v.* Cronin, 75 N. Y. 474; Schenck *v.* Marx, 125 N. Y. 703; The Steamship Haverton, 137 U. S. 145;

The mere fact that the cause of action arises out of a demand whose total sum exceeds the jurisdictional limit, will not prevent the attaching of that jurisdiction, provided the real amount due in the particular case is alone claimed.[1]

The Real Value and not the alleged value of property is the touchstone of jurisdiction in actions where value is the gravamen, such as replevin.[2]

Exemplary Damages allowed in actions of malicious trespass are calculable in addition to the actual damage in determining the jurisdictional amount.[3]

Attorney's Fees especially stipulated for in promissory notes are not considered costs, but are calculable in determining the amount in controversy.[4]

Courts Will Investigate the question in every instance in order to determine the real amount, and they will not be bound by allegations, but will carefully weigh and scrutinize the proceedings as a whole.[5]

Whitmer *v.* Spitzer, 81 Va. 64; Neal *v.* Van Winkle, 24 W. Va. 401. See also Blakeslee *v.* Murphy, 44 Conn. 188; Beard *v.* Kinney, 6 Blackf. (Ind.) 425.

1. Winston *v.* Majors, 6 Ala. 659; Wilhelms *v.* Noble, 36 Ga. 599; Maurer *v.* Derrick, 1 Ill. 197; Culley *v.* Laybrook, 8 Ind. 285; Inhabitants of Congressional Tp. *v.* Weir, 9 Ind. 224; Guard *v.* Circle, 16 Ind. 401; Pate *v.* Shafer, 19 Ind. 173; Brown *v.* Cain, 79 Ind. 93; Hapgood *v.* Doherty, 8 Gray (Mass.) 373; Best *v.* Best, 16 Mo. 530; Thompson *v.* Gibson, 2 Overt. (Tenn.) 235; Bridge *v.* Ballew, 11 Tex. 269; Dalby *v.* Murphy, 25 Tex. 354.

2. Sanford *v.* Scott, 38 Conn. 244; Tyler *v.* Bowlus, 54 Ind. 333; Leslie *v.* Reber, 4 Kan. 315; Leonard *v.* Hannon, 105 Mass. 113; Blake *v.* Darling, 116 Mass. 300; Octo *v.* Teahan, 133 Mass. 430; The Sydney, 139 U. S. 331. But *compare* Maxfield *v.* Scott, 17 Vt. 634.

3. Barry *v.* Edmunds, 116 U. S. 550. But in actions of contract such damages are excluded from the determination. Peterson *v.* Thomas (Tex. Civ. App., 1893), 24 S. W. Rep. 1124.

Double Damages and other statutory allowances of extra damages are generally excluded in computing the jurisdictional sum as indicated by the real amount. Hussey *v.* King, 83 Me. 568; Grau *v.* St Louis, etc., R. Co., 54 Mo. 240; Natchez *v.* Mallery, 54 Miss. 498; Morris *v.* Rucks, 62 Miss. 70; Nelson *v.* Nelson, 2 Munf. (Va.) 542.

4. Blankenship *v.* Wartelsky (Tex., 1887), 6 S. W. Rep. 140; Murrah *v.* Brichta (Tex., 1888), 9 S. W. Rep. 185; Altgelt *v.* Harris (Tex., 1889), 11 S. W. Rep. 857; Waters *v.* Walker (Tex. App., 1891), 17 S. W. Rep. 1085. *Compare* Simmons *v.* Terrell, 75 Tex. 275. *Contra*, Moore *v.* Foy (Tex. App., 1891), 15 S. W. Rep. 199; Baker *v.* Howell, 44 Fed. Rep. 113; Spiesberger *v.* Thomas, 59 Iowa 606. See PROMISSORY NOTES.

5. *Connecticut.*—Bridgeport *v.* Blinn, 43 Conn. 274.

Illinois.—Clark *v.* Cornelius, 1 Ill. 46; Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638.

Indiana.—Indianapolis, etc., R. Co. *v.* Elliott, 20 Ind. 430; Indianapolis, etc., R. Co. *v.* Kerchival, 24 Ind. 139; Toledo, etc., R. Co. *v.* Tilton, 27 Ind. 71; Jeffersonville, etc., R. Co. *v.* Brevoort, 30 Ind. 324; Louisville, etc., R. Co. *v.* Johnson, 67 Ind. 546.

Iowa.—Ruiter *v.* Plate, 77 Iowa 17; Nash *v.* Beckman, 86 Iowa 249.

Louisiana.—Lanier *v.* Gallatas, 13 La. Ann. 175; Wilkins *v.* Gantt, 32 La. Ann. 929; State *v.* Voorhies, 34 La. Ann. 1142; Denegre *v.* Moran, 36 La. Ann. 423; Breaux *v.* Recorder, 36 La. Ann. 742.

Missouri.—Kerr *v.* Simmons, 11 Mo. App. 595; Anchor Milling Co. *v.* Walsh, 97 Mo. 287; Wolff *v.* Matthews, 98 Mo. 246.

New York.—People *v.* Horton, 64 N. Y. 58; Campbell *v.* Mandeville, 110 N. Y. 628; Shaw *v.* Roberts (Supreme Ct.), 14 N. Y. Supp. 579.

An Appellant's Right to an appeal is determined by the amount shown by him to be really and legally due, and not by the recovery.[1]

2. **Amount Must Appear.**—Following almost as a corollary on the principle enunciated, that the real amount is a very important element in determining the question of jurisdiction, is the well-settled doctrine that the record must affirmatively show the amount in controversy in order that the court may take jurisdiction.[2]

Pennsylvania.—Byrne *v.* Gordon, 2 Brown (Pa.) 271.

South Carolina.—Allen *v.* Singleton, 1 Rice (S. Car.) 289.

United States.—Street *v.* Ferry, 119 U. S. 385; Culver *v.* Crawford County, 4 Dill. (U. S.) 239; Gray *v.* Blanchard, 97 U. S. 564; U. S. *v.* Hill, 123 U. S. 681; Davie *v.* Heyward, 33 Fed. Rep. 93.

Affidavits Showing Amount.—A rule prevails in the Supreme Court of the U. S. in appeals thereto, when the real amount can be determined in no other way, to allow affidavits of value to be made in order that the court may be apprised of its jurisdiction *vel non*. Williamson *v.* Kincaid, 4 Dall. (U. S.) 19; Youngstown Bank *v.* Hughes, 106 U. S. 523; Wilson *v.* Blair, 119 U. S. 387.

In an early case it was even held that the amount could be shown by *viva voce* testimony. U. S. *v.* Brig Union, 4 Cranch (U. S.) 216.

In Missouri.—By Gen. St. 1865, when the amount does not appear, the defendant is entitled to a verbal statement provided thereby. Gillihan *v.* Wren, 44 Mo. 377. *Compare* Agnew *v.* Dorman, Taney (U. S.) 386.

1. Crabtree *v.* Cliatt, 22 Ala. 181; House *v.* Lassiter, 49 Ala. 307; Langan *v.* Langan, 86 Cal. 132; Purcell *v.* Booth, 6 Dakota 17; Halpin *v.* Maxwell, 24 La. Ann. 94; Beirne *v.* Gill, 34 La. Ann. 7; Imhoff *v.* Imhoff (La., 1893), 13 So. Rep. 90; Wolff *v.* Matthews, 98 Mo. 246; State *v.* Gill, 107 Mo. 44; King *v.* Galvin, 62 N. Y. 238; Pennie *v.* Continental Ins. Co., 67 N. Y. 278; Rosevelt *v.* Linkert, 67 N. Y. 447; Brown *v.* Sigourney, 72 N. Y. 122; Wiley *v.* Brigham, 81 N. Y. 13; Knapp *v.* Deyo, 108 N. Y. 518; A. Hall Terra Cotta Co. *v.* Doyle, 133 N. Y. 603; Gorman *v.* Havira, 141 U. S. 206; American Express Co. *v.* Gray, 62 Vt. 421. See *post*, this article, XII. APPEALABLE AMOUNT.

In New York.—By Code of Procedure, wherever there come in litigation the mutual accounts of plaintiff and defendant, a justice has no jurisdiction when their sum total exceeds $400; but he is made the arbiter of that question, and it is only when such accounts shall "be proven to his satisfaction" to be in excess of that sum that his jurisdiction is ousted. Glackin *v.* Zeller, 52 Barb. (N. Y. Super. Ct.) 147; Boston Mills *v.* Eull, 6 Abb. Pr. N. S. (N. Y.) 319; Burdick *v.* Hale, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 60; Lamoure *v.* Caryl, 4 Den. (N. Y.) 370; White *v.* Place, 40 Hun (N. Y.) 481; Fuller *v.* Conde, 47 N. Y. 89.

2. *Alabama.*—Cahuzac *v.* Samini, 29 Ala. 288.

Arkansas.—McClure *v.* Hill, 36 Ark. 268.

California. — Hoyt *v.* Stearns, 39 Cal. 92; Heinlen *v.* Heilbron, 71 Cal. 557.

Connecticut.—Miles *v.* Troop, 1 Root (Conn.) 148; Lord *v.* Parmela, 1 Root (Conn.) 158; Melfon *v.* Hammond, 1 Root (Conn.) 518.

Illinois.—Trader *v.* McKee, 2 Ill. 558; McGuirk *v.* Burry, 93 Ill. 118; Lewis *v.* Shear, 93 Ill. 121; Hancock *v.* Tower, 93 Ill. 150; Morris *v.* Preston, 93 Ill. 215; Piper *v.* Jacobson, 98 Ill. 389.

Kansas.—Loomis *v.* Bass, 48 Kan. 26.

Kentucky.—Farron *v.* Summers, 3 Litt. (Ky.) 460.

Louisiana.—Gardere *v.* Garvey, 2 La. Ann. 136; Plique *v.* Bellome, 2 La. Ann. 293; Webb *v.* Kemp, 2 La. Ann. 337; McDonogh *v.* Derbigny, 2 La. Ann. 956; Spangenberg *v.* Bigelow, 3 La. Ann. 70; McDonogh *v.* Nugent, 4 La. Ann. 28; Lemoine *v.* Garcia, 4 La. Ann. 366; Second Municipality *v.* Corning, 4 La. Ann. 407; Kellar *v.* Palfrey, 8 La. Ann. 282; Bersheim *v.* Hudson, 8 La. Ann. 456; Le Blanc *v.* Pittman, 16 La. Ann. 430;

3. Amount Unaffected by Agreement of Parties.—No agreement of parties or consent on their part, either express or by implication,

New Orleans *v.* Imley, 12 La. Ann. 87; Boutte *v.* Maillard, 19 La. Ann. 276; State *v.* Levee Steam Cotton Press Co., 22 La. Ann. 622; State *v.* Laresche, 24 La. Ann. 148; State *v.* Friedlander, 25 La. Ann. 43; State *v.* Judge, 27 La. Ann. 676; Lallande *v.* Trezevant, 39 La. Ann. 830; Goodrich *v.* Newell, 43 La. Ann. 378; Miller *v.* Cappel, 39 La. Ann. 881; Adams *v.* Starks, 33 La. Ann. 304.

Missouri.—Cook *v.* Decker, 63 Mo. 328; State *v.* Gill, 107 Mo. 44.

New Jersey.—Coyle *v.* Coyle, 26 N. J. L. 132.

Ohio. — Aten *v.* Morgan, Tapp. (Ohio) 232.

United States.—U. S. *v.* Pratt Coal, etc., Co., 18 Fed. Rep. 708; Oleson *v.* Northern Pac. R. Co., 44 Fed. Rep. 1; Home Ins. Co. *v.* Nobles, 63 Fed. Rep. 641; Simon *v.* House, 46 Fed. Rep. 317; Continental Ins. Co. *v.* Rhoads, 119 U. S. 237; Halsted *v.* Buster, 119 U. S. 341; Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379; Börs *v.* Preston, 111 U. S. 252; Morris *v.* Gilmer, 129 U. S. 315; Menard *v.* Goggan, 121 U. S. 253; Everhart *v.* Huntsville College, 120 U. S. 223; Johnson *v.* Wilkins, 116 U. S. 392; Reynolds *v.* Burns, 141 U. S. 117; Cameron *v.* U. S., 146 U. S. 533; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227; Abadie *v.* U. S., 149 U. S. 261; El Paso Water Co. *v.* El Paso (1894), 152 U. S. 157.

Vermont.—Perkins *v.* Rich, 12 Vt. 595.

Virginia.—Maitland *v.* McDearman, 1 Va. Cas. 131.

West Virginia.—Rymer *v.* Hawkins, 18 W. Va. 309; Aspinwall *v.* Barrickman, 29 W. Va. 508; McCoy *v.* McCoy, 33 W. Va. 60.

Amount is not Presumed.—It is the real and not the problematical amount which governs; the law raises no presumption, in the absence of the affirmative showing of the amount in controversy, as to what the real amount may be. Thus it was held in Rich *v.* Bray, 37 Fed. Rep. 273, that a declaration that the amount involved was unknown, but that it was largely in excess of the jurisdictional minimum, was not sufficient to confer jurisdiction. Peters *v.* Goodrich, 3 Conn. 146; Griswold *v.* Mather, 5 Conn. 435; Abbe *v.* Goodwin, 7 Conn. 377; Umlauf *v.* Umlauf, 103 Ill. 651; Swan *v.* Bry, 21 La. Ann. 481; Wade *v.* Loudon, 30 La. Ann. 660; Lane *v.* Doak, 48 Tex. 227; Mawthe *v.* Crozier, 50 Tex. 153; Murphy *v.* East Portland, 42 Fed. Rep. 308; Olney *v.* Steamship Falcon, 17 How. (U. S.) 19. *Compare, contra*, Hefflin *v.* Bell, 30 Vt. 134.

The Burden of Proving Jurisdiction rests upon the party seeking a revision of the case. Hagan *v.* Foison, 10 Pet. (U. S.) 160. See art. EVIDENCE.

Want of Jurisdiction, when caused by the fact that the amount involved falls below the minimum limit, must affirmatively appear. Babcock *v.* Clayton County, 65 Iowa 110; Henkle *v.* Keota, 68 Iowa 334; District Tp. *v.* Independent Dist., 72 Iowa 687; Cook *v.* Decker, 63 Mo. 328; Parker *v.* Eaton, 25 Barb. (N. Y.) 122; Williams *v.* Shields, 2 W. N. C. (Pa.) 176.

The Court Will Dismiss the case when the real amount involved in controversy does not affirmatively appear. Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120; Home *v.* Duff, 5 Colo. 574; Spangenberg *v.* Bigelow, 3 La. Ann. 70; State *v.* Judge, 22 La. Ann. 49; Case *v.* Hurley, 22 La. Ann. 333; State *v.* Dopf, 22 La. Ann. 400; Zacharie *v.* Lyons, 22 La. Ann. 618; Hite *v.* Hinsel, 39 La. Ann. 113; Pinckney *v.* Wolf, 41 La. Ann. 306; Schwartz *v.* Firemen's Charitable Assoc., 41 La. Ann. 404; Webb *v.* Hoth (La., 1888), 15 So. Rep. 536; Stephen *v.* Eiseman, 54 Miss. 535; Eacrit *v.* Keen, 4 N. J. L. 203; Gulf, etc., R. Co. *v.* Buford, 85 Tex. 430; Kenyon *v.* Knipe, 46 Fed. Rep. 309; Parker *v.* Morrice, 106 U. S. 1; Hunt *v.* Blackburn, 127 U. S. 774; Walter *v.* Chichester, 84 Va. 723; Henry's Succession, 45 La. Ann. 156; Martin *v.* Harvey, 54 Miss. 685; Edwards *v.* Hopkins, 5 R. I. 138; Ontario, etc., R. Co. *v.* Marcheterre, 17 Can. Sup. Ct. Rep. 141. *Compare, contra*, Democrat Pub. Co. *v.* Lewis (Iowa, 1894), 57 N. W. Rep. 869.

In Home Ins. Co. *v.* Nobles, 63 Fed. Rep. 641, it was held that a bill for an injunction restraining defendants from further issuing a certain circular alleged to be detrimental to complainant's business, and from in any way interfering with that business by threats, etc., which does not contain any statement of the amount of dam-

can affect the real amount in controversy so as to render it within a court's jurisdiction, when without such consent or agreement it would not be.[1]

4. Amount Not Dependent on Collateral Effect of Judgment.— Naturally ensuing from what has already been said on the question of real amount is the further principle that neither the probative force of a judgment nor its collateral effect on another suit or suits can in any manner influence the determination of the amount in controversy, that being only the sum in dispute in the case then on trial.[2]

ages sustained or apprehended, or of the value of the matter in controversy, or of the object sought to be obtained, is not sufficient to give the court jurisdiction. But such a bill will not be dismissed where it does not affirmatively appear that the court is without jurisdiction, but complainant will be given leave to move to amend.

1. Leigh *v.* Mason, 2 Ill. 249; Williams *v.* Blankenship, 12 Ill. 122; Horton *v.* Sawyer, 59 Ind. 587; Denegre *v.* Moran, 35 La. Ann. 346; Gamber *v.* Holben, 5 Mich. 331; Stone *v.* Corbett, 20 Mo. 353; Aten *v.* Morgan, Tapp. (Ohio) 232; Haynes *v.* Briggs, 41 Fed. Rep. 468; Gruner *v.* U. S., 11 How. (U. S.) 163; Glidden *v.* Elkins, 2 Tyler (Vt.) 218. See also Miller *v.* Gidiere, 36 La. Ann. 201; Groves *v.* Janssens, 9 Exch. 481.

Neither Appearance in a lower court nor appealing to a higher can confer jurisdiction when the real amount involved is insufficient. Sons of America, etc., Assoc. *v.* Denver, 15 Colo. 592; Crane *v.* Farmer, 14 Colo. 294; McCloskey *v.* Lake View Min., etc., Co., 18 Colo. 65; Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120; Brondberg *v.* Babbott, 14 Neb. 517. Nor the filing of an answer. Citizens' Bank *v.* Condran, 22 La. Ann. 53; Connors *v.* Citizens' Mut. Ins. Co., 22 La. Ann. 330; Southern Pac. Co. *v.* Burns (Tex. Civ. App., 1893), 25 S. W. Rep. 288. Nor confessing judgment. Feillett *v.* Engler, 8 Cal. 76; Bellinger *v.* Ford, 14 Barb. (N. Y.) 250; Slocumb *v.* Cape Fear Shingle Co., 110 N. Car. 24. Nor on an appeal increasing the *ad damnum* in a case otherwise unappealable. Hurlbut *v.* Rogers, 2 Root (Conn.) 60; Savage *v.* White, 2 Root (Conn.) 377; Webster *v.* Buffalo Ins. Co., 110 U. S. 386. But *compare* Tintsman *v.* National Bank, 100 U. S. 6.

In Iowa, by special statute, parties may by consent extend the jurisdiction of a justice of the peace to sums in excess of his ordinary maximum limit. Hodge *v.* Ruggles, 36 Iowa 42; Long *v.* Loughran, 41 Iowa 543; Marshalltown Bank *v.* Kennedy, 53 Iowa 357; Brown *v.* Davis, 59 Iowa 641; Schlieman *v.* Webber, 65 Iowa 114; Houghton *v.* Bauer, 70 Iowa 314; Edwards *v.* Cosgro, 71 Iowa 296.

In Ohio a similar rule prevailed. Deming *v.* Austen, Wright (Ohio) 717.

In Pennsylvania, see Deming *v.* Holler, 3 Luz. Leg. Obs. (Pa.) 226; Boon *v.* Collins, 1 Phila. (Pa.) 438; Butler *v.* Urch, 2 Grant's Cas. (Pa.) 247.

2. Hartford F. Ins. Co. *v.* Bowner Mercantile Co. (1893), 56 Fed. Rep. 378; Grant *v.* M'Kee, 1 Pet. (U.S.) 248; Elgin *v.* Marshall, 106 U.S. 578; Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514; Gibson *v.* Shufeldt, 122 U. S. 27; Hilton *v.* Dickinson, 108 U. S. 165; The Jesse Williamson, Jr., 108 U. S. 305; New Jersey Zinc Co. *v.* Trotter, 108 U. S. 564; Opelika City *v.* Daniel, 109 U. S. 108; Wabash, etc., R. Co. *v.* Knox, 110 U. S. 304; New England Mortgage Security Co. *v.* Gay, 145 U. S. 123; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227; U. S. *v.* Wanamaker, 147 U. S. 149; Lamar Ins. Co. *v.* Gulick, 96 Ill. 619; Lotz *v.* Mason County (Wash., 1893), 6 Wash. 166. *Compare* Troy *v.* Evans, 97 U. S. 1; Richardson *v.* Green, 130 U. S. 104. See also Endom *v.* Ludeling, 34 La. Ann. 1024; State *v.* Cole, 34 La. Ann. 1215.

Difference Between Value Found and Judgment.—In a collision case in admiralty, where the District Court gives a judgment for value of the effects, to wit, the sum of $6057, but the Circuit Court awards a judgment for only $3028.50, the Supreme Court is without jurisdiction on libellant's appeal, because the real amount in controversy

VI. Amount Must Be Pecuniary.—The amount in controversy must always be an amount either consisting of money or readily calculable in money.[1]

VII. Accrued Interest—1. When Calculable—In the absence of statutory inhibition on claims naturally bearing interest, such as promissory notes, coupon bonds, and the like, interest accruing after suit is brought forms a part of, and is calculable in determining, the amount in controversy.[2]

is the difference between the latter judgment and the value as found by the former. The Steamship Haverton, 137 U. S. 145; Dows *v.* Johnson, 110 U. S. 223; Hilton *v.* Dickinson, 108 U. S. 165. *Contrast* Irvine *v.* Steamship Hesper, 122 U. S. 256; Metcalfe *v.* Steamship Alaska, 130 U. S. 201.

Contingent Loss Not Calculable.—It is not any contingent loss which a party may suffer by reason of judgment going against him which affects jurisdiction, but the amount actually in dispute. Ross *v.* Prentiss, 3 How. (U. S.) 771.

For an Exhaustive Review of the cases in the Supreme Court of the United States and an interesting and learned discussion of the principle of real amount as applied in that court, see the opinion of Waite, C.J., in Hilton *v.* Dickinson (1882), 108 U. S. 165.

1. Blakeslee *v.* Murphy, 44 Conn. 188; Farrow *v.* Summers, 3 Litt. (Ky.) 460; Barry *v.* Mercein, 5 How. (U. S.) 103; Youngstown Bank *v.* Hughes, 106 U. S. 523; Hoadley *v.* San Francisco, 124 U. S. 639; Farnsworth *v.* Montana, 129 U. S. 104; Wineberg *v.* Hampson, 19 Can. Sup. Ct. Rep. 369; Pratt *v.* Fitzhugh, 1 Black (U. S.) 271; DeKrafft *v.* Barney, 2 Black (U. S.) 704; Smith *v.* Adams, 130 U. S. 167; Sanx *v.* Patton, 34 La. Ann. 1155; State *v.* Miscar, 34 La. Ann. 834; Bell *v.* West Point, 51 Miss. 262. *Compare* Burke *v.* Wall, 29 La. Ann. 38, 29 Am. Rep. 316; Ritchie *v.* Mauro, 2 Pet. (U. S.) 243; Grant *v.* M'Kee, 1 Pet. (U. S.) 248; Scott *v.* Lunt, 6 Pet. (U. S.) 349; Ross *v.* Prentiss, 3 How. (U. S.) 772. See note to Richmond *v.* Van Clief, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 97. *Compare* also Smith *v.* Whitney, 116 U. S. 167; Columbian Ins. Co. *v.* Wheelright, 7 Wheat. (U. S.) 534; U. S. *v.* Addison, 22 How. (U. S.) 174; Lee *v.* Lee, 8 Pet. (U. S.) 44; Weston *v.* Charleston, 2 Pet. (U. S.) 449; Holmes *v.* Jennison, 14 Pet. (U. S.) 540—partly a money judgment.

The Appellate Court may acquire jurisdiction although the entire judgment is not calculable in money. Vonderweit *v.* Centerville, 15 Ind. 447. See also Farrow *v.* Summers, 3 Litt. (Ky.) 460, holding that under ancient statutory jurisdictional limits, the amount might be either in money or in kind.

Market Value Not Essential. — A market value is not necessary to bring the subject-matter within the jurisdictional amount of the U. S. Supreme Court. Sparrow *v.* Strong, 3 Wall. (U. S.) 97. *Compare* Lownsdale *v.* Parrish, 21 How. (U. S.) 290.

In Indiana. — By statute it is provided that the mere fact that another matter, not of a pecuniary character *per se*, is also involved in addition to a money claim, will not affect the exclusive jurisdiction of the appellate court. Harris *v.* Howe, 129 Ind. 72; Wysor *v.* Johnson, 1 Ind. App. 419; Hallett *v.* Hallett (Ind. App., 1892), 30 N. E. Rep. 534; Durham *v.* State, 133 Ind. 422.

In Virginia also. Cook *v.* Bondurant, 85 Va. 47.

2. Thus, for example, in Wilson *v.* Sparkman, 17 Fla. 871, which was a suit upon a note, the principal of which, without the addition of the interest, was insufficient to confer jurisdiction, and the court said: "After searching all the authorities at hand, we find no case in which, where the jurisdiction is limited to a certain 'amount in controversy,' such an amount is determined by the amount of principal of a note or bond in terms bearing interest, unless so provided by statute." And it was held that interest should be added in this case. Hempstead *v.* Collins, 6 Ark. 533; Malsof *v.* Vaughn, 23 Cal. 61; Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96; Denver Brick Mfg. Co. *v.* McAllister, 6 Colo. 326; Cramer *v.* Mc-

2. When Not Calculable—Excluded by Statute.—Interest forms no part of the amount in controversy, so far as affecting jurisdiction, when a statute defining a court's jurisdiction excludes it *eo nomine* from computation.[1]

Dowell, 6 Colo. 369; Tindall *v.* Meeker, 2 Ill. 137; Dowling *v.* Stewart, 4 Ill. 194; Welsh *v.* Karstens, 60 Ill. 118; Gregg *v.* Wooden, 7 Ind. 499; Congressional Tp. *v.* Weir, 9 Ind. 224; Schlenker *v.* Taliaferro, 20 La. Ann. 565; Barber *v.* Kennedy, 18 Minn. 216; Reese *v.* Hawks, 63 Md. 130; Scott *v.* Russell, 8 Mo. 407; Stone *v.* Murphy, 2 Iowa 35; Sweeny *v.* Lowe, 6 B. Mon. (Ky.) 314; Orth *v.* Clutz, 18 B. Mon. (Ky.) 223; Bracy *v.* Bracy, 12 Bush (Ky.) 153; Kleni *v.* Allenback, 6 Nev. 159; Fake *v.* Addy, 15 Wend (N. Y.) 76; Ansley *v.* Alderman, Phill. (N. Car.) 215; Simpson *v.* M'Million, 1 Nott. & M. (S. Car.) 192; Collier *v.* Rogers, 2 Brev. (S. Car.) 41; Melton *v.* Ellison, 2 Brev. (S. Car.) 399; Moseley *v.* Farrell, 31 Tex. 613; Sherman *v.* Clark, 3 McLean (U. S.) 91; Smith *v.* Smith, 15 Vt. 620. *Compare* Rohr *v.* Anderson, 51 Md. 205; Hedgecock *v.* Davis, 64 N. Car. 650. See *contra*, Chatten *v.* Heffley, 21 Ark. 313; Sherrill *v.* Wilson, 29 Ark. 384; Jackson *v.* Whitfield, 51 Miss. 202; McDaniels *v.* Johnson, 36 Vt. 687.

In Assumpsit on a simple contract in a court whose minimum jurisdiction was $100, where in a suit the bill of particulars filed showed a balance due below that minimum, the court allowed interest to be calculated in determining its jurisdiction. Stone *v.* Hawkins, 56 Conn. 111; Crabtree *v.* Cliatt, 22 Ala. 181. *Contra*, Blake *v.* Knom, 128 N. Y. 64.

In Debts, Covenants, and all contracts whose amount and value is fixed and determinable, interest is generally calculable in estimating the amount in controversy. Howell *v.* Milligan, 13 Ark. 40; Carter *v.* Dade, 1 Stew. (Ala.) 18; Hogan *v.* Adam, 3 Stew. (Ala.) 58; Howard *v.* Wear, Minor (Ala.) 84; Curtis *v.* Gary, Minor (Ala.) 118; Fidler *v.* Hall, 2 Metc. (Ky.) 461; Stone *v.* Ware, 6 Munf. (Va.) 541; Stratton *v.* Mutual Assur. Soc., 6 Rand. (Va.) 22; Woodward *v.* Jewell, 140 U. S. 247. *Contra*, Insley *v.* Jones, 4 Exch. Div. 16.

Judgments.—Interest generally runs on recovered judgments, and unless forbidden by statute is calculable in determining the amount in controversy on appeal. State *v.* Police Jury, 34 La. Ann. 95; Dryden *v.* Wyllis, 51 Iowa 534; Clapham *v.* Lewis, 1 Va. Cas. 182; Boswell *v.* Kilborn, 12 Moore, P. C. C. 467.

Interest Does Not Necessarily Oust Jurisdiction of a court when principal sued on independent thereof falls within that jurisdiction, but the interest, if added, would swell the amount in excess. State *v.* Westbrook, 7 Blackf. (Ind.) 138; Bakewell *v.* Howell, 2 Metc. (Ky.) 268; Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61. But see *contra*, in *Tennessee*, Dixon *v.* Caruthers, 9 Yerg. (Tenn.) 30; Morrow *v.* Colloway, Mart. & Y. (Tenn.) 240.

Interest Accruing After Suit Brought in an Appeal from a Justice of the Peace.—Where interest which had accrued after suit was brought was added to the amount recovered before a justice of the peace, whereby on appeal therefrom a larger amount is recovered than was recovered before the justice, the jurisdiction of the court will not thereby be ousted, although its juristion depends on the sum demanded. Mitcheltree *v.* Sparks, 2 Ill. 198; Haight *v.* McVeagh, 69 Ill. 624; Bargis *v.* Farrar, 45 Ind. 41; Trego *v.* Lewis, 58 Pa. St. 463; Linton *v.* Vogel, 98 Pa. St. 459; Shaw *v.* Squires, 153 Pa. St. 150; Factors, etc., Ins. Co. *v.* New Harbor Protection Co., 39 La. Ann. 583.

1. The act of Congress of 1887 limits the jurisdiction of the U. S. Circuit Courts to cases "in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000." This clause was construed to inhibit jurisdiction to such courts of actions on bonds, coupons, and interest thereon, the aggregate amount of which bonds and coupons was less than said sum of $2000, although with the interest added it amounted to more. Moore *v.* Edgefield, 32 Fed. Rep. 498; Howard *v.* County, 43 Fed. Rep. 276; Walker *v.* U. S., 4 Wall. (U. S.) 163; Knapp *v.* Banks, 2 How. (U. S.) 73; Fisher *v.* Hall, 1 Ark. 275; Nelson *v.* Ladd (S. Dak., 1893), 54 N. W. Rep, 809; Ball *v.* Biggam, 43

VIII. AGGREGATED AMOUNT—1. Several Plaintiffs.—Where several parties sue jointly for the recovery of money or property, claiming under one common right, and the adverse party is wholly unaffected by the manner in which it may be apportioned in case of recovery, it is the aggregate sum of their several claims which determines the amount in controversy.[1]

Can. 327; Decklar *v.* Frankenberger, 30 La. Ann. 410; Breaux *v.* Recorder, 33 La. Ann. 14; Breaux *v.* Recorder, 36 La. Ann. 742; Conger *v.* Nesbitt, 30 Minn. 436; Hedgecock *v.* Davis, 64 N. Car. 650. *Contra*, Bloom *v.* Kern, 30 La. Ann. 1263.

On appeal interest is not calculable on judgments when it is especially excluded by statute. Denison *v.* Denison, 16 Conn. 34; Cincinnati, etc., R. Co. *v.* Grames (Ind., 1893), 33 N. E. Rep. 896; Ryan *v.* Waule, 63 N. Y. 57; Produce Bank *v.* Morton, 67 N. Y. 199; Van Gelder *v.* Van Gelder, 81 N. Y. 128; Northern Pac. R. Co. *v.* Booth, 152 U. S. 671.

Under act of Congress, 1875, increasing the appellate jurisdiction of the U. S. Supreme Court to a minimum limit of $5000, interest cannot be added to a judgment both rendered and entered up below, even when it is for exactly $5000, in order to secure the jurisdiction of that court. Western Union Tel. Co. *v.* Rogers, 93 U. S. 565; Baltimore, etc., R. Co. *v.* Trook, 100 U. S. 112. But *contra* if judgment is rendered but not *entered up*. New York El. R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608; The Patapsco *v.* Boyce, 12 Wall. (U. S.) 451; U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32; Quebec Steamship Co. *v.* Merchant, 133 U. S. 375; Zeckendorf *v.* Johnson, 123 U. S. 617; Benson Min. Co. *v.* Alta Min. Co., 145 U. S. 428; Sloan *v.* Lewis, 22 Wall. (U. S.) 150; Massachusetts Ben. Assoc. *v.* Miles, 137 U. S. 689; Brown *v.* Shannon, 20 How. (U. S.) 55; McGinnity *v.* White, 3 Dill. (U. S.) 350. *Compare* Arnold *v.* Lewis County Ct., 38 W. Va. 142; Quebec F. Assur. Co. *v.* Anderson, 13 Moore P. C. C. 477; *Ex p.* Sweeney, 126 Ind. 583.

Interest Accruing Pendente Lite is not calculable in determining the sum necessary to secure the appealable amount. Keiser *v.* Cox, 116 Ill. 26; Hays *v.* Chicago, etc., R. Co., 64 Iowa 593; Josuez *v.* Conner, 75 N. Y. 156; Mason *v.* Oglesby, 2 La. Ann. 793; Frellsen *v.* Copley, 2 La. Ann. 911; Owen *v.* Boyd, 7 La. Ann. 109; Cornell *v.* Geddes, 10 La. Ann. 170; Klein *v.* Wild, 12 La. Ann. 87; Wolf *v.* Witherell, 22 La. Ann. 25; Rogers *v.* Goldthwaite, 32 La. Ann. 48.

Interest Prior to Suit Brought cannot be added in *Louisiana* in a suit to annul a sale of property in fraud of a creditor, for in that state the jurisdiction depends on amount of the principal of the debt claimed. Schwartz *v.* Schmidt, 37 La. Ann. 41; Buffington *v.* Blouin, 36 La. Ann. 326; Boagni *v.* Gordon, 34 La. Ann. 1052. But *compare, contra*, in *New York*, Mitchell *v.* Pike, 17 Hun (N. Y.) 142.

1. Thus in a suit by a portion of the distributees and heirs at law of an intestate against the administrator, the amount in controversy was held to be the amount in the administrator's hands, and not the separate sums decreed to the distributees. Thornton *v.* Tison, 95 Ala. 592. So also in Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 56 Fed. Rep. 378, which was a bill by several insurance companies to set aside an award made, under a certain arbitration, in the case of a loss, it was held that the whole amount of the loss, and not the several liabilities of the several insurance companies, constituted the jurisdictional amount in controversy. And see State *v.* Judges, 41 La. Ann. 56; Prince *v.* Towns, 33 Fed. Rep. 161; Lovett *v.* Prentice, 44 Fed. Rep. 459; Hill *v.* Glasgow R. Co., 41 Fed. Rep. 610; Herbert *v.* Rainey, 54 Fed. Rep. 248; Shields *v.* Thomas, 17 How. (U. S.) 3; Handley *v.* Stutz, 137 U. S. 366; Washington Market Co. *v.* Hoffman, 101 U. S. 112; The Connemara, 103 U. S. 754; Davies *v.* Corwin, 112 U. S. 36; Estes *v.* Gunter, 121 U. S. 183; Stuart *v.* Boulware, 133 U. S. 78. *Compare* The Mamie, 105 U. S. 773.

In Appeals.—Similarly, where the judgment recovered is a common one, the appellate court's jurisdiction is determined by the amount of the whole judgment, and not by the proportionate share of the several parties interested therein. Saunders *v.* Waggoner, 82 Va. 316; Atkinson *v.* McCormick, 76

2. Several Defendants.—In like manner, where two or more persons are jointly and not severally liable in one and the same suit, the amount in controversy is the cumulated liability.[1]

3. Several Claims in One Suit.—And similarly the sum of all the demands constitutes the jurisdictional amount, where the plaintiff sues to recover several claims, which from their character, or owing to the fact that they arise out of one and the same transaction or circumstances, are in reality joint and not several.[2]

Va. 791; Martin *v.* Fielder, 82 Va. 455; Alexander *v.* Byrd, 85 Va. 690; Wirtz *v.* Osburn, 83 Va. 227; Craig *v.* Williams (Va., 1894), 18 S. E. Rep. 899; Colt *v.* O'Callaghan, 2 La. Ann. 984; Ruthenberg *v.* Helberg, 43 La. Ann. 410; Brierre *v.* Creditors, 43 La. Ann. 423; Dougart's Succession, 42 La. Ann. 516; Duran's Succession, 34 La. Ann. 585; Goh's Succession, 37 La. Ann. 429; Harmony Club *v.* Gas Light Co., 42 La. Ann. 453; Oxford *v.* Barron (La., 1891), 9 So. Rep. 479; State *v.* Judges (La., 1892), 11 So. Rep. 148; Sedgwick *v.* Johnson, 107 Ill. 385; Powers *v.* Yonkers, 114 N. Y. 145; Freeman *v.* Dawson, 110 U. S. 264; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42. *Compare* Friend *v.* Wise, 111 U. S. 797.

In Admiralty Cases.—In Clay *v.* Field, 138 U. S. 479, the court said: "If several persons be joined in a suit in * * * admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only," their claims or liabilities, as the case may be, cannot be aggregated. The Propeller Burlington, 137 U. S. 386; *Ex p.* Baltimore, etc., R. Co., 106 U. S. 5; Metcalf *v.* The Alaska, 130 U. S. 201; Rodd *v.* Heartt, 17 Wall. (U. S.) 354. *Compare* also The Rio Grande, 19 Wall. (U. S.) 178; Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146.

Cases Consolidated by Order of Court.—Where by order of court separate cases are consolidated on trial, appeals will lie from each although the several amounts in controversy are insufficient to confer jurisdiction. Devries *v.* Johnston, 27 Gratt. (Va.) 805; Marshall *v.* Fall, 9 La. Ann. 92.

Cases Consolidated by Agreement of Parties.—Similarly appeals will lie from cases consolidated by agreement of parties. Neal *v.* Reynolds, 91 Ga. 609; Brock *v.* Barr, 70 Iowa 399; Edwards *v.* Cosgro, 71 Iowa 296; Tuthill Spring Co. *v.* Smith (Iowa, 1894), 57 N. W. Rep. 853; Bowman *v.* New Orleans, 27 La. Ann. 501; Ammons *v.* Whitehead, 31 Miss. 99.

Cases Improperly Joined.—Appeals will lie for the defendant even when two causes are improperly joined below and there is a demurrer sustained and plaintiff has not amended. Penter *v.* Staight, 1 Wash. 365; *Ex p.* Sweeney, 126 Ind. 583.

1. Lampton *v.* Bruner, 2 Litt. (Ky.) 142; Lartigue *v.* White, 25 La. Ann. 291; Ready *v.* New Orleans, 27 La. Ann. 169; State *v.* Cousin, 31 La. Ann. 297; Dalcour *v.* McCan, 37 La. Ann. 7; Cotter *v.* Parks, 80 Tex. 539; Clay *v.* Field, 138 U. S. 464. Thus in Wilde *v.* Haycraft, 2 Duv. (Ky.) 309, where several signers of one contract were joined in one suit thereon for separate amounts, the sum of these amounts was held to be the jurisdictional test. So in like manner in appeals where several defendants appeal from separate judgments against each, it is the aggregate of all the judgments which determines the jurisdiction of the appellate tribunal. Priest *v.* Deaver, 21 Mo. App. 209.

2. Thus, for example, in Martin *v.* Goode, 111 N. Car. 288, an administratrix *c. t. a.* was sued, in a court whose jurisdictional minimum limit was $200, upon two demands, one for $150, being an annuity charge on testator's estate, the other for $359.46, being the value of certain board, which by the terms of the will the administratrix was bound to pay; and it was held these two claims, rightfully joined in one action, conferred jurisdiction on the court.

Another familiar illustration of claims which from their character are properly aggregated is of suits like State Bank *v.* Brooks, 4 Blackf. (Ind.) 485, in which a suit was held right-

Several Items in One Demand.—Where a person honestly possesses a demand which is proved to have been made up at one time of several small items, each less than the jurisdictional amount, he should not thereby be restricted from prosecuting such claim when its sum total is of sufficient amount to enable the court to entertain it.[1]

Divided Claims or Debt.—Where a claim is in its character one and indivisible, jurisdiction cannot be conferred by splitting it up into smaller claims, each within a certain court's cognizance, while the claim as a unit is in excess thereof.[2]

fully instituted in a Circuit Court on several promissory notes, some of which alone would have been in the exclusive jurisdiction of a justice of the peace. And see Jones *v.* Buntin, 1 Blackf. (Ind.) 322; New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542; Floyd *v.* Cox, 72 Ga. 147; Bakewell *v.* Howell, 2 Metc. (Ky.) 268; Brown *v.* Brown, 10 B. Mon. (Ky.) 247; State *v.* Third Justice, 15 La. 660; Scofield *v.* Pensons, 26 Miss. 402; McCasten *v.* Quinn, 4 Ired. (N. Car.) 43; Boyle *v.* Robbins, 71 N. Car. 130; Moore *v.* Nowell, 94 N. Car. 265; State *v.* Roberts, 108 N. Car. 174; Mays *v.* Lewis, 4 Tex. 38; Lott *v.* Adams, 4 Tex. 426; Ferguson *v.* Culton, 8 Tex. 283; Eude *v.* Spencer, 38 Tex. 114; Gulf, etc., R. Co. *v.* Washington, 4 U. S. App. 121; Keyes *v.* Weed, 1 D. Chip. (Vt.) 379. *Compare* Gregory *v.* Williams, 24 Ark. 177. See also Fenton *v.* St. Louis, etc., R. Co., 72 Mo. 259; Kline *v.* Wood, 9 S. & R. (Pa.) 294.

Several Penalties arising out of and enforceable against a single crime each by itself below a court's jurisdiction may be cumulated to confer such jurisdiction in a suit to recover the same. Barkhamsted *v.* Parsons, 3 Conn. 1; Mobile, etc., R. Co. *v.* State, 51 Miss. 137; Prussia *v.* Guenther (Orleans County Ct.), 16 Abb. N. Cas. (N. Y.) 230; Gibson *v.* Gault, 33 Pa. St. 44. *Contra, semble*, Gault *v.* Vinyard, 26 Pa. St. 282.

1. Stanley *v.* Albany County, 15 Fed. Rep. 483; Armstrong *v.* Ettlesohn, 36 Fed. Rep. 209; Gulf, etc., R. Co. *v.* Washington, 49 Fed. Rep. 347; O'Connell *v.* Reed, 56 Fed. Rep. 531; Judson *v.* Macon County, 2 Dill. (U. S.) 213; Yon *v.* Baldwin, 76 Ga. 769; Green *v.* Lester, 78 Ga. 86; Livingstone *v.* L'Engle, 27 Fla. 502; Palmer *v.* Assessors, 42 La. Ann. 1122; Wild *v.* Haycraft, 2 Duv. (Ky.) 309; Sayre *v.* Lewis, 5 B. Mon. (Ky.) 90; Woodruff *v.* Chambers, 13 Pa. St. 132; Curry *v.* Spink, 23 Pa. St. 58; Farmers' Mut. F. Ins. Co. *v.* Marshall, 29 Vt. 23; Windham County Ins. Co. *v.* Pierce, 36 Vt. 16; Sauvageau *v.* Gauthier, 22 W. R. 667; Grimbley *v.* Aykroyd, 12 Jur. 357.

Several Counts in a declaration, each claiming separate damage, where there is no general *ad damnum*, may be aggregated to form the jurisdictional amount in controversy. Swift *v.* Woods, 5 Blackf. (Ind.) 97; Wetherill *v.* Congressional Tp., 5 Blackf. (Ind.) 357; Bainum *v.* Small, 4 Ind. 49; Mays *v.* Dooley, 59 Ind. 287; Edwards *v.* Hopkins, 5 R. I. 138. *Compare* Longwith *v.* Riggs, 123 Ill. 258; Smith *v.* Clark County, 54 Mo. 58; Fickle *v.* St. Louis, etc., R. Co., 54 Mo. 225; Hunt *v.* Hopkins, 66 Mo. 98; Vineyard *v.* Lynch, 86 Mo. 684.

2. Moore *v.* Woodruff, 5 Ark. 214; Grayson *v.* Williams, Walk. (Miss.) 298, 12 Am. Dec. 568; Morris *v.* Shryock, 50 Miss. 590; Ash *v.* Lee, 51 Miss. 101; Willard *v.* Sperry, 16 Johns. (N. Y.) 121; Boyle *v.* Robbins, 71 N. Car. 130; McPhail *v.* Johnson, 109 N. Car. 571; Walton *v.* Vanhorn, 1 Phila. (Pa.) 377; Richards *v.* Marten, 23 W. R. 93. *Contra*, Herrin *v.* Buckelew, 37 Ala. 585; Dews *v.* Eastham, 5 Yerg. (Tenn.) 297; Reed *v.* Stockwell, 34 Vt. 206. See *ante*, notes to III. AMOUNT REMITTED, JURISDICTION CONFERRED, p. 707.

Claim Acquired by Assignment.—Under act of Congress of March 3, 1887, U. S. Circuit Courts have jurisdiction where the matter in dispute is sufficient to confer jurisdiction upon those courts, although such amount is made up of several demands acquired by assignment. Stanley *v.* Albany County,

IX. UNAGGREGATED AMOUNT— Several Claims in One Suit.—Whenever there are several distinct demands united in one suit in which separate judgments should be rendered, or two cases are united in one, and are so united for convenience or to avoid multiplicity of suits, the several amounts of each cannot be aggregated to confer jurisdiction.[1]

Separate Promises on One Instrument.—It is immaterial that one instrument contains the separate promises of several defendants when the same is put in suit.[2]

15 Fed. Rep. 483; Hammond *v.* Cleaveland, 23 Fed. Rep. 1; Bernheim *v.* Birnbaum, 30 Fed. Rep. 885; Judson *v.* Macon County, 2 Dill. (U. S.) 213.

In Louisiana similarly also on appeal. State *v.* Judge, 21 La. Ann. 65; State *v.* Judge, 28 La. Ann. 935; Pease *v.* Police Jury, 34 La. Ann. 137; Palmer *v.* Assessors, 42 La. Ann. 1122. See also Fink *v.* Denny, 75 Va. 663.

Value and Damages Consolidated.—In an action of replevin, where the property was alleged to be worth $200, and $500 damages were claimed, it was held on plaintiff's appeal that the amount in controversy was the sum of the value and the damages combined. Freeburger *v.* Caldwell, 5 Wash. 769; Hargrave *v.* Wilson, 39 La. Ann. 1116; Stevers *v.* Gunz, 23 Minn. 520.

Judgment and Counterclaim Consolidated.—On appeal to the U. S. Supreme Court by defendant from a judgment against him, it was held that he could add his counterclaim to said judgment in order to confer jurisdiction on the court. Clark *v.* Sidway, 142 U. S. 682. See also Lovell *v.* Craigin, 136 U. S. 130; Telford *v.* Garrels, 132 Ill. 550; Francis *v.* Leak (Ind. App., 1892), 31 N. E. Rep. 212; Bowlus *v.* Brier, 87 Ind. 391; Wysor *v.* Johnson, 1 Ind. App. 419; Hutts *v.* Williams, 55 Ind. 237; Shriver *v.* Bowen, 57 Ind. 266; Little *v.* Danville, etc., Plank Road Co., 18 Ind. 86; Parsley *v.* Eskew, 73 Ind. 558; Uplinger *v.* Kettering, 43 Iowa 483; Crawford *v.* West Side Bank, 92 N. Y. 631; Cass *v.* Higenbotam, 100 N. Y. 248. But see also below, note 1 to UNAGGREGATED AMOUNT—SEVERAL CLAIMS, etc.; and *contra*, Madison *v.* Spitsnogle, 58 Iowa 369; Fox *v.* Duncan, 60 Iowa 321.

1. *Arkansas.*—Berry *v.* Linton, 1 Ark. 252; Wilson *v.* Mason, 3 Ark. 494; Collins *v.* Woodruff, 9 Ark. 463; Gregory *v.* Williams, 24 Ark. 177; Mannington *v.* Young, 35 Ark. 287.

Georgia.—Epsten *v.* Levenson, 79 Ga. 718.

Indiana.—State *v.* Forry, 64 Ind. 260; Luce *v.* Shoff, 70 Ind. 152.

Kentucky.—Lightfoot *v.* Payton, Hardin (Ky.) 3.

Louisiana.—Stevenson *v.* Weber, 29 La. Ann. 105; Larrieux *v.* Crescent City Live-Stock, etc., Co., 30 La. Ann. 609.

Mississippi.—Grayson *v.* Williams, Walk. (Miss.) 298, 12 Am. Dec. 568; Ash *v.* Lee, 51 Miss. 101.

Missouri.—Gerber *v.* McCoy, 23 Mo. App. 295; Bridle *v.* Grau, 42 Mo. 360

Pennsylvania.—Gault *v.* Vinyard, 26 Pa. St. 282.

Texas.—Ferguson *v.* Culton, 8 Tex. 283; Nichols *v.* Snow, 42 Tex. 72.

United States.—Woodman *v.* Latimer, 2 Fed. Rep. 842; Massa *v.* Cutting, 30 Fed. Rep. 1; Rich *v.* Bray, 37 Fed. Rep. 273; King *v.* Wilson, 1 Dill. (U. S.) 556; Seaver *v.* Bigelows, 5 Wall. (U. S.) 208; Terry *v.* Hatch, 93 U. S. 44; Ballard Paving Co. *v.* Mulford, 100 U. S. 147; Chatfield *v.* Boyle, 105 U. S. 231; McMurray *v.* Moran, 134 U. S. 150; Handley *v.* Stutz, 137 U. S. 366; Walter *v.* Northeastern R. Co., 147 U. S. 370; Keels *v.* Central R. Co., 147 U. S. 374; Russell *v.* Stansell, 105 U. S. 303.

Wisconsin.—Howard *v.* Mansfield. 30 Wis. 75.

England.—Brunskill *v.* Powell, 19 L. J. Exch. 362. *See* also Caldwell *v.* Beatty, 69 N. Car. 365.

Thus, for example, in Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, a bill in equity was filed by which an injunction was prayed to restrain the collection of taxes from a railroad company, by separate counties under distinct assessments, and it was held that the whole amount of such taxes could not be cumulated to confer jurisdiction upon the Circuit Court, but that the claim in each individual case determined the amount in controversy.

2. Thomas *v.* Anderson, 58 Cal. 99;

Separate Lien Claims in One Suit.—In suits to enforce separate lien claims it is the several amounts of each claim, and not the aggregate sum of all in one suit, which determine the jurisdictional amount.[1]

Claim and Set-off Cannot be United.—When in a suit the court is without jurisdiction because the amount in dispute is too small, an off-set in a larger amount pleaded cannot be added to the claim to confer jurisdiction.[2]

On Appeals Judgments Cannot Be United.—The appellate court cannot acquire jurisdiction by uniting on an appeal thereto two judgments wholly separable and distinct.[3]

Tague *v.* Royal Ins. Co., 38 La. Ann. 456; Merritt *v.* Hozey, 4 Rob. (La.) 319; U. S. *v.* Cochrane, 5 Rob. (La.) 120; Armitage *v.* Barrow, 10 La. Ann. 78; Broadwell *v.* Smith, 28 La. Ann. 172; Louisiana, etc., R. Co. *v.* Hopkins, 33 La. Ann. 806; Prevost *v.* Greig, 5 Martin N. S. (La.) 87. *Compare* People *v.* Love, 25 Cal. 520; State *v.* King, 5 Ind. 439.

1. Keystone Min. Co. *v.* Gallagher, 5 Colo. 23; Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46; Copley *v.* Edwards, 5 La. Ann. 650; Harrison *v.* Moss, 41 La. Ann. 239; Davis *v.* Bargas, 41 La. Ann. 313; Adler *v.* Cannon, 42 La. Ann. 835; Lyons *v.* Blum, 42 La. Ann. 838; Rymer *v.* Hawkins, 18 W. Va. 309; Bee *v.* Burdett, 23 W. Va. 744; Love *v.* Pickens, 26 W. Va. 341; Ayers *v.* Blair, 26 W. Va. 558; Morrison *v.* Goodwin, 28 W. Va. 328. But *compare* Rhods *v.* Scholfield, 6 La. Ann. 251.

In California.—By the constitution stockholders of a corporation are liable only in severalty to creditors for corporate debts, and consequently, in a District Court whose jurisdictional minimum was $300, when several actions against separate stockholders were consolidated, it was held that the court was without jurisdiction as to those stockholders against whom less than said minimum was claimed. Derby *v.* Stevens, 64 Cal. 287; Hyman *v.* Coleman, 82 Cal. 650. *Compare* Sioux Falls Nat: Bank *v.* Swenson, 48 Fed. Rep. 621; Dakota, etc., Bank *v.* Swenson, 48 Fed. Rep. 626.

In Connecticut.—Different and distinct demands in separate counts in one suit cannot be cumulated to confer jurisdiction when the several claims themselves are too small for that purpose, and this obtains even in a case where the final damage claim is in an amount sufficient. Denison *v.* Denison, 16 Conn. 34; Nichols *v.* Hastings, 35 Conn. 546; Hoey *v.* Hoey, 36 Conn. 386; Hunt *v.* Rockwell, 41 Conn. 51; Camp *v.* Stevens 45 Conn. 92; Davis *v.* Seymour, 59 Conn. 531. See also Richards *v.* Marten, 23 W. R. 93; Kimpton *v.* Willey, 9 C. B. 719. But *compare* Main *v.* First School Dist., 18 Conn. 214, and Conn. Gen. Sts. sec. 812, according to which any number of separatecontracts can be joined to give jurisdiction, although each is less than the jurisdictional minimum.

2. Myers *v.* Lienning, 13 Cal. 650.

On Appeals, for same principle, see Smith *v.* Merchants' Mut. Ins. Co., 33 La. Ann. 1071; Prejean *v.* Lecompte, 41 La. Ann. 747; State *v.* Judge, 42 La. Ann. 1084; Gore *v.* Kendig, 3 Rob. (La.) 387; Hanna *v.* Bartlette, 10 Rob. (La.) 438; *Ex p.* Goodwin, 11 Rob. (La.) 12; Lamorere *v.* Avery, 32 La. Ann. 1010; Dean *v.* Clarke, 5 La. Ann. 105; Tardos *v.* Toulon, 14 La. Ann. 432, 74 Am. Dec. 435; Stevenson *v.* Whitney, 33 La. Ann. 658; Colomb *v.* McQuaid. 36 La. Ann. 327; St. Clair *v.* Day, 89 N. Y. 357. *Contra, semble*, in the case of appeals, see *ante*, notes to VIII. AGGREGATED AMOUNT, SEVERAL CLAIMS, p. 722, note 2.

3. Thompson *v.* Adams, 82 Va. 672; Hartsook *v.* Crawford, 85 Va. 413; Gee *v.* Thompson, 39 La. Ann. 310; Marshall *v.* Holmes, 39 La. Ann. 313; State Bank *v.* Allen, 39 La. Ann. 806; Farwell *v.* Becker, 129 Ill. 261, 16 Am. St. Rep. 276; Kellar *v.* Palfrey, 8 La. Ann. 282; Riddell *v.* Smith, 6 La. Ann. 431; Armitage *v.* Barrow, 10 La. Ann. 78; Bazoni *v.* Marcera, 18 La. Ann. 136; State *v.* Judge, 18 La. Ann. 398; Louisiana, etc., R. Co. *v.* Hopkins, 33 La. Ann. 806; Gohs' Succession, 37 La. Ann. 428; Akin *v.* Cassiday, 105 Ill. 22; Aultman, etc., Co. *v.* Weir, 134 Ill.

X. VALUE DISTINGUISHED FROM AMOUNT—Property Rights Involved.—Where property itself or its title is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claims of the contending parties.[1]

137; Zable *v.* Harris, 82 Ky. 473; Oswald *v.* Morris, 92 Ky. 48; Fleshman *v.* Fleshman, 24 W. Va. 342; Umbarger *v.* Watts, 25 Gratt. (Va.) 167; Whitmer *v.* Shitzer, 81 Va. 64. *Compare* State *v.* Burke, 33 La. Ann. 969; State *v.* MacKenzie, 39 La. Ann. 508; Wimbish *v.* Gross, 7 Leigh (Va.) 331.

Thus where two wards sued their guardian's estate, and together obtained a decree for $639.79, but the amount decreed to each was less than $500, it was held that the appellate court was without jurisdiction, because the amount decreed to each was the amount in controversy, and the constitution of *Virginia*, in which state the case arose, fixed the appellate court's jurisdiction at a minimum of $500. Martin *v.* Fielder (Va., 1887), 4 S. E. Rep. 602.

On Appeals to the Supreme Court of the United States.—"The rule is well settled * * * that when distinct causes of action in favor of distinct parties are united in one suit, and distinct judgments are rendered for or against several parties, their judgments cannot be united to give us jurisdiction." Per Waite, C.J., in Hawley *v.* Fairbanks, 108 U. S. 543.

The leading case of Gibson *v.* Shufeldt, 122 U. S. 27, was one in which a debtor had assigned his property to secure a preferred debt, and other creditors sued the debtor, the trustee, and the preferred creditor, and the defendants sought no affirmative relief; the assignment was adjudged to be void in the lower court as against the plaintiffs, and the decree ordered a distribution among them. On defendant's appeal it was held that the U. S. Supreme Court was without jurisdiction, except as to those plaintiffs who had individually recovered more than $5000. Chatfield *v.* Boyle, 105 U. S. 231. See also McCarthy *v.* Provost, 103 U. S. 673; Henderson *v.* Wadsworth, 115 U. S. 264; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25; Chapman *v.* Handley, 151 U. S. 443; Merrill *v.* Petty, 16 Wall. (U. S.) 338; Terry *v.* Hatch, 93 U. S. 44; Stewart *v.* Durham, 115 U. S. 61; Rodd *v.* Heartt, 17 Wall. (U. S.) 354; Ballard Paving Co. *v.* Mulford, 100 U. S. 147; Tupper *v.* Wise, 110 U. S. 398; Farmers' L. & T. Co. *v.* Waterman, 106 U. S. 265; Adams *v.* Crittenden, 106 U. S. 576; Schwed *v.* Smith, 106 U. S. 188; *Ex p.* Baltimore, etc., R. Co., 106 U. S. 5; Fourth Nat. Bank *v.* Stout, 113 U. S. 684; *Ex p.* Phœnix Ins. Co., 117 U. S. 367; Hassall *v.* Wilcox, 115 U. S. 598; McMurray *v.* Moran, 134 U. S. 150; Wheeler *v.* Cloyd, 134 U. S. 537; Miller *v.* Clark, 138 U. S. 223.

In Admiralty the same doctrine applies. Thus in another leading case, that of Oliver *v.* Alexander, 6 Pet. (U. S.) 143, which was a libel in admiralty against the owners of a vessel to recover seamens' wages, and also an attachment of the proceeds of a vessel in the hands of assignees, the libellants obtained a decree for the payment out of the proceeds to them respectively of sums each less than $1000, but amounting in all to more than $2000 (the then jurisdictional minimum of the U. S. Supreme Court), and the assignees appealed. The appeal was dismissed for want of jurisdiction, for the reason that the shipping articles constituted a several contract with each seaman, and although the libel was in form joint, yet the decree to each libellant was in reality several. Spear *v.* Place, 11 How. (U. S.) 525; Rich *v.* Lambert, 12 How. (U. S.) 352; The Nevada, 106 U. S. 154; Clifton *v.* Sheldon, 23 How. (U. S.) 481; Stratton *v.* Jarvis, 8 Pet. (U. S.) 4.

1. *California.*—Cullen *v.* Langridge, 17 Cal. 67; Shealor *v.* Amador County, 70 Cal. 564.

Connecticut.—Scripture *v.* Johnson, 3 Conn. 211; Griswold *v.* Mather, 5 Conn. 438.

Michigan.—Fuller *v.* Grand Rapids, 40 Mich. 395.

Louisiana.—Renneberg's Succession, 15 La. Ann. 661; Werlein *v.* Merchants' Mut. Ins. Co., 30 La. Ann. 1399; Queyrouze *v.* Thibodeaux, 30 La. Ann. 1114; Meyer *v.* Logan, 33 La. Ann. 1055; State *v.* Judges, 33 La. Ann. 1051; Bouligny *v.* White, 5 La. Ann. 31; State *v.* Judge, 12 La. Ann. 48;

Suits in Ejectment.—Thus in ejectment cases the matter in dispute is the value of the property, either as set forth in the declaration or as established by the proof.[1]

In Bills Quia Timet.—So also in bills to quiet the title of property, whose possession and enjoyment is threatened, the amount in controversy is the whole value of the property.[2]

Enforcing Liens Against Land.—In suits the object of which is to sell land to pay debts or to enforce a lien of judgment or attachment thereon, the value of the land, apart from the debt or debts or the claim of damages, is the amount in controversy.[3]

In Suits Annulling Instruments.—Where a creditor of the grantor sues the grantee of a deed of certain property for the purpose of setting the deed aside as fraudulent, the value of the land

Thompson *v.* Lemelle, 32 La. Ann. 932; Rhodes *v.* Black, 34 La. Ann. 406; Lombard *v.* Belanger, 35 La. Ann. 311; State *v.* Lappeyrollerie, 38 La. Ann. 264; Godshaw *v.* Judges, 38 La. Ann. 643; Schlieder *v.* Martinez, 38 La. Ann. 847; Pasley *v.* McConnell, 40 La. Ann. 609; Wickham *v.* Nalty, 42 La. Ann. 423; Simon *v.* Richard, 42 La. Ann. 842; Boggs *v.* Hays, 44 La. Ann. 859.

Missouri.—Gartside *v.* Gartside, 42 Mo. App. 513; Evens, etc., Fire Brick Co. *v.* St. Louis Smelting, etc., Co., 48 Mo. App. 634.

United States.—Simon *v.* House, 46 Fed. Rep. 317; Mississippi, etc., R. Co. *v.* Ward, 2 Black. (U. S.) 485; Parker *v.* Morrill, 106 U. S. 1; Smith *v.* Adams, 130 U. S. 175; Kenaday *v.* Edwards, 134 U. S. 117; Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195.

Virginia.—Barker *v.* Jenkins, 84 Va. 895.

West Virginia.—Ayers *v.* Blair, 26 W. Va. 558; Stanley *v.* Hubbard, 27 W. Va. 740. See also Burke *v.* Grace, 53 Conn. 513; Bruneau *v.* Haughton, 16 La. Ann. 47; Rainey *v.* Herbert, 55 Fed Rep. 443, as *modifying* and *affirming* Herbert *v.* Rainey, 54 Fed. Rep. 248.

Thus in Smith *v.* Bivens, 56 Fed. Rep. 352, in a bill for an injunction to restrain the trespassing of cattle on complainant's land, which bill alleged that the land was only good for pasturage, and that he, complainant, is entirely deprived of his property rights therein, the amount in dispute was held to be the value of the land, in fixing the question of jurisdiction. And in Chaffe *v.* De Moss, 37 La. Ann. 186, where a judgment creditor of a husband, whose claim was less than $2000, sought to have the purchase of a plantation in the name of the wife declared a "simulation" and as really made for the husband's benefit, it was held that the case was appealable to the supreme court in *Louisiana*, whose minimum jurisdiction was $2000, because the property was worth $6000.

Contra, semble.—Harris *v.* Stockett, 35 La. Ann. 387; Farmers' Bank *v.* Hooff, 7 Pet. (U. S.) 168.

1. Crawford *v.* Burnham, 1 Flip. (U. S.) 116; Eaton *v.* Calhoun, 2 Flip. (U. S.) 593; Lanning *v.* Dolph, 4 Wash. (U. S.) 624; Green *v.* Liter, 8 Cranch (U. S.) 242; Duwell *v.* Bohmer, 2 Flip. (U. S.) 168; Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195; Grant *v.* M'Kee, 1 Pet. (U. S.) 248; Den *v.* Wright, 1 Pet. (C. C.) 64; Simon *v.* House, 46 Fed. Rep. 317; Greene *v.* Tacoma, 53 Fed. Rep. 562.

2. Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 43 Fed. Rep. 545.

3. Peters *v.* Goodrich, 3 Conn. 146; Walker *v.* Malin, 94 Ill. 596; Curtis *v.* Blacketer, 13 La. Ann. 592; Danjean *v.* Blacketer, 13 La. Ann. 595; Tertrou *v.* Comeau, 28 La. Ann. 633; Wood *v.* Rocchi, 32 La. Ann. 1120; Francisco *v.* Gauthier, 35 La. Ann. 393; Testant *v.* Belot, 33 La. Ann. 1469; Phillips *v.* Hoffman, 5 Coldw. (Tenn.) 251; Lane *v.* Howard, 22 Tex. 7; Hargrave *v.* Simpson, 25 Tex. 396; Buckner *v.* Metz, 77 Va. 107. See also Casey *v.* Harvey, 14 Ill. 45. *Compare* Vaughan *v.* Thompson, 15 Ill. 39. *Contra*, Hoppe *v.* Byers, 39 Iowa 573; May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

conveyed, and not the debt, is the amount in controversy on appeal.[1]

Specific Personal Property.—In suits to test the title to, or for the recovery of, specific personal property, the damages claimed or recovered are generally merely an incidental matter; it is the value of the property which is the determinative factor upon a question of jurisdiction *vel non*.[2]

XI. AMOUNT IMMATERIAL.—An exception to the general rule hereinbefore laid down, as governing the question of the amount in controversy, is to be found in a certain class of cases controlled by special statutory enactments, which render the jurisdiction of courts, under certain circumstances, wholly independent of the amount in controversy.[3]

1. Kahn *v.* Kerngood, 80 Va. 342; Black *v.* McStea, 37 La. Ann. 620; Solari *v.* Barras (La., 1893), 13 So. Rep. 627; Handy *v.* New Orleans, 39 La. Ann. 107; Livingstone *v.* Hardie, 41 La. Ann. 311; Moore *v.* Ringuet (La., 1893), 13 So. Rep. 670. See also Sharon *v.* Terry, 36 Fed. Rep. 337.

2. Astell *v.* Phillippi, 55 Cal. 265; Shealor *v.* Amador County, 70 Cal. 564; Fowler *v.* Bishop, 32 Conn. 199; Cummins *v.* Holmes, 107 Ill. 552; Tyler *v.* Bowlus, 54 Ind. 333; Garrett *v.* Wood, 3 Kan. 231; Leslie *v.* Reber, 4 Kan. 315; State *v.* Lagarde, 21 La. Ann. 18; State *v.* Judge, 21 La. Ann. 107; Lallande *v.* Ball, 21 La. Ann. 186; Gogreve *v.* Windhorst, 21 La. Ann. 296; State *v.* Richardson (La., 1894), 14 So. Rep. 915; Ridlon *v.* Emery, 6 Me. 261; Natchez *v.* Mallery, 54 Miss. 499; Neibardt *v.* Kilmer, 12 Nev. 35; Godsey *v.* Weatherford, 86 Tenn. 670; Peyton *v.* Robertson, 9 Wheat. (U. S.) 527; The Sydney, 139 U. S. 331; Vaiden *v.* Bell, 3 Rand. (Va.) 448. *Compare* State *v.* Pitot, 21 La. Ann. 336; Payne *v.* Weems, 36 Mo. App. 54.

Value of an Office.—In State *v.* Owens, 63 Tex. 261, which was an action of *quo warranto* to oust an incumbent from his office, it was held that the test of the court's jurisdiction was the value of the office. Ritchie *v.* Mauro, 2 Pet. (U. S.) 243.

The Salary of an Office is determinative of its value in controversy. State *v.* Judge, 20 La. Ann. 574; Smith *v.* Whitney, 116 U. S. 167; Smith *v.* Adams, 130 U. S. 175.

The Business Value, not the sum for which a property would sell at a forced sale, is the jurisdictional value in controversy. Berthold *v.* Hoskins, 38 Fed Rep. 772.

In Texas.—By Tex. Rev. Sts. art. 4823, in suits affecting the value of property in the District and County Courts, it was enacted that it was not the value of the property as proven, but the value assessed by the officer serving the writ which fixed the amount in controversy. Cleveland *v.* Tufts, 69 Tex. 580. *Compare* Minor *v.* Budd, 38 La. Ann. 99.

3. **In Alabama.**—Circuit Courts are not limited to their ordinary jurisdictional amount in suits against an officer for failure to return an execution to the Supreme Court. Huggins *v.* Ball, 19 Ala. 587.

In California.—The Supreme Court on appeal, where the question is not one on the merits, but is only as to whether an inferior tribunal had or had not jurisdiction. Heinlen *v.* Phillips, 88 Cal. 557; *reversing* Bienenfield *v.* Fresno Milling Co., 82 Cal. 425; Winter *v.* Fitzpatrick, 35 Cal. 269; Morley *v.* Elkins, 37 Cal. 456; Palache *v.* Hunt, 64 Cal. 474. District Court when title to real estate is involved, unless property's value is too small. Cullen *v.* Langridge (1860), 17 Cal. 67.

In Colorado.—The Supreme Court in suits relating to a freehold or a franchise. Crane *v.* Farmer (1890), 14 Colo. 294.

In Connecticut—*Supreme Court.*—In actions of trespass involving title to land an appeal may be had although the sum claimed is below the ordinary jurisdictional amount. Dunton *v.* Mead, (1827), 6 Conn. 418. *Compare* Fuller *v.* Topliff, 10 Conn. 60; Scovill *v.* Seeley, 14 Conn. 238; Richards *v.* Eno, 23 Conn. 413.

In Illinois.—The Supreme Court in appeals from appellate court in ques-

Statutes rendering jurisdiction independent of amount are strictly construed. Matters not properly contained therein will

tions involving a freehold or a franchise. Lequatte *v.* Drury (1880), 6 Ill. App. 389; Patterson *v.* McKinney, 6 Ill. App. 394; Daly *v.* St. Patrick Catholic Church, 6 Ill. App. 458; Trustees *v.* Beale, 6 Ill. App. 536; Baber *v.* Pittsburg, etc., R. Co., 93 Ill. 342; Gage *v.* Busse, 94 Ill, 590; Richards *v.* People, 100 Ill. 423; Peck *v.* Herrington, 104 Ill. 88; Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571. *Compare* Talcott *v.* Schuh, 95 Ill. 201; Graham *v.* People, 104 Ill. 321.

In Indiana (1879) *Supreme Court*, on appeal in cases originating in circuit or superior courts, but not those heard before justices of the peace or mayors of cities. Hill *v.* Shannon, 68 Ind. 470; Hancock County *v.* Binford, 70 Ind. 208; Plymouth *v.* Milner, 117 Ind. 324. Courts of Common Pleas. Ordinary jurisdiction is unlimited in amount by Act of 1859. Jenkinson *v.* Ewing (1861), 17 Ind. 505. Justices of the peace *in distraint* proceedings by Rev. Sts. 1838. Ezra *v.* Manlove (1843), 6 Blackf. (Ind.) 454. In proceedings against tenants for holding over by act of 1838. Ricketts *v.* Ash (1844), 7 Blackf. (Ind.) 274; Dougherty *v.* Thompson, 7 Blackf. (Ind.) 277. In proceedings to try right of property taken on execution. Griffin *v.* Malony (1859), 13 Ind. 402.

In Iowa *Supreme Court*, where real estate is involved. See Code, § 3173; McBurney *v.* Graves (1885), 66 Iowa 314.

In Kentucky—*Court of Appeals.*—Where the case involves title to real property either party may appeal irrespective of the amount in controversy. Moore *v.* Boner, 7 Bush (Ky.) 26; Caskey *v.* Lewis (1854), 15 B. Mon. (Ky.) 27. Circuit Courts in cases of liens affecting land. Bush *v.* Williams (1869), 6 Bush (Ky.) 405.

In Louisiana—*Supreme Court.*—In actions of nullity of judgments where there is no pecuniary amount. Bryant *v.* Austin (1884), 36 La. Ann. 808; Cobb *v.* McGuire, 36 La. Ann. 801; New Orleans *v.* Arthurs, 36 La. Ann. 98; Sweeney *v.* Seiler, 37 La. Ann. 585. *Compare* New Orleans *v.* Schoenhausen, 39 La. Ann. 237; Johnson *v.* Cavanac (1888), 40 La. Ann. 773.

In Maine.—The supreme judicial court on appeal, sitting as the Supreme Court of Probate by Rev. Sts. ch. 66, sec. 11. Merrill *v.* Crossman (1878), 68 Me. 412. Also original as well as concurrent jurisdiction with justices of the peace in actions of trespass *q. c. f.*, without reference to amount. Burnham *v.* Ross (1860), 47 Me. 456.

In Massachusetts, in interlocutory questions of law, appeals will lie to supreme judicial court, although the *ad damnum* be for less than the requisite amount, and although on a trial of the case on its merits no appeal would lie because of that fact. Hovey *v.* Crane (1830), 10 Pick. (Mass.) 440.

In Minnesota.—District Courts under the constitution have a general original jurisdiction, unlimited in amount in civil actions. Agin *v.* Heyward, 6 Minn. 110; Southern Minn. R. Co. *v.* Stoddard, 6 Minn. 150; Fowler *v.* Atkinson, 6 Minn. 503; Cressey *v.* Gierman, 7 Minn. 398; Thayer *v.* Cole (1865) 10 Minn. 215.

In Missouri.—Circuit Courts have exclusive jurisdiction to enforce liens against railroads to an unlimited amount. Cranston *v.* Union Trust Co. (1881), 75 Mo. 29. Justices of the peace are unrestricted in amount to enter judgments on motion on bonds in attachment suits commenced before them by Rev. Code, 1855. McDowell *v.* Morgan (1863), 33 Mo. 555. And also in collateral matters, such as interpleas, growing out of suits over which originally they had jurisdiction. Mills *v.* Thomson (1875), 61 Mo. 415.

In Mississippi.—Justices of the peace have a similar unlimited jurisdiction in incidental matters to suits regularly before them. Bernheimer *v.* Martin (1889), 66 Miss. 486.

In North Carolina—*Supreme Court.*—In suits affecting enforcement of claims against real estate. Charlotte Planing Mills *v.* McNinch, 99 N. Car. 517; Dougherty *v.* Sprinkle, 88 N. Car. 300; Webster *v.* Laws, 89 N. Car. 224; Smaw *v.* Cohen, 95 N. Car. 85; Neville *v.* Pope (1886), 95 N. Car. 346. Justices of the peace, in actions on former justices' judgments. Jones *v.* Jones, 3 Dev. (N. Car.) 360; Bryan *v.* Washington, 4 Dev. (N. Car.) 479; Morgan *v.* Allen (1844), 5 Ired. (N. Car.) 156.

In New York *Supreme Court*, in appeals, where the action is "affecting

not be read into the statutes in order to prevent the ordinary and statutory attaching of a court's jurisdiction.[1]

the title to real property or an interest therein," under Code Civ. Proc. sec. 191, subsec. 3. Warren *v.* Wilder, 114 N. Y. 209; Getman *v.* Ingersoll (1889), 117 N. Y. 75.

City Courts of New York.—In all actions which seek a judgment for money only. Root *v.* Meyer (1885), 2 How. Pr. N. S. (N. Y. City Ct.) 20.

Justices of the Peace.—Over counterclaims which clearly arise out of the same transaction as the claim sued on, when the latter is within the jurisdiction. Heigel *v.* Willis (Supreme Ct., 1889), 3 N. Y. Supp. 497.

Equitable Actions.—The N. Y. Code of Civ. Proc. and the constitution of 1846, by implication, abolished all limitations as affecting the jurisdiction of courts in equitable actions. Sarsfield *v.* Van Vaughner (1862), 38 Barb. (N. Y.) 444.

In Pennsylvania Courts of Common Pleas had a general civil jurisdiction to any amount. Palmer *v.* Com. (1820), 6 S. & R. (Pa.) 245.

In Texas District Courts, in suits involving questions of license taxes. Aulanier *v.* Governor (1846–47), 1 Tex. 653; also in questions affecting real estate. Jenkins *v.* Cain (Tex., 1889), 12 S. W. Rep. 1114; and, having once acquired jurisdiction, retains it to fully adjudicate all collateral matters, irrespective of amount. Peticolas *v.* Carpenter (1880), 53 Tex. 23; Heidenheimer *v.* Johnson (1890), 76 Tex. 200.

Federal Courts—*U. S. Supreme Court.*—On appeals from Circuit Courts of the United States in questions touching the revenue laws, by act of May 31, 1844, U. S. *v.* Carr, 8 How. (U. S.) 1; also in cases "touching patent rights," under Rev. Sts. sec. 699, St. Paul Plough Works *v.* Starling (1888), 127 U. S. 376; also in appeals from the Supreme Court of Utah Territory in a suit drawing in question the power of the territorial governor under the organic act to appoint a person to be auditor of public accounts, Clayton *v.* Utah (1889), 132 U. S. 632. Circuit Courts in suits affecting revenue laws, under U. S. Rev. Sts. sec. 629. Ames *v.* Hager (1888), 36 Fed. Rep. 129; U. S. *v.* Huffmaster, 35 Fed. Rep. 81; Yardley *v.* Dixon (1891), 47 Fed. Rep. 835; Wetmore *v.* Rice, 1 Biss. (U. S.) 237; U. S. *v.* Davidson (1864), 1 Biss. (U. S.) 433.

Where United States is a plaintiff the federal courts have jurisdiction entirely independent of what amount may be involved in controversy; neither the act of Congress of March 3, 1875, nor that of March 3, 1887, defining its jurisdiction as to the amount involved, have any application. U. S. *v.* Shaw, 39 Fed. Rep. 433; U. S. *v.* Kentucky River Mills (1891), 45 Fed. Rep. 273. See also an old case in *North Carolina*, holding a similar doctrine as to the *sovereign state*. State *v.* Garland, 7 Ired. (N. Car.) 48.

Where United States is Appellant, in a case of judgment rendered against it in the Court of Claims, appealing to the Supreme Court. U. S. *v.* Davis, 131 U. S. 36; U. S. *v.* Mosby, 133 U. S. 273.

In Vermont, in the Supreme Court, on appeal, in a case involving a question of building and repairing a partition fence, involving also a question of title. Hall *v.* Niles (1872), 44 Vt. 439.

In Virginia—*Supreme Court of Appeals.*—Where a freehold or franchise is in question in a suit, the sum recovered need not amount to $150, the appellate jurisdictional minimum, to enable the appellate court to take cognizance. Cooke *v.* Piles, 2 Munf. (Va.) 151; Minor *v.* Goodall, 3 Call. (Va.) 393; Staunton *v.* Stout (1889), 86 Va. 321; but the matter of franchise must be directly, not collaterally, involved. Hutchinson *v.* Kellam (1811), 3 Munf. (Va.) 202. Similarly when the constitutionality of an act is involved, under provision of the constitution the amount involved is immaterial. Norfolk, etc., R. Co. *v.* Pendleton (1890), 86 Va. 1004.

In West Virginia—*Supreme Court of Appeals.*—On appeal in an action to set aside a deed as fraudulent and to subject land for a debt, irrespective of the amount of the debt. McClaugherty *v.* Morgan (1892), 36 W. Va. 191.

In Washington.—An action to foreclose a mechanic's lien is an equitable one and is appealable, without regard to the amount in controversy. Fox *v.* Nachtsheim (1892), 3 Wash. 684.

1. Thus, for example, in a suit to recover damages for a personal injury

XII. APPEALABLE AMOUNT—1. When Plaintiff Appeals.—Much of the apparent conflict as to what constitutes the amount in controversy on appeal vanishes if the principle already laid down, that the real amount is after all the final and controlling jurisdictional question, be borne constantly in mind and applied to the changing circumstances of particular cases. For this reason, when the plaintiff appeals from a judgment against him or for less than his claim, the amount claimed by him below is manifestly still that which he is seeking to enforce and therefore constitutes *prima facie* the amount in controversy in the appellate court.[1]

brought against the District of Columbia, said injury being caused by defective streets in the city of Washington, in which the court refused to charge that the District is not responsible for its government because the United States has imposed the same upon it, does not "draw in question" any statute of the United States in the sense of that clause as contained in the statute, and thus confer jurisdiction on the U.S. Supreme Court on appeal irrespective of the amount recovered below in judgment. District of Columbia *v.* Gannon, 130 U. S. 227; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210; *In re* Craft, 124 U. S. 370; U. S. *v.* Hill, 123 U. S. 681; U. S. *v.* Broadhead, 127 U. S. 212; Cogswell *v.* Fordyce, 128 U. S. 391. *Compare* Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611; U. S. *v.* Carr, 8 How. (U. S.) 1.

Local statutory provisions are largely controlling, of necessity, whenever jurisdiction is held to be independent of some specific amount made requisite also by local enactment. Such local statutory provisions, it is quite apparent, frequently do not even come into litigation. Recourse must therefore be had to the statutes and Codes of the various states for anything like an exhaustive examination of the immateriality of amount as affecting jurisdiction. Such an examination is naturally beyond the scope of this article, which professes to deal only with adjudged cases.

1. In the case of Walker *v.* U. S., 4 Wall. (U. S.) 163, Chase, C.J., said: "It has been a good deal controverted whether the sum or value in controversy is to be determined by reference to the amount claimed or the amount of the judgment or the amount in dispute in this court. It has long been settled, however, that when the judgment is for the defendant, or for the plaintiff and less than $2000" (the then maximum jurisdictional amount of the U. S. Supreme Court), "and the plaintiff sues out a writ of error, the court has jurisdiction if the damages claimed in the declaration exceed that sum."

United States.—McCormick *v.* Gray, 13 How. (U. S.) 26; Cooke *v.* Woodrow, 5 Cranch (U. S.) 13; Wise *v.* Columbian Turnpike Co., 7 Cranch (U. S.) 276; Gordon *v.* Ogden, 3 Pet. (U. S.) 33; Smith *v.* Honey, 3 Pet. (U. S.) 469; Hulsecamp *v.* Teel, 2 Dall. (U. S.) 358; Scott *v.* Lunt, 6 Pet. (U. S.) 349; Farmers' Bank *v.* Hooff, 7 Pet. (U. S.) 168; Clark *v.* Bever, 139 U. S. 96; Lee *v.* Watson, 1 Wall. (U. S.) 337; Schacker *v.* Hartford F. Ins. Co., 93 U. S. 241; U. S. *v.* Mosby, 133 U. S. 273; Johnson *v.* St. Louis, etc., R. Co., 141 U. S. 602.

Illinois.—Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638.

Indiana.—Morton *v.* Gravel Road Co. *v.* Wysong, 51 Ind. 4; Flora *v.* Russell (Ind. App., 1892), 31 N. E. Rep. 936.

Iowa.—Ormsby *v.* Nolan, 69 Iowa 130.

Kentucky.—Vance *v.* Cox, 2 Dana (Ky.) 152; Com. *v.* Fugate, 1 T. B. Mon. (Ky.) 1; Miller *v.* Yocum, 12 T. B. Mon. (Ky.) 421; Searcy *v.* Switzer, 13 T. B. Mon. (Ky.) 352; Brandies *v.* Stewart, 1 Metc. (Ky.) 395; Williams *v.* Wilson, 5 Dana (Ky.) 596; Evans *v.* Sanders, 10 B. Mon. (Ky.) 291.

Louisiana.—State *v.* Strickland, 35 La. Ann. 215; Aymar *v.* Bourgeois, 36 La. Ann. 392.

Missouri.—Mathews *v.* Danahy, 25 Mo. App. 354; Willi *v.* Lucas, 40 Mo. App. 70.

New York.—Burleigh *v.* Center, 74 N. Y. 608; Miele *v.* Deperino, 135 N. Y. 618.

On Appeal from a Refusal by Court to Enter a Judgment.—An exception arises where plaintiff's demand below is enough to confer jurisdiction, but his recovery is not, for in such a case no appeal will lie from the refusal by the lower court to enter judgment on the verdict if that verdict is below the appellate jurisdictional amount.[1]

2. When Defendant Appeals—*a.* No Counterclaim Filed.—On the other hand, the sum recovered in judgment below furnishes the amount in controversy when the defendant appeals, provided he has filed no counterclaim and sought no affirmative relief in the trial court.[2]

Virginia.—Umbarger *v.* Watts, 25 Gratt. (Va.) 167; Harman *v.* Lynchburg, 33 Gratt. (Va.) 37; Fink *v.* Denny, 75 Va. 663; McCrowell *v.* Burson, 79 Va. 290; Duffy *v.* Figgat, 80 Va. 664; Wirtz *v.* Osburn, 83 Va. 227; Hawkins *v.* Gresham, 85 Va. 34; Pitts *v.* Spotts, 86 Va. 71.

West Virginia.—Marion Machine Works *v.* Craig, 18 W. Va. 559; Love *v.* Pickens, 26 W. Va. 341; Arnold *v.* Lewis County Court, 38 W. Va. 142.

England.—Harris *v.* Dreesman, 9 Exch. 485.

But *compare* Leahy *v.* Davis, 49 Mo. App. 519.

Defendant's Counterclaim when filed does not in any manner affect the amount, when the plaintiff appeals. Bowman *v.* Gary, Minor (Ala.) 326; Overton *v.* Simon, 10 La. Ann. 685; Pickett *v.* Hollingsworth (1893), 6 Ind. App. 436. *Contra, semble*, Kerr *v.* Simmons, 82 Mo. 269; Mackay *v.* Banister, 53 L. T. N. S. 567.

The Evidence Produced, although in conflict with the claim, in no manner can affect plaintiff's right to appeal as fixed by the amount of the latter. Zoeller *v.* Riley, 98 N. Y. 668. *Compare, contra, semble*, Thomson *v.* Wales, Kirby (Conn.) 35; Williams *v.* Leeds (1787), Kirby (Conn.) 351.

1. Jewell *v.* Sullivan, 130 Ind. 574; Hancock *v.* Barton, 1 S. & R. (Pa.) 269; Wilson *v.* Daniel, 3 Dall. (U. S.) 401; Cooke *v.* Woodrow, 5 Cranch (U. S.) 13; Cooke *v.* Piles, 2 Munf. (Va.) 151; Minor *v.* Goodall, 3 Call (Va.) 393; Henry *v.* Elcan, 2 Munf. (Va.) 541; Hepburn *v.* Lewis (1800), 2 Call (Va.) 498; Lewis *v.* Long, 3 Munf. (Va.) 136.

The Recovery and Not the Claim is the Appellate Amount in Controversy where there is a special verdict for plaintiff but a general judgment for defendant. Buscher *v.* La Fayette (Ind. App., 1894), 36 N.E. Rep. 371. See also McCrowell *v.* Burson, 79 Va. 290.

The recovery is also the test where a plaintiff appeals from an affirmative judgment against him, that is, a judgment not only refusing his claim, but finding him liable to defendant. Holmes *v.* Hull, 48 Iowa 177.

The recovery in the lower court becomes also the appellate amount in controversy where plaintiff appeals from the judgment of an intermediate appellate court reversing a judgment found for him in said lower court. Thus the case of The D. R. Martin, 91 U. S. 365, was a suit by B., the libellant, to recover damages for his wrongful eviction from the steamboat D. R. M. He demanded in his libel $25,000 damages, but in the District Court recovered only $500. From this decree the claimant appealed. B., the libellant, did not appeal. The Circuit Court reversed the decree, and dismissed the libel. B. then appealed to the U. S. Supreme Court, and the court said: "B., having failed to appeal from the decree of the District Court, is concluded by the amount there found in his favor. * * * In the Circuit Court, the matter in controversy was his right to recover the sum which had been awarded him as damages. * * * The matter in dispute here is that which was in dispute in the Circuit Court." Wagner *v.* Long Island R. Co., 70 N. Y. 614; Schenck *v.* Marx, 125 N. Y. 703; Dominion Salvage Co. *v.* Brown, 20 Can. Sup. Ct. Rep. 203; Cossette *v.* Dun, 18 Can. Sup. Ct. Rep. 222.

2. Waite, C.J., said in the case of Hilton *v.* Dickinson (1887), 108 U. S. 165: "It has always been assumed since Cooke *v.* Woodrow, 5 Cranch (U. S.) 13, that when a defendant brought

The Amount Claimed Below.—In some states a different rule prevails, although with some conflict of opinion; and the amount claimed in the lower court is frequently, if not invariably, the amount in controversy, even when the defendant is the appellant.[1]

a case here the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief which was denied, and this because, as to him, jurisdiction depended on the matter in dispute here. (If the original demand against him was for more than our jurisdictional limit and the recovery for less, the record would show * * * that his object in bringing the case here * * * was to get more.)"

United States.—Knapp *v.* Banks, 2 How. (U. S.) 73; Sampson *v.* Welsh, 24 How. (U. S.) 207; Walker *v.* U. S., 4 Wall. (U. S.) 163; Merrill *v.* Petty, 16 Wall. (U. S.) 338; Gordon *v.* Ogden, 3 Pet. (U. S.) 33; U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32; Thompson *v.* Butler, 95 U. S. 694; Troy *v.* Evans, 97 U. S. 1; Pierce *v.* Wade, 100 U. S. 444; Lamar *v.* Micou, 104 U. S. 465; Dodge *v.* Knowles, 114 U. S. 430; Williamsport Bank *v.* Knapp, 119 U. S. 357; District of Columbia *v.* Gannon, 130 U. S. 227; District of Columbia *v.* Emerson, 130 U. S. 229; Keller *v.* Ashford, 133 U. S. 610; The Propeller Burlington, 137 U. S. 386.

Alabama.—Cothran *v.* Weir, 3 Ala. 24.

Arizona.—Grounds *v.* Ralph, 1 Arizona 227.

Illinois.—Emerson *v.* Clark, 3 Ill. 489; Lake Erie, etc., R. Co. *v.* Faught, 129 Ill. 257; Martin *v.* Stubbins, 126 Ill. 387, 9 Am. St. Rep. 620; Svanoe *v.* Jurgens (1893), 144 Ill. 507.

Indiana.—Bogart *v.* New Albany, 1 Ind. 38; Tripp *v.* Elliott, 5 Blackf. (Ind.) 168; Reed *v.* Seeing, 7 Blackf. (Ind.) 135; Jones *v.* Yetman, 6 Ind. 46; Overton *v.* Overton, 17 Ind. 226; Moffitt *v.* Wilson, 44 Ind. 476; Bowers *v.* Elwood, 45 Ind. 234; Quigley *v.* Aurora, 50 Ind. 28; Dailey *v.* Indianapolis, 53 Ind. 483; Hall *v.* Spurgeon, 23 Ind. 73; Painter *v.* Guirl, 71 Ind. 240; Baltimore, etc., R. Co. *v.* Johnson, 83 Ind. 57; Galbreath *v.* Trump, 83 Ind. 381; Baker *v.* Groves, 126 Ind. 593; Cincinnati, etc., R. Co. *v.* McDade, 111 Ind. 23; Louisville, etc., R. Co. *v.* Steele (1893), 6 Ind. App. 183.

Iowa.—Cooper *v.* Dillon, 56 Iowa 367.

Kentucky.—Moore *v.* Boner, 7 Bush (Ky.) 26; Tipton *v.* Chambers, 1 Metc. (Ky.) 565; Revill *v.* Pettit, 3 Metc. (Ky.) 314; Louisville, etc., R. Co. *v.* Wade, 89 Ky. 255; Brandies *v.* Stewart, 1 Metc. (Ky.) 395; Williams *v.* Wilson, 5 Dana (Ky.) 596; Turner *v.* Pash (Ky., 1891), 17 S. W. Rep. 809; Mullins *v.* Bullock (Ky., 1892), 19 S. W. Rep. 8.

Kansas.—Richmond *v.* Brummie, 52 Kan. 247.

Mississippi.—Ward *v.* Scott, 57 Miss. 826.

Missouri.—State *v.* St. Louis Ct., 87 Mo. 569; Reichenbach *v.* United Masonic Ben. Assoc., 112 Mo. 22; Ellis *v.* Harrison, 104 Mo. 270.

New York.—Brown *v.* Sigourney, 72 N. Y. 122; Graville *v.* New York, etc., R. Co., 104 N. Y. 674.

Utah.—Openshaw *v.* Utah, etc., R. Co., 6 Utah 268.

West Virginia. — Marion Machine Works *v.* Craig, 18 W. Va. 559.

Virginia. — Gage *v.* Crockett, 27 Gratt. (Va.) 735; Harman *v.* Lynchburg, 33 Gratt. (Va.) 37; Skipwith *v.* Young, 5 Munf. (Va.) 276; Duffy *v.* Figgat, 80 Va. 664.

Canada. — Ontario, etc., R. Co. *v.* Marcheterre, 17 Can. Sup. Ct. Rep. 141.

England.—Macfarlane *v.* Leclaire, 15 Moore P. C. C. 181; The Doctor Van Thumnen Tellon, 20 L. T. N. S. 960; The Elizabeth, L. R. 3 Adm. 33.

Compare Campbell *v.* Smith, 32 Gratt. (Va.) 288; Washington County *v.* Parlier, 9 Ill. 353.

Amount Not Aided by Other Question Involved. — In an action for assault, where less than the jurisdictional amount is recovered, there is no appeal from the Supreme Court in *New York*, without leave, even though the case involves also a question of the right to use a private way. McMillen *v.* Cronin, 57 How. Pr. (N. Y. Ct. of Appeals) 53. See also Kurtz *v.* Hoffman, 65 Iowa 260; Cook *v.* Bondurant, 85 Va. 47; Greathouse *v.* Sapp, 26 W. Va. 87.

1. *In California* the decisions are conflicting. See, in support of recovery below the appellate juris-

b. COUNTERCLAIM FILED.—When the defendant files a counterclaim in the trial court and then appeals from a judgment against him, he occupies substantially the position of a plaintiff appealing from an adverse judgment, and therefore the amount so claimed affirmatively by him becomes the appellate amount in controversy.[1]

dictional amount, Maxfield *v.* Johnson, 30 Cal. 545; Pennybecker *v.* McDougal, 48 Cal. 161; Solomon *v.* Reese, 34 Cal. 33; Bailey *v.* Sloan, 65 Cal. 387; Lord *v.* Goldberg, 81 Cal. 596, 15 Am. St. Rep. 82; Dashiell *v.* Slingerland, 60 Cal. 653. But *compare* the able dissenting opinion of Morrison, C.J., in the latter case; and see, *contra*, Votan *v.* Reese, 20 Cal. 89; Zabriskie *v.* Torrey, 20 Cal. 173; Meeker *v.* Harris, 23 Cal. 286; Dumphy *v.* Guindon, 13 Cal. 28.

In Louisiana it is the rule. Prieur *v.* Commercial Bank, 7 La. 509; State *v.* Hackett, 5 La. Ann. 91; McKee *v.* Ellis, 2 La. Ann. 163; State *v.* Wiltz, 11 La. Ann. 439; Holland *v.* Duchamp, 12 La. Ann. 784; State *v.* Lagarde, 21 La. Ann. 18; Hendricks *v.* Wood, 33 La. Ann. 1051; Smith *v.* Merchants' Mut. Ins. Co., 33 La. Ann. 1071; State *v.* Judges, 34 La. Ann. 1046; Francisco *v.* Gauthier, 35 La. Ann. 393; Munday *v.* Lyons, 35 La. Ann. 990; Zuberbier *v.* Morse, 36 La. Ann. 970; State *v.* Judges, 37 La. Ann. 372; Johnson *v.* Cavanac, 40 La. Ann. 773; Flower *v.* Prejean, 42 La. Ann. 897.

In Iowa.—In appeals from justices of the peace, where by statute "any person aggrieved by the final judgment * * * may appeal," it was held that if the plaintiff could appeal because his claim was in an amount sufficient, although his recovery was below the appealable amount, the defendant was entitled to the same privilege, the plaintiff's claim availing for him. Lundak *v.* Chicago, etc., R. Co., 65 Iowa 473; Hays *v.* Chicago, etc., R. Co., 64 Iowa 593; Perry *v.* Conger, 65 Iowa 588; Curran *v.* Excelsior Coal Co., 63 Iowa 94; Nichols *v.* Wood, 66 Iowa 225; Sterner *v.* Wilson, 68 Iowa 714.

In Missouri a similar rule prevails. Ellis *v.* Harrison, 104 Mo. 270. See *semble*, *contra*, Bateman *v.* Sisson, 70 Iowa 518.

In Illinois, under the Rev. Sts. of 1891, in actions arising *ex delicto* and tried on the merits, the jurisdiction of the Supreme Court depends on the amount recovered, no matter who appeals. Fitzpatrick *v.* Chicago, etc., R. Co., 139 Ill. 248; Baber *v.* Pittsburg, etc., R. Co., 93 Ill. 342; Bradshaw *v.* Standard Oil Co., 114 Ill. 172.

The right of a Court of Chancery to give relief against the decisions of courts of record or justices of the peace depends upon the amount of the judgment recovered therein. Ballentine *v.* Beall, 4 Ill. 203. *Compare* Bailey *v.* Green, 8 Wend. (N. Y.) 339.

In Massachusetts.—In suits on simple contracts, appeals in which are, by statute, limited to cases wherein "plaintiff claims more than $50," it is invariably the amount claimed which tests appellate jurisdiction. Stone *v.* Kelly, 8 Mass. 98. See also, arising under Mass. statutes of 1820, Chamberlain *v.* Cochran, 8 Pick. (Mass.) 522; Hemmenway *v.* Hickes, 4 Pick. (Mass.) 499.

In Connecticut a similar rule obtains. Pitkin *v.* Flowers, 2 Root (Conn.) 42; Newton *v.* Danbury, 3 Conn. 553.

In Washington, by statute, appellate jurisdiction being made to depend, in certain actions, on "the original" amount in controversy, this language is construed to include all cases, no matter who appeals. Bleecker *v.* Satsop R. Co., 3 Wash. 77.

In Wisconsin.—By the organic law of Wisconsin while still a Territory, in force in 1847, the amount recovered determined the right of appeal *vel non* to the U. S. Supreme Court. Oakley *v.* Hibbard, 2 Pin. (Wis.) 21, 52 Am. Dec. 139.

1. *Illinois.*—Capen *v.* De Steiger Glass Co., 105 Ill. 185.

Iowa.—Mash *v.* Beckman, 86 Iowa 249; Sterner *v.* Wilson, 68 Iowa 714.

Indiana.—Lake Shore, etc., R. Co. *v.* Van Auken, 1 Ind. App. 492.

Louisiana.—Lamorere *v.* Avery, 32 La. Ann. 1008; Davenport *v.* Knox, 35 La. Ann. 486; New Orleans, etc., R. Co. *v.* Barton, 43 La. Ann. 171; Young *v.* Wilson, 34 La. Ann. 385; Miller *v.* Gidiere, 36 La. Ann. 201; Colomb *v.* McQuaid, 36 La. Ann. 370; Citizens' Bank *v.* Webre, 44 La. Ann.

3. In Intermediate Appeals.—Where the jurisdiction of a justice of the peace or a court of similar standing has failed for want of a sufficient amount in controversy, and an appeal is taken to some intermediate appellate court, the latter, according to the current weight of authority, is without power to review the case, its jurisdiction being solely dependent upon that of the former.[1] See "JURISDICTION."

XIII. STATUTORY AMOUNT—LOCAL PROVISIONS.—From the very nature of the case the amount in controversy as affecting the jurisdiction of courts, both original and appellate, is largely dependent upon constitutional and statutory enactment of a purely local and limited character, and differing to a greater or less degree in the various states. So far as these provisions have been construed or applied in the adjudicated cases they are collated in the notes.[2]

334; McKnight's Succession, 44 La. Ann. 399.

Missouri.—Forster Vinegar Co. *v.* Guggemos, 24 Mo. App. 444.

New York.—Dudley *v.* Brinkerhoff (Supreme Ct.), 2 N.Y. Supp. 321; Reed *v.* Trowbridge, 106 N. Y. 657.

United States.—Dushane *v.* Benedict, 120 U. S. 630; Ryan *v.* Bindley, 1 Wall. (U. S.) 66; Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579; Block *v.* Darling, 140 U. S. 234; Buckstaff *v.* Russell (1894), 151 U. S. 626.

Vermont.—Sherwin *v.* Colburn, 25 Vt. 613; Church *v.* French, 54 Vt. 420. See also Myers *v.* Myers, 22 Mo. App. 94; Mackay *v.* Banister, 53 L. T. N. S. 567. *Contra*, Fowler *v.* Stocking (1813), 5 Day (Conn.) 539.

1. **The Difference between the Counterclaim and the Amount Allowed** thereon constituted the amount in controversy, on an appeal by the defendant, when the said counterclaim was sufficient to confer jurisdiction, but the amount recovered thereon was insufficient. Carne *v.* Russ (1894), 152 U. S. 250; Peyton *v.* Robertson, 9 Wheat. (U. S.) 527.

The difference between the amount allowed plaintiffs and the amount allowed the defendants on their counterclaim was held to be the amount in controversy on the defendants' appeal. Purcell *v.* Booth, 6 Dakota 17; State *v.* Lewis (Mo. 1, 888), 8 S. W. Rep. 770; Ryan *v.* Bindley, 1 Wall. (U. S.) 66. See also Thompson *v.* French, 57 Iowa 559.

The Counterclaim Must be Provable.—A counterclaim which presents no case and is unsupported by evidence forms no part of the amount in controversy. Kurtz *v.* Hoffman, 65 Iowa 260; Campbell *v.* Lewis, 83 Iowa 583; Bledsoe *v.* Gulf, etc., R. Co. (Tex. Civ. App., 1894), 25 S. W. Rep. 314; Blanchard *v.* Kenison, 25 La. Ann. 385; Wiley *v.* Brigham, 81 N. Y. 13; Blake *v.* Krom, 128 N. Y. 64.

Claiming a Reduction of Judgment is not equivalent to the filing of a counterclaim by defendant, so as to entitle him to an appeal as for affirmative relief sought. Lamar *v.* Micou, 104 U. S. 465.

In Virginia disallowed counterclaims cannot be included in the amount in controversy when the defendant appeals from a judgment for the plaintiff. Lewis *v.* Long, 3 Munf. (Va.) 136; Umbarger *v.* Watts, 25 Gratt. (Va.) 167; Harman *v.* Lynchburg, 33 Gratt. (Va.) 37; Hawkins *v.* Gresham, 85 Va. 34; Kendrick *v.* Spotts (Va., 1893), 17 S. E. Rep. 853.

Alternative and General Statements of the law upon the question of the amount in controversy on appeal are to be found in the following cases: Wilson *v.* Daniel (1798), 3 Dall. (U.S.) 401; Lee *v.* Watson, 1 Wall. (U. S.) 337; Knapp *v.* Banks (1844), 2 How. (U. S.) 73; Merrill *v.* Petty, 16 Wall. (U. S.) 338; Gage *v.* Crockett, 27 Gratt. (Va.) 735; Harman *v.* Lynchburg, 33 Gratt. (Va.) 37; Reynolds *v.* Sneed, 1 Ark. 199; Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96; Poland *v.* Carrigan, 20 Cal. 174.

2. **Alabama**—*Circuit Courts.*—Original jurisdiction in civil cases limited to cases where sum involved exceed $50, by constitution. Huggins *v.*

The notes to this section, however, do not give, and do not profess to give, a reference to all the multitudinous and constantly

Ball, 19 Ala. 587; Camp *v.* Marion County, 91 Ala. 240. Affidavit is requisite alleging *bona fides* of plaintiff's claim in all cases where a greater sum than is due is demanded. Cavender *v.* Funderburg, 9 Port. (Ala.) 460. So also where a sum below the court's jurisdiction is recovered in such actions, unless recovery is reduced by a set-off successfully interposed. McClure *v.* Lay, 30 Ala. 208; Camp *v.* Marion County, 91 Ala. 240.

Chancery Courts have jurisdiction in claims of a purely equitable nature, where the sum demanded exceeds $20 and is less than $50. Hall *v.* Canute, 22 Ala. 650.

Justices of the Peace.—By statute their maximum jurisdiction in actions *ex contractu* not sounding in damages was $50. Cavender *v.* Fundebourg (1839), 9 Port. (Ala.) 460; Williams *v.* Hinton (1841), 1 Ala. 297. In other civil cases $50 was also the maximum limit. Crabtree *v.* Cliatt (1853), 22 Ala. 181; Carter *v.* Alford, 64 Ala. 236; Brown *v.* Alabama, etc., R. Co. (1880), 87 Ala. 370. The constitution of 1865 increased their jurisdiction in contract cases to $100, also in attachment. Pearce *v.* Pope, 42 Ala. 319; Solomon *v.* Ross, 49 Ala. 198. But jurisdiction in other civil cases is not increased thereby. Taylor *v.* Woods, 52 Ala. 474. By sec. 3378 of Code of 1886 they have original jurisdiction of actions of unlawful detainer up to $100, the constitutional limit of civil jurisdiction in the year 1890. Sykes *v.* Schwartz (Ala., 1890), 8 So. Rep. 71.

Montgomery City Court is given by the constitution concurrent jurisdiction with the Circuit Court and justices of the peace where the amount involved is a sum between $50 and $100. Carew *v.* Lillienthall, 50 Ala. 44.

Arkansas—*County Courts of Common Pleas.*—Original jurisdiction is limited to $500 and under, exclusive of interest. Street *v.* Stuart (1881), 38 Ark. 159. Circuit and county courts have as a minimum limit of their original jurisdiction $100. Huddleston *v.* Spear, 8 Ark. 406; Crabtree *v.* Moore, 7 Ark. 74; Blackwell *v.* State, 3 Ark. 320.

Justices of the Peace.—Original jurisdiction in all civil cases in contract except covenant limited to $100 and under, by constitution. Crabtree *v.* Moore, 7 Ark. 74; Howell *v.* Milligan, 13 Ark. 40; Chatten *v.* Heffley, 21 Ark. 313; Dicus *v.* Bright, 23 Ark. 110; Sherrill *v.* Wilson, 29 Ark. 384. By Ark. new constitution, art. 7, sec. 3, jurisdiction in contract extended to a maximum limit of $200 and a concurrent jurisdiction with the Circuit Courts where the amount claimed exceeds $100 and does not exceed $500. Rogers *v.* Glascock, 25 Ark. 24; Sherrill *v.* Wilson, 29 Ark. 384. In criminal cases they have concurrent jurisdiction with the Circuit Courts when fine does not exceed $100, but exclusive of such courts and concurrent with police and city courts in cases involving fines not exceeding $10. State *v.* Smith, 26 Ark. 149. By constitution, as in force in 1881, wherever the sum claimed on an open account is less than $300, it is within the jurisdiction of a justice of the peace. Hibbard *v.* Kirby, 38 Ark. 102. So also in cases for the recovery of personal property whose value does not exceed $300, and in such cases where damages do not exceed $100. Stanley *v.* Bracht, 42 Ark. 210. By constitution, art. 7, sec. 40, in actions for damages the maximum limit of justices' jurisdiction is to claims of $100. Little Rock, etc., R. Co. *v.* Manees, 44 Ark. 100.

Circuit Court.—Appellate jurisdiction in appeals thereto from justices of the peace only attaches when the sum in controversy exceeds $100, by organic law, p. 38. McCamy *v.* Smith, 1 Ark. 142.

California.—*Supreme Court* has concurrent original jurisdiction, by the constitution, of all cases in which the amount demanded exceeds $200, with the district, county, probate courts, and court of sessions. Zander *v.* Coe, 5 Cal. 230. Same court had appellate jurisdiction where matter in dispute exceeded $200. Adams *v.* Town (1853), 3 Cal. 247; Conant *v.* Conant (1858), 10 Cal. 249, 70 Am. Dec. 717; Bolton *v.* Landers (1864), 27 Cal. 106. By a subsequent constitutional provision its minimum limit in appeals was increased to $300. Hopkins *v.* Cheeseman (1865), 28 Cal. 180; People *v.* Perry (Cal., 1889), 21 Pac. Rep. 423; Bienenfeld *v.* Fresno Milling Co. (1890), 82 Cal. 425. But the question

changing statutes in all the various jurisdictions which affect the jurisdictional amount of local courts. Nothing short of a com-

is only one of costs; the jurisdiction extends to a demand for less than $300. Oullahan *v.* Morrissey (1887), 73 Cal. 297. And also in cases involving title to real estate. Doherty *v.* Thayer, 31 Cal. 140.

District Courts were without original jurisdiction in cases involving less than $200, exclusive of interest. Arnold *v.* Van Brunt (1854), 4 Cal. 89; Brock *v.* Bruce, 5 Cal. 279; Page *v.* Ellis (1858), 9 Cal. 248. Subsequently the minimum limit of jurisdiction was fixed at $300. People *v.* Mier, 24 Cal. 61; Bell *v.* Crippen, 28 Cal. 327; Brown *v.* Rice, 52 Cal. 489; Derby *v.* Stevens (1883), 64 Cal. 287.

Justices of the Peace are limited to a maximum jurisdiction of $100. Small *v.* Gwinn (1856), 6 Cal. 447; Van Etten *v.* Jilson, 6 Cal. 19; Freeman *v.* Powers (1857), 7 Cal. 104; Ballerino *v.* Bigelow (1891), 90 Cal. 500. "A second alcalde" is limited under the Mexican law in California to demands not exceeding $100. Norrell *v.* Gray, 1 Cal. 133.

Colorado—*Supreme Court.*—Is limited in its appellate jurisdiction to cases in which the judgment recovered below, exclusive of costs, amounts to $100. Meyer *v.* Brophy (1890), 15 Colo. 572. Sons of America Bldg., etc., Assoc. *v.* Denver, 15 Colo. 592; Crane *v.* Farmer (1890), 14 Colo. 294; McClaskey *v.* Lake View Min. Co. (1892), 18 Colo. 65.

Court of Appeals.—The act of 1887 makes the same limitation applicable to the Court of Appeals as the successor of the Supreme Court. Pitkin County *v.* Aspen Min., etc., Co. (1891), 1 Colo. App. 125; Stevenson *v.* Clarke (1893), 2 Colo. App. 108.

Dakota.—*District Courts* which by the organic law have original jurisdiction in chancery and common law are not impliedly limited in the amount thereof to $50 because the law only allows a plaintiff costs when his recovery equals that sum. St. Paul, etc., Ins. Co. *v.* Coleman, 6 Dakota 458.

Connecticut.—*Superior Courts* prior to 1852 had appellate jurisdiction in appeals from a county court where the matter in dispute exceeded $70. Huntley *v.* Davis (1815), 1 Conn. 391. *Compare* Houghton *v.* Havens (1826), 6 Conn. 305. The act of 1852, by giving county courts original jurisdiction in cases wherein demand did not exceed $200, absolutely repealed the former appellate jurisdiction of superior courts. Brown *v.* Payne, 22 Conn. 565; Imlay *v.* Judges, 23 Conn. 445. Equity suits, where matter in demand exceeds $335, may be entertained by superior courts. Where it is less than that sum the jurisdiction belongs to the county courts. Wheat *v.* Griffin (1810), 4 Day (Conn.) 419.

Courts of Common Pleas, by general statutes, have jurisdiction in suits in equity where demand does not exceed $500. Of sums in excess of this the superior courts have cognizance. Stone *v.* Platt (1874), 41 Conn. 285; Boyle *v.* Rice, 41 Conn. 418; Blakeslee *v.* Murphy (1876), 44 Conn. 188.

Florida — *Supreme Court.* — By act 1845 has appellate jurisdiction only where the amount in controversy is in excess of $50. Curry *v.* Marvin (1849), 2 Fla. 411; Anderson *v.* Brown (1855), 6 Fla. 299.

Justices of the Peace have exclusive jurisdiction in suits to collect debts not exceeeding $50 by act of 1842. Mc Millan *v.* Savage (1856), 6 Fla. 748. They have jurisdiction in larceny cases where property stolen does not exceed $20. McLean *v.* State (1887), 23 Fla. 281.

Georgia.—*Superior Courts*, by the Constitution of 1868, had concurrent original jurisdiction with justices of the peace in all civil cases where the amount of debt or claim was less than $100. McDonald *v.* Feagin, 43 Ga. 360. By same constitution the appellate jurisdiction of said courts extends to all claim cases wherein the amount ceeds $50. Burts *v.* Farrar, 50 Ga. 601.

District Courts, by the act of 1870, sec. 12, have cognizance of claims in debt and contract not exceeding $100. Forbes *v.* Owens, 45 Ga. 132.

Justices of the Peace, by the constitution, may entertain civil cases arising *ex contractu* only where the principal sum, exclusive of interest, costs, and other charges, does not exceed $100. Baxter *v.* Bates (1882), 69 Ga. 587; Johnson *v.* Stephens, 69 Ga. 756; Beach *v.* Atkinson, 87 Ga. 288. The jurisdiction of justices' courts in the

plete transcript of those statutes would accomplish this result, for, as can readily be seen, the cases adjudicated construe only a

city of Macon was enlarged by the act of 1852 from a $30 to a $50 limit. Freeman *v.* Carhart (1855), 17 Ga. 348.

Illinois—*Supreme Courts.*—Appellate jurisdiction from appellate court in cases of tort where damages are capable of direct proof is limited to where those damages exceed $1000; but where they are not so ascertainable it is sufficient, whether action be *ex delicto* or *ex contractu*, if they amount to $1000. Hankins *v.* Chicago, etc., R. Co. (1881), 100 Ill. 466; Hutchinson *v.* Howe, 100 Ill. 11; Brant *v.* Gallup (1885), 111 Ill. 487, 53 Am. Rep. 638; Ives *v.* Hulce (1885), 17 Ill. App. 38; Moore *v.* Sweeney (1889), 128 Ill. 204; Scharf *v.* People (1890), 134 Ill. 240, *overruling* Rawlings *v.* People, 102 Ill. 475; Common *v.* People (1891), 137 Ill. 601; Umlauf *v.* Umlauf, 103 Ill. 651; Seelye *v.* Seelye (1892), 143 Ill. 264. By a statute in force in 1832 there could be an appeal from a Circuit Court to the Supreme Court, where a judgment in the former, exclusive of costs, amounted to $20, but there could be a writ of error although judgment was less than that sum. Bowers *v.* Green (1832), 2 Ill. 42, *overruling* Clark *v.* Ross, 1 Ill. 334.

Justices of the Peace.—By statute of 1836 their maximum jurisdiction of actions by or against administrators is $20. Leigh *v.* Mason (1836), 2 Ill. 249; Williams *v.* Blankenship (1850), 12 Ill. 122. By Justices Act, sec. 17, this was changed so that in suits in which administrators were plaintiffs the jurisdiction was enlarged to $100. Miller *v.* McCray (1865), 37 Ill. 428. In attachment their jurisdiction was formerly limited to $30 and less, and then increased to $50. Hull *v.* Blaisdell (1837), 2 Ill. 332. In trespass *d. b. a.* there was also a limit of $30. Hyatt *v.* Harmon (1844), 6 Ill. 379. In actions for debts due upon verbal contracts they had by statute in force in 1841 a maximum limit of $100. Dowling *v.* Stewart, 4 Ill. 193. So also in a suit upon the judgment of another justice the highest limit was $100. Chicago, etc., R. Co. *v.* Whipple (1859), 22 Ill. 337. The proposed bill of 1871 to increase justices' jurisdiction in civil cases to $200 failed to become a law. People *v.* De Wolf (1871), 62 Ill. 253. *Compare* Hensoldt *v.* Petersburg (1872), 63 Ill. 157. In Peoria county, by Rev. Stats. ch. 49, § 17, the jurisdictions of justices and police magistrates over all complaints, suits, and prosecutions in said statute mentioned extends to where the claim does not exceed $300; and a similar limit was fixed in all cases of debts, penalties, and demands in which debt, or assumpsit and trover, or trespass to personal property would lie. Steamboat Delta *v.* Walker (1860), 24 Ill. 233; Campbell *v.* Conover, 26 Ill. 64. The constitution of 1870 abolished all local jurisdictional limits of amount in the jurisdiction of justices, and rendered it uniform throughout the state, the maximum limit by the act of 1871 being fixed at $100. Markham *v.* Heffner (1873), 67 Ill. 101; Johnson *v.* Logan, 68 Ill. 313; Phillips *v.* Quick (1872), 63 Ill. 445; Taylor *v.* Smith (1872), 64 Ill. 445. In garnishment on judgment recovered before him a justice of the peace has jurisdiction without regard to the statutory limit. Nesbitt *v.* Dickover (1886), 22 Ill. App. 140. By a statute of 1890 the maximum limit of jurisdiction in replevin is fixed to where property is not worth over $200. Vogel *v.* People, 37 Ill. App. 388.

County Courts. — Have concurrent jurisdiction with Circuit Courts in all cases where amount does not exceed $500. Lachman *v.* Deisch (1873), 71 Ill. 59.

Indiana—*Supreme Court.*—Has appellate jurisdiction only where amount involved, exclusive of interest and costs, exceeds $50, by Practice Act of March, 1877. Louisville, etc., R. Co. *v.* Jackson, 64 Ind. 398; Cowley *v.* Rushville, 60 Ind. 327; Halleck *v.* Weller, 72 Ind. 342. See also Hall *v.* Durham, 113 Ind. 327.

Appellate Court.—Has exclusive jurisdiction of appeals fom circuit, superior, and criminal courts in cases originating before a justice where sum involved exceeds $50, and in cases for the recovery of money only wherein amount does not exceed $1000. Baker *v.* Groves (1890), 126 Ind. 593; Parker *v.* Indianapolis Nat. Bank, 126 Ind. 595; Harris *v.* Howe (1891), 129 Ind. 72; Wysor *v.* Johnson, 1 Ind. App. 419; Hallett *v.* Hallett (Ind. App., 1892), 30 N. E. Rep. 534; Durham *v.*

portion of the statutory enactments, and these adjudicated cases fulfil the whole purpose of this article.

State, 133 Ind. 422. By acts of 1893, p. 29, sec. 1, the appellate jurisdiction was extended in money actions to a maximum limit of $3500. Bible *v.* Voris (Ind. App., 1893), 34 N. E. Rep. 128; Miller *v.* Hart, 6 Ind. App. 557.

Court of Common Pleas.—Had a statutory jurisdiction of less than $1000. Fleece *v.* Indiana, etc., R. Co. (1856), 8 Ind. 460; Vawter *v.* Grant (1857), 10 Ind. 7; May *v.* Crawford (1859), 14 Ind. 5; Lambdin *v.* Miller (1860), 14 Ind. 514. By a subsequent statute, act of 1859, this jurisdiction was enlarged to sums of $1000 and over, except in special cases. Murdock *v.* Wheelock, 13 Ind. 472; Stevenson *v.* Gould (1861), 17 Ind. 406; Schoonover *v.* Bennett (1862), 18 Ind. 223.

Circuit Courts.—The minimum limit of their jurisdiction was $50. Proctor *v.* Bailey (1841), 5 Blackf. (Ind.) 495. Their minimum limit was afterwards by statute $1000. State *v.* Turner (1858), 10 Ind. 411; Marsh *v.* Sherman (1859), 12 Ind. 358.

Justices of the Peace.—By statute of 1823 their general jurisdictional maximum limit was $50. M'Fadin *v.* Gill (1824), 1 Blackf. (Ind.) 309; Parkins *v.* Smith (1837), 4 Blackf. (Ind.) 299; Middleton *v.* Harris, 6 Blackf. (Ind.) 397; Forsha *v.* Watkins, 4 Blackf. (Ind.) 520; Markin *v.* Jornigan (1852), 3 Ind. 548; White Water Valley Canal Co. *v.* Dow, 1 Ind. 141; Falkner *v.* Iams, 5 Ind. 200; Wilcox *v.* Hogan, 5 Ind. 546. By statutes of 1827, p. 30, this jurisdiction in actions of debt or assumpsit was extended to cases in which the claim was for an amount not exceeding $100. Cowgill *v.* Wooden, 2 Blackf. (Ind.) 332; Evans *v.* Shoemaker, 2 Blackf. (Ind.) 237; State *v.* Westbrook, 7 Blackf. (Ind.) 138. By Rev. Stats. of 1852 the maximum limit was fixed at claims of $100, inclusive of interest, both in actions arising *ex contractu* and *ex delicto*. Gregg *v.* Wooden (1856), 7 Ind. 499; Rodman *v.* Kelly (1859), 13 Ind. 377. By act of 1861 jurisdiction in actions of tort extended where claim amounted to $200, concurrently with courts of common pleas. Leathers *v.* Hogan, 17 Ind. 242. See also Harrell *v.* Hammond, 25 Ind. 104; Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Deam *v.* Dawson (1878), 62 Ind. 22. By act of 1876, § 10, and of 1881, § 1433, jurisdiction is given both in contract and tort to sums up to $200. State *v.* Forry (1878), 64 Ind. 260; Second Nat. Bank *v.* Hutton (1881), 81 Ind. 101; Fawkner *v.* Baden (1883), 89 Ind. 587. By the same acts in judgments confessed, the jurisdictional maximum limit is fixed at $300. Calloway *v.* Byram, 95 Ind. 423. In actions of assaults, batteries, affrays, and other breaches of the peace they may impose a fine not exceeding $20, by Rev. Stats. 1830 and 1843. Henry *v.* Hamilton, 7 Blackf. (Ind.) 506.

Idaho—*Probate Court.*—By the act of Congress, Dec. 13, 1870, has concurrent jurisdiction with the District Court where the amount in controversy, exclusive of interest, does not exceed $500. Greathouse *v.* Heed, 1 Idaho 494.

Iowa—*Supreme Court.*—Has a minimum limit in its appellate jurisdiction of $100, with certain specified statutory exceptions. Wilson *v.* Iowa County (1879), 52 Iowa 339; Hakes *v.* Dott (1880), 54 Iowa 17; Mohme *v.* Livingston, 54 Iowa 458; Davis *v.* Upright, 54 Iowa 752; Andrews *v.* Burdick (1883), 62 Iowa 714; Kurtz *v.* Hoffman (1884), 65 Iowa 260; Hays *v.* Chicago, etc., R. Co. 64 Iowa 593; McBurney *v.* Graves (1885), 66 Iowa 314; Ardery *v.* Chicago, etc., R. Co., 65 Iowa 723; Bradenberger *v.* Rigler (1886), 68 Iowa 300; Cooper *v.* Wilson (1887), 71 Iowa 204; Ellithorpe *v.* Reidesil, 71 Iowa 315; Riddle *v.* Fletcher, 72 Iowa 454; Chilton *v.* Chicago, etc., R. Co., 72 Iowa 689; Hutchinson *v.* Hutchinson, 73 Iowa 763; Harrington *v.* Pierce, 38 Iowa 260; District Tp. *v.* Independent Dist., 72 Iowa 687. (*N.B.*—That in this case the court says, in construing the statute conferring the appellate jurisdiction, that *the same is limited to* $100 *and* LESS, whereas, as per statute and all other cases, it is "$100 *and* OVER.") State *v.* McCulloch (1889), 77 Iowa 450.

District Courts, by act of February, 1843, have jurisdiction where debt or demand as claimed is for $50 and over. Bush *v.* Elson (1844), Morris (Iowa) 316. They have concurrent jurisdiction, in cases for $50 and less, with justices of the peace. Koons *v.* Dyer (1841), Morris (Iowa) 93; Hudson *v.* Matthews, Morris

(Iowa) 94; Hutton *v.* Drebilbis (1850), 2 Greene (Iowa) 593. Subsequently it was held that this concurrent jurisdiction with justices extended to $100 and under. Nelson *v.* Gray, 2 Greene (Iowa) 397.

Justices of the Peace are by statute limited to a maximum jurisdiction of $100, which may be extended by consent and agreement of parties to $300. Hodge *v.* Ruggles (1872), 36 Iowa 42; Galley *v.* Tama County (1874), 40 Iowa 49; Long *v.* Loughran (1875), 41 Iowa 543; Gillett *v.* Richards (1877), 46 Iowa 652; Marshalltown Bank *v.* Kennedy (1880), 53 Iowa 357; Brown *v.* Davis (1882), 59 Iowa 641; Schlisman *v.* Webber (1884), 65 Iowa 114; Houghton *v.* Bauer (1886), 70 Iowa 314.

Kansas—*Supreme Court.* — Prior to act of 1889 its jurisdiction attached although the amount in controversy was less than $100. By that act, chap. 245, § 1, it was made necessary that the amount should exceed $100, exclusive of costs, in civil cases, save in certain cases especially made exceptional thereby. Hite *v.* Stimmel (1891), 45 Kan. 469.

District Courts.—By act of 1855 their minimum limit of jurisdiction in civil cases was $100. Sattig *v.* Small (1862), 1 Kan. 170. See also Henderson *v.* Kennedy, 9 Kan. 163. And their maximum limit $300. Norton *v.* Foster, 12 Kan. 44.

Justices of the Peace have jurisdiction in replevin only where value of property is less than $100. Garrett *v.* Wood (1865), 3 Kan. 231; Leslie *v.* Reber (1868), 4 Kan. 270. So also in actions of trespass to real estate where the damages demanded do not exceed that sum. Missouri Pac. R. Co. *v.* Atchison (1890), 43 Kan. 529. In civil matters for money demands only, the maximum limit is $300. Ball *v.* Biggam (1890), 43 Kan. 327; Missouri Pac. R. Co. *v.* Atchison, 43 Kan. 529.

Kentucky—*Court of Appeals.*—By acts 1824, sec. 16, its minimum jurisdictional limit was $20 exclusive of costs. Clarke *v.* Chiles (1825), 2 T. B. Mon. (Ky.) 105. This was subsequently extended to a minimum of $100. Nichols *v.* Hansel (1830), 3 J. J. Marsh. (Ky.) 442; Kendall *v.* Spradling (1854), 15 B. Mon. (Ky.) 33. By Gen. Statutes, chap. 28, art. 22, sec. 2, in suits for the recovery of money or personal property the value thereof must amount to $50. Bracy *v.* Bracy (1876), 12 Bush (Ky.) 153.

Superior Court has appellate jurisdiction to enforce land liens where demand is for less than $3000. Stultz *v.* Farthing, 91 Ky. 372.

Circuit Courts have a general minimum of original jurisdiction, by the constitution, of $50.

Circuit Courts — Original Jurisdiction.—By statutes their minimum jurisdiction was £5, and between that amount and $50 they exercised concurent jurisdiction with justices of the peace. Sayre *v.* Lewis (1844), 5 B. Mon. (Ky.) 90. See also Sams *v.* Stockton (1853), 14 B. Mon. (Ky.) 187; Harris *v.* Smith (1828), 7 T. B. Mon. (Ky.) 310. Subsequently it was held, in accordance with statute, that they were without jurisdiction where the amount in controversy, exclusive of interest and costs, did not exceed $50. Griswold *v.* Peckenpaugh (1866), 1 Bush (Ky.) 220.

Equity Jurisdiction. — The circuit judge sitting in chancery could only enjoin judgments for £5 and over. Cummins *v.* Carter (1827), 5 T. B. Mon. (Ky.) 493. The judgment of a quarterly court amounting to $50 may be enforced in equity, as per Rev. Stats., chap. 40, sec. 10. Hopkins *v.* Stout, 6 Bush (Ky.) 375; Craig *v.* Garnett, 9 Bush (Ky.) 97.

Circuit Courts — Appellate Jurisdiction in appeals from a justice depends upon whether the sum claimed before the latter exceeds £5. Williams *v.* Wilson (1837), 5 Dana (Ky.) 596; Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46. If less than £5, the appeal is to the County Court. Bassett *v.* Oldham (1838), 7 Dana (Ky.) 168.

County Courts are, by a construction of statutes in force in 1840, without jurisdiction of attachment for rents exceeding £5. Poer *v.* Peebles, 1 B. Mon. (Ky.) 1. It was held doubtful if the *Virginia* act of 1748, prohibiting the jurisdiction of county courts from an action for £10 for deceitful gaming, was in force in the year 1840. Parks *v.* Munford, 9 Dana (Ky.) 319.

The General Court, by act of 1802, has a jurisdiction where matter in dispute exceeds $20 in all controversies between citizens and non-residents. Turner *v.* O'Bannon (1829), 2 J. J. Marsh. (Ky.) 186.

Justices of the Peace.—By statute in force in 1809 their maximum jurisdictional limit in actions *ex contractu* was

£5, but in actions *ex delicto* and tort, except in the action of trover, their minimum limit was £5. Singleton *v.* Madison, 1 Bibb (Ky.) 342. See also Evans *v.* Sanders (1850), 10 B. Mon. (Ky.) 291. By statute subsequently their maximum jurisdiction in actions *ex contractu* was extended to $50. Coonrod *v.* Doan, 3 J. J. Marsh. (Ky.) 510; Coleman *v.* Cason, 3 J. J. Marsh. (Ky.) 234; Latham *v.* Ford, 1 A. K. Marsh. (Ky.) 411; Thomas *v.* Thomas (1826), 2 A. K. Marsh. (Ky.) 430; Owens *v.* Starr (1822), 2 Litt. (Ky.) 230; Hawkins *v.* Com. (1824). 1 T. B. Mon. (Ky.) 144; Florrance *v.* Goodin (1844), 5 B. Mon. (Ky.) 111; Howke *v.* Buford (1847), 8 B. Mon. (Ky) 38; Smith *v.* Terrill (1853), 14 B. Mon. (Ky.) 207; Fleming *v.* Limebaugh (1859), 2 Metc. (Ky.) 265. The same limit also appertains to actions for the recovery of money and personal property. Fidler *v.* Hall (1859), 2 Metc. (Ky.) 461; Burnes *v.* Cade (1874), 10 Bush (Ky.) 251. By statute in force in 1869, in offenses for erecting and continuing a fence across a public road, a justice has jurisdiction if the whole fine does not exceed $10; if it is more than this, the Circuit Court takes cognizance. Com. *v.* Mills, 6 Bush (Ky.) 296.

Louisiana—*Supreme Court.*—Formerly minimum limit on appeal was $300, save in certain excepted cases. Jarvis's Succession (1854), 9 La. Ann. 370; Police Jury *v.* Villaviabo (1857), 12 La. Ann. 788; State *v.* Third Justice (1857), 12 La. Ann. 789; Fletcher *v.* Henley (1858), 13 La. Ann. 150; State *v.* Fabre, 13 La. Ann. 279; State *v.* Judge (1862), 16 La. Ann. 416. Subsequently this minimum limit was increased to $500 by the constitution of 1868. Myers *v.* Mitchell (1868), 20 La. Ann. 533; Cushing *v.* Hickle, 20 La. Ann. 567; Rooney *v.* Brown (1869), 21 La. Ann. 51; Malone *v.* Casey, 25 La. Ann. 466; Edwards *v.* Edwards, 29 La. Ann. 597; Newan *v.* Carney, 30 La. Ann., Part II. 1201; Lamarque *v.* New Orleans (1880), 32 La. Ann. 276; Fendler *v.* Bates (1882), 34 La. Ann. 595. A further increase was made to a minimum limit of $1000 in certain cases. Renshaw *v.* Stafford (1882), 34 La. Ann. 1138; State *v.* Judges (1883), 35 La. Ann. 736. And this was still further increased to the present jurisdictional minimum limit of $2000. Sweenev *v.* Seiler, 37 La. Ann. 585; Denis *v.* Houston, 38 La Ann. 39; State *v.* New Orleans (1887), 39 La. Ann. 342; Conery *v.* New Orleans Water Works Co., 39 La. Ann. 770; Bush *v.* Berard, 39 La. Ann. 899; Pochelu *v.* Catonnet (1888), 40 La. Ann. 327; Bedford's Succession, 38 La. Ann. 244; Young *v.* Duncan, 39 La. Ann. 86; Emancipation of Pochelu (1889), 41 La. Ann. 331; Ellis *v.* Silverstein, 26 La. Ann. 47; Barry Garnier, 31 La. Ann. 831; Mayer *v.* Stahr, 35 La. Ann. 57; Forstall *v.* Larche, 39 La. Ann. 286; Barnett *v.* Gill (1891), 43 La. Ann. 1041.

Court of Appeals has a minimum limit of $200 and a maximum limit of $1000. State *v.* Mayo (1881), 33 La. Ann. 1070; State *v.* Judges, 33 La. Ann. 1096; State *v.* Judges (1883), 35 La. Ann. 736. See also Louisiana Ice Co. *v.* State Nat. Bank, 32 La. Ann. 597.

District Courts.—Minimum jurisdictional limit by the constitution is $500. Choppin *v.* Forstall, 28 La. Ann. 303; State *v.* De Vargas, 28 La. Ann. 342; Gay *v.* New Orleans Pac. R. Co., 31 La. Ann. 274.

Parish Courts.—Maximum jurisdictional limit is $500 by the constitution. Swan *v.* Gayle, 21 La. Ann. 478; Bartlett's Succession, 21 La. Ann. 531; Mayer *v.* Dayries, 24 La. Ann. 206; Fellers *v.* Brown, 24 La. Ann. 300; *In re* Brown, 28 La. Ann. 716; Flournoy *v.* Flournoy, 29 La. Ann. 737; Fields *v.* Gague, 31 La. Ann. 182.

City Courts in the Parish of New Orleans are by the constitution limited to cases in which the amount involved is $100. State *v.* Judge, 32 La. Ann. 1222; State *v.* Judge, 33 La. Ann. 15; Fredricks *v.* Skinner, 33 La. Ann. 146; State *v.* Voorhies, 34 La. Ann. 99; State *v.* Voorhies, 34 La. Ann. 1142; State *v.* Judge, 37 La. Ann. 583.

Justices of the Peace have a maximum jurisdictional limit of $100. State *v.* Third Justice (1860), 15 La. Ann. 660; Clerc *v.* Boudreaux (1886), 38 La. Ann. 732; State *v.* Judge (1889), 41 La. Ann. 403.

Maine.—*Court of Appeals* may entertain appeals, in accordance with statutes and their construction, in personal actions where sum demanded exceeds $200. Wherever the amount claimed falls below this sum, the only method of bringing the matter before this court is by bill of exceptions. Kimball *v.* Moody (1841), 18 Me. 359.

The Supreme Judicial Court has original as well as concurrent jurisdiction with justices of the peace of actions of trespass *q. c. f.* although damages demanded are less than $20. Burnham *v.* Ross (1860), 47 Me. 456.

District Court.—Both before and after the passage of the act of August 10, 1846, this court had original jurisdiction of all civil suits in which the amount claimed was between $20 and $100; and the act by which justices of Waldo County obtained original jurisdiction in civil suits in which debt or demand did not exceed $50, and concurrent jurisdiction with District Courts in actions wherein the amount was between $50 and $100, had no impairing effect upon the said general jurisdiction of the latter courts. Abbott *v.* Knowlton (1849), 31 Me. 77.

Justices of the Peace, by act of 1829, ch. 443, were given a maximum jurisdiction in replevin of $20; but this act also construed as giving them not an exclusive but a concurrent jurisdiction with Courts of Common Pleas in such actions within said limit. Ridlon *v.* Emery (1830), 6 Me. 261.

Maryland.—*Circuit Courts* in the counties have concurrent jurisdiction with justices of the peace where the amount claimed or the thing in action exceeds $50. Harris *v.* Dorsey, 1 Har. & J. (Md.) 416; Baltimore, etc., Turnpike Co. *v.* Barnes, 6 Har. & J. (Md.) 57; Barger *v.* Collins, 7 Har. & J. (Md.) 220; Offutt *v.* Offutt, 2 Har. & J. (Md.) 178; Schindel *v.* Suman, 13 Md. 310; Deitrich *v.* Swartz, 41 Md. 196; Randle *v.* Sutton, 43 Md. 64.

Justices of the Peace.—Jurisdiction limited to cases both of contract and tort where debt or damages claimed do not exceed $100. O'Reilly *v.* Murdock, 1 Gill (Md.) 32; Beall *v.* Black, 1 Gill (Md.) 203; Carter *v.* Tuck, 3 Gill (Md.) 248; Brumbaugh *v.* Schnebly, 2 Md. 325; Ott *v.* Dill, 7 Md. 251; Abbott *v.* Gatch, 13 Md 336, 71 Am. Dec. 635; Bushey *v.* Culler, 26 Md. 534; Herzberg *v.* Adams, 39 Md. 309; Deitrich *v.* Swartz, 41 Md. 196; State *v.* Tabler, 41 Md. 236; Randle *v.* Sutton, 43 Md. 64; Rohr *v.* Anderson, 51 Md. 212; Reese *v.* Hawks, 63 Md. 130.

Courts of Equity cannot "hear, try, determine, or give relief in any cause * * * wherein the original debt or damages does not amount to $20." Reynolds *v.* Howard, 3 Md. Ch. 331; Pentz *v.* Citizens' F. Ins. Co., 35 Md. 73.

Baltimore City Courts.—By the constitution of 1864 Superior Court of Baltimore City had jurisdiction when debt or damage claimed exceeded $1000. Reidel *v.* Turner, 28 Md. 362; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635. And the Court of Common Pleas when the claim exceeded $100 and did not exceed $1000, exclusive of interest. State *v.* Mace, 5 Md. 337; Blimline *v.* Cohen, 8 Md. 147; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Miller & Barroll, 14 Md. 173; Baltimore Cannel, etc., Coal Co. *v.* Stewart, 28 Md. 365. Constitution of 1867 gives both of these courts and the Baltimore City Court concurrent jurisdiction in all cases where the debt or damage claimed exceeds $100, below which sum justices of the peace take cognizance under general statutory law. See Rohr *v.* Anderson, 51 Md. 206.

Appeals from Justices in Baltimore City.—Such cases are triable in Baltimore City Court *de novo*, and a judgment beyond justices' jurisdiction can be rendered. Zitzer *v.* Jones, 48 Md. 115. *Contra*, Louisville, etc., R. Co. *v.* Breckenridge, 64 Ind. 113.

County Courts had jurisdiction in cases where an executor or administrator was defendant and in which debt or demand did not exceed $50. Hale *v.* Howe (1815), 4 Har. &. J. (Md.) 448.

Massachusetts.—*Superior Court of Judicature of the Province of Massachusetts* between the years 1761 and 1772. No appeal would lie therefrom granting a prohibition to the admiralty to the king in council unless the matter in controversy exceeded £300. Scollay *v.* Dunn (1763), Quincy (Mass.) 74.

Supreme Judicial Court.—Ordinary minimum limit of appellate jurisdiction is $100. Sibley *v.* Smith (1837), 19 Pick. (Mass.) 546. *Contrast* Hovey *v.* Crane, 10 Pick. (Mass.) 440. By construction of the statutes of 1838 and 1840, $300 is the minimum jurisdictional limit in appeals from decisions of commissioners allowing or rejecting creditors' claims against estates of deceased insolvent debtors. Sabine *v.* Strong (1843), 6 Met. (Mass.) 270. This court also has original jurisdiction of actions to foreclose mortgages in which the real amount sought to be recovered exceeds the value of $600. Hyde *v.* Greenough (1853), 11 Cush. (Mass.) 87.

Court of Common Pleas for the counties, by statutes 1782, ch. 11, had a minimum jurisdictional limit in civil actions of 40 shillings. Cleveland *v.* Welsh (1808), 4 Mass. 591; Briggs *v.* Nantucket Bank (1809), 5 Mass. 94.

District and Police Courts may hear and determine cases of tort where damages demanded are more than $20 and less than $300. Bossidy *v.* Branniff, 135 Mass. 290.

Justices of the Peace, by stat. 1783 have a maximum limit of £4. Blood *v.* Kemp (1826), 4 Pick. (Mass.) 169; Carroll *v.* Richardson (1812), 9 Mass. 329; Sumner *v.* Finegan (1818), 15 Mass. 280. See also Pitman *v.* Flint (1830), 10 Pick. (Mass.) 504. By act of 1852, chap. 314, this jurisdiction was enlarged to $100 except in actions of trespass to real estate, in which it remains at $20. Trees *v.* Rushworth (1857), 9 Gray (Mass.) 47; McQuade *v.* O'Neil (1860), 15 Gray (Mass.) 52, 77 Am. Dec. 350; Bossidy *v.* Branniff, 135 Mass. 290; Leonard *v.* Hannon, 105 Mass. 113; Blake *v.* Darling, 116 Mass. 300: Octo *v.* Teahan, 133 Mass. 430. By statute 1858, chap. 45, sec 2, the maximum limit in amount of justices' criminal jurisdiction is for offenses punishable by a fine not exceeding $50, and this held not to oust the jurisdiction of the Court of Common Pleas in such cases. Com. *v.* Hudson (1858), 11 Gray (Mass.) 64.

Boston Municipal Court has a maximum limit in civil actions of $300. Cooper *v.* Skinner, 124 Mass. 183.

Michigan.—*Circuit Court's* minimum jurisdictional limit is $100. Raymond *v.* Hinkson (1886), 15 Mich. 113; Dewey *v.* Duyer, 39 Mich. 509.

Justices of the Peace have a maximum jurisdiction in actions *ex contractu*, according to the state constitution, of $100. Raymond *v.* Hinkson (1866), 15 Mich. 113. In replevin as to plaintiff who is successful in the suit a justice has jurisdiction to render a judgment for any sum not exceeding $500. Henderson *v.* Desborough (1873), 28 Mich. 170; Chilson *v.* Jennison (1886), 60 Mich. 235. By Comp. Laws, sec. 5255, in suits on money bonds given to secure specific sums of money the maximum limit is $150. Gray *v.* Stafford (1884), 52 Mich. 497.

Equity Court has no jurisdiction of suit only involving $50. Sanford *v.* Haines, 71 Mich. 116.

Minnesota—*Justices of the Peace and District Courts.*—By statute the maximum limit of the former and the minimum limit of the latter is $100. Castner *v.* Chandler (1858), 2 Minn. 86.

Mississippi—*Supreme Court.*—In all appeals from the Circuit Court in cases originally commenced before a justice of the peace this court has a minimum limit of $50, as provided by statute. New Orleans, etc., R. Co. *v.* Evans (1874), 49 Miss. 785; O'Leary *v.* Harris, 50 Miss. 13; Ward *v.* Scott, 57 Miss. 826; Clark *v.* Gresham (1890), 67 Miss. 203.

Circuit Courts.—The constitution limited their jurisdiction to sums in excess of $50. Loomis *v.* Commercial Bank (1840), 4 How. (Miss.) 660; Crapoo *v.* Grand Gulf (1848), 9 Smed. & M. (Miss.) 205. Their equity jurisdiction has a maximum limit, as provided in the constitution, of $500. Henderson *v.* Herrod (1852), 23 Miss. 434.

Justices of the Peace were formerly limited to a maximum amount of $50 by the constitution. Loomis *v.* Commercial Bank (1841), 4 How. (Miss.) 660. Subsequently this limit was enlarged to $150 by the constitution of 1869. Randall *v.* Kline (1870), 44 Miss. 313; Mobile, etc., R. Co. *v.* State (1875), 51 Miss. 137; Jackson *v.* Whitfield, 51 Miss. 202; Bell *v.* West Point, 51 Miss. 262. By the constitution of 1890 this jurisdiction was still further enlarged to $200. Rich *v.* Calhoun (Miss., 1893), 12 So. Rep. 707.

Missouri.—*Supreme Court* has a jurisdiction whose minimum limit is $2500. Golding *v.* Golding (1881), 74 Mo. 123; Corrigan *v.* Morris, 97 Mo. 174; Kerr *v.* Simmons (1884), 11 Mo. App. 595; State *v.* Slevin (1885), 16 Mo. App. 541.

Court of Appeals has a maximum limit of $2500. Caruth *v.* Richeson (1888), 96 Mo. 186; Syenite Granite Co. *v.* Bobb (1888), 97 Mo. 46.

Circuit Court.—Ordinary minimum limit is $50. Smith *v.* Clark County, 54 Mo. 58; Fickle *v.* St. Louis, etc., R. Co., 54 Mo. 219; Williams *v.* Payne, 80 Mo. 409. But *compare* Cranston *v.* Union Trust Co., 75 Mo. 29; Works *v.* Strange, 25 Mo. App. 12.

In actions *ex contractu* they have concurrent jurisdiction with justices of the peace in sums exceeding $50 and not exceeding $90. Murphy *v.* Campbell (1865), 36 Mo. 110.

Justices of the Peace.—By statute their jurisdiction in actions for the recovery of specified personal .property has a maximum limit of $50, and also in certain damage cases to such property. Butler *v.* Ivie (1860), 30 Mo. 478; Hansberger *v.* Pacific R. Co. (1869), 43 Mo. 199; Grau *v.* St. Louis, etc., R. Co. (1873), 54 Mo. 240; Shrewsbury *v.* Bawtlitz (1874), 57 Mo. 414; Dillard *v.* St. Louis, etc., R. Co. (1874), 58 Mo. 69.

This species of action was enlarged as to the said jurisdiction to $100, and made also concurrently cognizable before a Circuit Court. Henks *v.* Debertshauser (1876), 1 Mo. App. 402. But *compare* Mason *v.* Hannah (1888), 30 Mo. App. 190. By Rev. Sts. 1879, sec. 2881, justices in all counties having less than fifty thousand inhabitants have a maximum limit in replevin suits of $150. Mason *v.* Hannah (1888), 30 Mo. App. 190; Payne *v.* Weems (1889), 36 Mo. App. 54. In all actions on notes in St. Louis county, justices have a minimum limit of $50 and a maximum of $300. Weis *v.* Geyer (1877), 4 Mo. App. 404; Wannall *v.* Lighthizer (1878–79), 6 Mo. App. 593. See also Simpson *v.* Watson (1884), 15 Mo. App. 425. By the charter of Kansas City, acts 1875, a justice has concurrent jurisdiction with a city recorder of suits on tax bills to the sum of $300 and under. Harris *v.* Hunt (1888), 97 Mo. 571. By the "Dramshop-keeper" statute, an action to enforce the penalty of $50 is cognizable before a justice. State *v.* Lack (1875), 58 Mo. 501. By statutes in force in 1889 a defendant's counterclaim not exceeding the jurisdictional limit, as applicable to the claim of a plaintiff, is also cognizable before a justice. Green *v.* Beebe (1889), 39 Mo. App. 465. By Rev. Sts. sec. 2835, the jurisdiction of justices of the peace in civil actions was fixed at a maximum of $150, exclusive of interest and costs. State *v.* Emmerling (1882), 12 Mo. App. 98.

Nebraska.—*Probate Court.*—By act of March 3, 1873, minimum limit is fixed to where amount claimed exceeds $100. Beach *v.* Cramer (1876), 5 Neb. 98.

County Court.—By statute prior to the amendment of 1883 its civil jurisdiction had a maximum limit of $500. Brondberg *v.* Babbott (1883), 14 Neb. 517.

Justices of the Peace were limited by the Code, secs. 1100 and 1103, in suits on notes, bonds, and other written instruments, to a minimum of $100 and a maximum of $200. Fletcher *v.* Daugherty (1882), 13 Neb. 224; Bullock *v.* Jordan (1884), 15 Neb. 665; Burton *v.* Manning, 15 Neb. 669; Bunker *v.* State Nat. Bank (1884), 16 Neb. 234; Strang *v.* Krickbaum (1885), 18 Neb. 365. But in replevin cases a justice may issue the writ although property exceeds the value of $200. Hill *v.* Wilkinson (1888), 25 Neb. 103.

New Hampshire.—*Court of Appeals.*—Appellate jurisdiction limited to a minimum of $50 demanded by plaintiff below. Robbins *v.* Appleby (1820), 2 N. H. 223. Original jurisdiction in personal actions also has the same minimum limit of $50. Hoit *v.* Malony (1821), 2 N. H. 322.

Courts of Common Pleas.—By the act of Dec. 13, 1796, their jurisdiction, save in actions involving questions of title to real estate, was fixed at a minimum limit of $13.33. Flagg *v.* Gotham (1834), 7 N. H. 266.

Justices of the Peace.—By the act of February, 1791, their maximum jurisdictional limit, save in actions involving title, was established at 40 shillings; and by the act of February, 1794, this jurisdiction, with the same exception, was increased to a maximum of £4, to continue for a term of three years, and afterward, by the act of December, 1796, made perpetual. Flagg *v.* Gotham (1834), 7 N. H. 266.

New Jersey.—*Supreme Court* could by statute entertain any suit of a civil nature in which the amount in controversy did not exceed $100. Eacrit *v.* Keen (1818), 4 N. J. L. 203.

District Courts, prior to the act of March 20, 1878, had a limit of $100 and less, and by that act their jurisdiction in all civil suits was enlarged to a maximum of $200. State *v.* Blum (N. J., 1893), 26 Atl. Rep. 861.

Justices of the Peace were formerly limited to a maximum jurisdiction of £12. Sout. *v.* Hall (1790), 1 N. J. L. 29; McCauly *v.* Barnes (1791), 1 N. J. L. 52. By the act of March 12, 1879, this limit was enlarged to $200 in all small causes. State *v.* Moran (1881), 43 N. J. L. 49; State *v.* Neumeyer (1889), 51 N. J. L. 299; Whyte *v.* McGovern, 51 N. J. L. 356. But by the 62d sec. of the Attachment Act the jurisdiction of justices in attachment cases is limited to cases in which the

debt does not exceed $100. State *v.* Moran (1881), 43 N. J. L. 49.

New Mexico.—*District Courts* have concurrent jurisdiction with justices of the peace in actions of debt for sums less than $100. Romero *v.* Silva, 1 N. Mex. 157.

New York.—*Court of Appeals*, prior to the constitution of 1894, had a statutory minimum jurisdictional limit of $500. Butterfield *v.* Rudde (1874), 58 N. Y. 489; Wheeler *v.* Scofield (1876), 67 N. Y. 311; Wagner *v.* Long Island R. Co. (1877), 70 N. Y. 614; Petrie *v.* Adams (1877), 71 N. Y. 79; Nichols *v.* Voorhis (1878), 74 N. Y. 28; Trevett *v.* Barnes (1888), 110 N. Y. 500; Warren *v.* Wilder (1889), 114 N. Y. 209; Getman *v.* Ingersoll (1889), 117 N. Y. 75; Folts *v.* State (1890), 118 N. Y. 406; Norris *v.* Nesbit (1890), 123 N. Y. 650.

Supreme Court.—Formerly its equity jurisdiction had a minimum limit of $100. Vaughn *v.* Ely (1848), 4 Barb. (N. Y.) 159. By Code of Civ. Proc. this limitation was done away with. Sarsfield *v.* Van Vaughner, 38 Barb. (N. Y.) 444; Marse *v.* Benson (1866), 34 N. Y. 358.

County Courts. — In assumpsit they had by statute a maximum jurisdiction of $2000. Beecher *v.* Allen (1849), 5 Barb. (N. Y.) 169. So also in assault and battery the same limit. Sweet *v.* Flannagan (Chemung Co. Ct., 1881), 61 How. Pr. (N. Y.) 327. By Laws of 1880, ch. 480, they had a maximum jurisdiction of $3000 and a minimum of $1000 in money demands. Sweet *v.* Flannagan (Chemung Co. Ct., 1881), 61 How. Pr. (N. Y.) 327. This afterward held to be in conflict with the constitution, which limits the said jurisdiction to $1000. Lenhard *v.* Lynch (Erie Co. Ct., 1881), 62 How. Pr. (N. Y.) 56; Gilbert *v.* York (1886), 41 Hun (N. Y.) 594. See also Kundolf *v.* Thaleimer (1855), 12 N. Y. 593.

Marine Court.—Formerly in actions of contract and money claims limited to a minimum of $100. By act of April, 1852, this was increased to $250. People *v.* Marine Court (1862), 23 How. Pr. (N. Y. Supreme Ct.) 446. By act of 1853 this was still further enlarged to $500. People *v.* Marine Court (1862), 23 How. Pr. (N. Y. Supreme Ct.) 446; Farley *v.* De Waters, 2 Daly (N. Y.) 192; Murray *v.* De Gross, 3 Duer (N. Y.) 668.

District Courts in New York City are limited by the act of 1857 in money claims to where the recovery does not exceed $250. Loomis *v.* Bowers (1862), 22 How. Pr. (N. Y. C. Pl.) 361.

City Courts, by Code of Civ. Proc., have a maximum jurisdiction in actions *ex contractu* of $2000. Crane *v.* Crane (City Ct.), 19 N. Y. Supp. 691.

Justices of the Peace had a jurisdictional maximum limit of £80. Tuttle *v.* Maston (1799), 1 Johns. Cas. (N. Y.) 25. This was subsequently fixed at a maximum of $50. Moore *v.* Lyttle (1819), 4 Johns. Ch. (N. Y.) 183; Walker *v.* Cruikshank (1842), 2 Hill (N. Y.) 296. Subsequently in debt and damage cases the maximum was fixed at $100. Bryan *v.* Cain (1845), 1 Den. (N. Y.) 507; Daniels *v.* Hinkston (1849), 5 How. Pr. (N. Y. Supreme Ct.) 322; Dennis *v.* Crittenden (1870), 42 N. Y. 542. This was again enlarged to $200 in certain cases. Bellinger *v.* Ford (1852), 14 Barb. (N. Y.) 250; Humphrey *v.* Persons (1857), 23 Barb. (N. Y.) 313; Loomis *v.* Bowers (1862), 22 How. Pr. (N. Y. C. Pl.) 361. By Code of Civ. Proc. in actions *involving mutual accounts* a justice is without jurisdiction where the balance as proven to the satisfaction of the justice exceeds $400. Abernathy *v.* Abernathy (1823), 2 Cow. (N. Y.) 413; Glackin *v.* Zeller (1868), 52 Barb. (N. Y.) 147; Boston Mills *v.* Eull (1869), 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 319; Burdick *v.* Hale, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 60; Lamoure *v.* Caryl, 4 Den. (N. Y.) 370; Fuller *v.* Conde, 47 N. Y. 89; Brisbane *v.* Batavia Bank (1885), 36 Hun (N. Y.) 17; White *v.* Place (1886), 40 Hun (N. Y.), 481; Shaw *v.* Roberts (Supreme Ct., 1891), 14 N. Y. Supp. 579.

North Carolina—*County Courts.*—Appellate jurisdiction in appeals from justices of the peace had a minimum limit in debt claims of £20. Brooks *v.* Collins (1801), 1 Tayl. (N. Car.) 236. By Rev. Stats. ch. 31, § 40, their original jurisdiction in suits on bonds, notes, or liquidated accounts had a minimum limit of $100. Newman *v.* Tabor (1844), 5 Ired. (N. Car.) 231.

Superior Courts.—By acts of 1777 and 1796 their original jurisdiction had a minimum limit of £100 where plaintiff and defendant resided in the same district; where in different districts the minimum was £50. Allen *v.* Stokes (1794), 1 Hayw. (N. Car.) 142; McNeill *v.* West (1806), 2 Hayw. (N. Car.) 211; Williams *v.* Holcombe (1818),

1 Law Repos. (N. Car.) 365; Mera *v.* Scales (1823), 2 Hawk. (N. Car.) 364.

A subsequent statute fixed their minimum jurisdiction at $60 in actions for goods, etc., sold; and in suits on notes, bonds, etc., at $100. Parham *v.* Hardin (1850), 11 Ired. (N. Car.) 219; Bean *v.* Baxter (1855), 2 Jones (N. Car.) 356. See also Smaw *v.* Cohen (1886), 95 N. Car. 85. In actions not arising *ex contractu* these courts have concurrent jurisdiction with justices of the peace where value of the property claimed is less than $50. Crinkley *v.* Egerton (1893), 113 N. Car. 142.

Justices of the Peace.—A single justice was limited in suits to collect debts to £20 and less. Brooks *v.* Collins (1801), 1 Tayl. (N. Car.) 236. Jurisdiction is limited to a maximum of $60 in all claims except in suits for notes and liquidated demands, in which the statutory maximum is $100. Bryan *v.* Washington (1834), 4 Dev. (N. Car.) 479; Midgett *v.* Watson (1846), 7 Ired. (N. Car.) 143; M'Rae *v.* M'Rae (1838), 3 Dev. & B. (N. Car.) 85. But in the case of a debt founded upon a former magistrate's judgment, such a debt being, *semble*, a liquidated claim, the minimum is greater than $60. Morgan *v.* Allen (1844), 5 Ired. (N. Car.) 156.

Criminal Jurisdiction of justices by the constitution of 1868 extended to cases where the punishment in fines could not exceed $50. State *v.* Moore (1880), 82 N. Car. 659; State *v.* Benthall, 82 N. Car. 664; State *v.* Wood (1886), 94 N. Car. 855. By the Constitution, art. iv, § 33, their regular civil jurisdiction in claims was fixed at a maximum of $200. Hedgecock *v.* Davis (1870), 64 N. Car. 650; Derr *v.* Stulbs (1880), 83 N. Car. 539; Fisher *v.* Webb (1881), 84 N. Car. 44; Smaw *v.* Cohen (1886), 95 N. Car. 85.

Ohio—*Courts of Common Pleas* have a minimum original and exclusive jurisdiction of $300. Wood *v.* O'Ferrall (1869), 19 Ohio St. 427.

Justices of the Peace.—They had a maximum statutory limit in civil cases of $70. Aten *v.* Morgan (1817), Tapp. (Ohio) 232. This was subsequently raised to a minimum of $100. Deming *v.* Austin (1834), Wright (Ohio) 717. Still later, by the emendatory act of May 1, 1854, they were given concurrent jurisdiction with the Courts of Common Pleas in claims of any sum not exceeding $300 and over $100. McKibben *v.* Lester (1859), 9 Ohio St. 627; Job *v.* Harlan (1862), 13 Ohio St. 485; Bowers *v.* Pomeroy (1871), 21 Ohio St. 184; Butcher *v.* Smith (1876), 29 Ohio St. 604.

Pennsylvania.—*Supreme Court* at *nisi prius* has an original jurisdiction of single causes of action in which the amount in controversy is as much as $500. Gault *v.* Vinyard (1856), 26 Pa. St. 282.

District Courts of the city and county of Philadelphia have a minimum limit of $100. Coates *v.* Cork (1836), 1 Miles (Pa.) 270; Rodman *v.* Hutchinson (1838), 4 Whart. (Pa.) 242; Curry *v.* Spink (1854), 23 Pa. St. 58; Lelar *v.* Gault (1856–58), 2 Phila. (Pa.) 78.

Justices of the Peace, by the act of April, 1809, had in actions of trover a maximum jurisdiction of $30. McKinley *v.* McCalla (1813), 5 Binney (Pa.) 600. By the act of 1810, except in amicable actions wherein both parties appeared and consented to a greater jurisdiction, a justice's general maximum limit was $100. Black *v.* Coolbaugh (1754, etc.), 2 Luz. Leg. Obs. (Pa.) 324; Brenneman *v.* Greenawalt (1814), 1 S. & R. (Pa.) 27; McKillip *v.* McKillip (1816), 2 S. & R. (Pa.) 489; Hoops *v.* Crowley (1823), 12 S. & R. (Pa.) 219; Powell *v.* Shank (1834), 3 Watts (Pa.) 235; Green *v.* Leymer, 3 Watts (Pa.) 381; Camp *v.* Wood (1840), 10 Watts (Pa.) 118; Boon *v.* Collins (1850–55), 1 Phila. (Pa.) 438; Trultt *v.* Ludwig (1854), 25 Pa. St. 145; Phillips's Appeal (1859), 34 Pa. St. 489; Borland *v.* Ealy (1862), 43 Pa. St. 111. *Compare* Delancy *v.* Brindle (1826), 15 S. & R, (Pa.) 75. The act of May 29, 1879, enlarges the maximum limit of justices, aldermen, and magistrates to $300. Jacoby *v.* Shafer (1884), 105 Pa. St. 610; Beatty *v.* Rankin (1890), 139 Pa. St. 358. See also Tarr *v.* Eddy, 142 Pa. St. 410.

Courts of Common Pleas of the city and county of Philadelphia may also entertain actions in which the amount involved is less than $100, concurrently with justices of the peace, the only result being that in such causes before the latter a successful plaintiff recovers his costs, while in the former he must always pay his own costs. Hoops *v.* Crowley (1823), 12 S. & R. (Pa.) 219.

South Carolina.—*Justices of the Peace*

were formerly limited in their jurisdiction in actions *ex contractu* to a maximum of $20; and wherever the demand was for more than $6 there might be an appeal therefrom, but below this latter sum their adjudication was final and conclusive. Debruehl *v.* Parker (1814), 1 Treadw. Const. Rep. (S. Car.) 475; Penning *v.* Porter (1817), 1 Mill (S. Car.) 396; Allen *v.* Singleton (1839), 1 Rice (S. Car.) 289. Subsequently their maximum limit was enlarged to $100. Dillard *v.* Samuels (1886), 25 S. Car. 318; Cavender *v.* Ward (1887), 28 S. Car. 470. Wherever in a criminal proceeding the amount of the penalty is uncertain, a trial justice cannot take jurisdiction, inasmuch as it may exceed his limit. State *v.* Weeks (1880), 14 S. Car. 400.

Tennessee. — *Superior Courts* have original jurisdiction by the act of 1794, chap. 1, sec. 6, for any debt or demand, where plaintiff and defendant both reside in the same district, not exceeding $100; but where they live in different districts then they are limited to a maximum of $50. Hendrick *v.* Stewart (1809), 1 Overt. (Tenn.) 476.

County Courts have a minimum limit by the act of 1803, chap. 5, sec. 2, of $50. Martin *v.* Carter (1831), 1 Yerg. (Tenn.) 489; Covington *v.* Neilson (1834), 6 Yerg. (Tenn.) 475.

Justices of the Peace were formerly limited in their jurisdiction by the act of 1801, in actions in contract for liquidated damages, and by a subsequent act, i.e., that of 1851, in replevin suits, to a maximum of $50. Thompson *v.* Gibson (1814), 2 Overt. (Tenn.) 235; Smith *v.* Wallace (1833), 4 Yerg. (Tenn.) 572; Crockett *v.* Wright (1840), 2 Humph. (Tenn.) 322; Collins *v.* Oliver (1844), 4 Humph. (Tenn.) 439; Bryan *v.* Buckholder (1847), 8 Humph. (Tenn.) 561; Hockaday *v.* Wilson (1858), 1 Head (Tenn.) 113; Mason *v.* Westmoreland (1858), 1 Head (Tenn.) 555. By the act of 1831, chap. 59, sec. 2, their jurisdiction over notes, bonds, and specialties was increased to $100 as a maximum. Hay *v.* Lea (1835), 8 Yerg. (Tenn.) 89; Collins *v.* Oliver (1844), 4 Humph. (Tenn.) 439 By the act of May, 1866, chap. 51, their jurisdiction in actions of trover, etc., was further increased to a maximum of $250. Taylor *v.* Pope (1868), 5 Coldw. (Tenn.) 413; White *v.* Buchanan (1868), 6 Coldw. (Tenn.) 32. By the act of 1852 their jurisdiction in attachment was extended to a maximum limit of $500. Apperson *v.* Looney (1853), 2 Swan (Tenn.) 664. A similar extension to $500 was also made in certain actions on negotiable paper. Mason *v.* Westmoreland (1858), 1 Head (Tenn.) 555. And likewise in actions of replevin. Godsey *v.* Weatherford (1888), 86 Tenn. 670.

Chancery Courts have a minimum jurisdiction ordinarily of $50. Malone *v.* Dean (1882), 9 Lea (Tenn.) 336. *Compare* Frazier *v.* Browning, 11 Lea (Tenn.) 253.

Texas—*Supreme Court.*—By act of 1866 its appellate jurisdiction in cases appealed to it from the District Court, which had been previously appealed to the latter from the County Court, had a minimum limit to where judgments below were $200. Meriweather *v.* Whitley (1873), 38 Tex. 525.

Court of Appeals.—Where cause is appealed thereto from a trial *de novo* in the County Court, on appeal to the latter from a justice of the peace, it has a minimum limit of $100. Wyatt *v.* Barmore (1878), 5 Tex. App. 332; Johnson *v.* State (1888), 26 Tex. App. 395; Gulf, etc., R. Co. *v.* Farmer (Tex. Civ. App., 1893), 22 S. W. Rep. 515; Gulf, etc., R. Co. *v.* Rowley (Tex. Civ. App., 1893), 22 S. W. Rep. 182. Where there has been no trial *de novo* in the County Court in such appeal, then the minimum is $20. Williams *v.* Sims (Tex. App., 1890), 16 S. W. Rep. 786.

County Courts.—Appellate jurisdiction in appeals from justices of the peace has a minimum limit of $20. Pevito *v.* Rodgers (1880), 52 Tex. 581; Brazoria County *v.* Calhoun (1884), 61 Tex. 223; Gulf, etc., R. Co. *v.* Rowley (Tex. Civ. App., 1893), 22 S. W. Rep. 182.

Original Jurisdiction of County Courts has a maximum of $500 by the constitution of 1866. Hamman *v.* Lewis (1870-71), 34 Tex. 474. And this includes the exact sum of $500. Gulf, etc., R. Co. *v.* Ramboldt, 67 Tex. 654; Garrison *v.* Pacific Express Co. (1887), 69 Tex. 345; Carroll *v.* Silk, 70 Tex. 23; Henderson *v.* Anglo-American L., etc. Assoc. (Tex., 1888), 7 S. W. Rep. 837. But *compare* Betterton *v.* Echols, 85 Tex. 212; Erwin *v.* Blanks, 60 Tex. 583; Carney *v.* Marsalis, 77 Tex. 62. In misdemeanors County Courts had concurrent jurisdiction with justices of the peace, in 1878, in cases in which the maximum fine did not exceed $200.

Solon *v.* State (1878), 5 Tex. App. 301.

District Courts had formerly a minimum jurisdiction of $100, and at the same time, in claims wherein the exact amount of $100 was involved, they had concurrent jurisdiction with justices of the peace. Johnson *v.* Happell (1849), 4 Tex. 96; Love *v.* McIntyre (1848), 3 Tex. 10. *Compare* Lockridge *v.* Baldwin (1857), 20 Tex. 303, 70 Am. Dec. 385. Subsequently the minimum limit was fixed at $500. Bond *v.* Dillard (1878), 50 Tex. 302; Chrisman *v.* Grayham (1878), 49 Tex. 491; Moody *v.* Cox, 54 Tex. 492; Mixan *v.* Grove (1883), 59 Tex. 573; Erwin *v.* Blanks, 60 Tex. 583; State *v.* De Gress, 72 Tex. 242; East Dallas *v.* State, 73 Tex. 371; Largen *v.* State, 76 Tex. 323; Betterton *v.* Echols (1892), 85 Tex. 212.

Justices of the Peace, by statute, have a maximum limit of jurisdiction of of $100. Johnson *v.* Happell (1849), 4 Tex. 96; State *v.* Newhous (1874), 41 Tex. 185.

United States.—*Supreme Court* had formerly a minimum limit in jurisdiction of $2000. U. S. *v.* More (1805), 3 Cranch (U. S.) 159. See also Richmond *v.* Milwaukee (1858), 21 How. (U. S.) 80. A late act of Congress (Feb. 1889) has increased this minimum to $5000. See 25 U. S. Sts. 693. By the act of Congress of April, 1816, in appeals from the Circuit Court of the District of Columbia to the U. S. Supreme Court the minimum limit was fixed at $1000. Campbell *v.* Read (1864), 2 Wall. (U. S.) 198. See also Nicholls *v.* Hodges (1828), 1 Pet. (U. S.) 562. By act of March 3, 1885, appeals from the Supreme Courts of the Territories and the Supreme Court of the District of Columbia were dependent upon the general established minimum jurisdictional amount of $5000. Street *v.* Ferry (1886), 119 U. S. 385.

Circuit Courts had a minimum jurisdictional limit of $500. Towne *v.* Smith (1845), 1 Woodb. & M. (U. S.) 115; Kohl *v.* Hannaford (1875), 4 Rec. (Ohio) 372. By act of Congress, Aug. 13, 1888, correcting act of March 3, 1887, this was increased to a minimum limit of $2000. Baker *v.* Howell (1890), 44 Fed. Rep. 113. A similar note seems desirable to be here inserted to the effect that cases setting forth the statutory limit of U. S. Supreme, Circuit, and District Courts are so numerous and are so fully cited elsewhere in this article (see *ante*, titles V. REAL AMOUNT and VIII. AGGREGATED AMOUNT, etc., and notes) that it would be superfluous to repeat them here. By act of Congress, March 1, 1889, U. S. courts in Indian Territory were limited in their civil jurisdiction to a minimum of $100. Gulf, etc., R. Co. *v.* Washington (1892), 49 Fed. Rep. 347.

Utah Territory.—*Justices of the Peace* have, by the organic act of September 9th, 1850, a maximum jurisdictional limit of $100. Snow *v.* U. S. (1873), 18 Wall. (U. S.) 317.

Vermont.—*County Courts.*—The statute defining their jurisdiction and that of justices of the peace was at one time construed to give them concurrent original jurisdiction therewith in unliquidated demands above $7 and under $33. Young *v.* Sanders (1800), 1 Tyler (Vt.) 8. This was subsequently overruled, and it was held that, in such demands and also in liquidated demands to a maximum limit of $50, their jurisdiction was only appellate, the original cognizance of such actions residing in justices alone. Glidden *v.* Elkins (1801), 2 Tyler (Vt.) 218. In actions of trespass to the freehold their jurisdiction was limited by statute, passed subsequently, to $20 as a minimum. Doubleday *v.* Marstin (1854), 27 Vt. 488.

Justices of the Peace had by statute at various periods a maximum original jurisdiction in civil actions of respectively $33, $53, and $100. Carlton *v.* Young (1826), 1 Aik. (Vt.) 332. See also Prindle *v.* Cogswell (1837), 9 Vt. 183; Beach *v.* Boynton (1853), 26 Vt. 105. By the act of 1867 a justice of the peace has a maximum limit of $200 in a suit between adjoining landowners to recover damages for a failure to build and repair a partition fence. Hall *v.* Niles (1872), 44 Vt. 439.

Virginia.—*Supreme Court of Appeals* had by Code, ch. 182, sec. 3, in force in 1851, a minimum appellate jurisdiction of $200. McGruder *v.* Lyons (1851), 7 Gratt. (Va.) 233. Subsequently, by constitution, art. 6, sec. 2, this minimum limit in civil cases was increased to $500, save in certain specified exceptional cases. Meal *v.* Com. (1871), 21 Gratt. (Va.) 511; McCrowell *v.* Burson (1884), 79 Va. 290; Richmond, etc., R. Co. *v.* Knopffs

(1890), 86 Va. 981; Pattie *v.* Guggenheimer, 86 Va. 993; Atlantic, etc., R. Co. *v.* Reid (1890), 87 Va. 119; Prince George's Co. *v.* Atlantic, etc., R. Co., 87 Va. 283; Com. *v.* Chaffin, 87 Va. 545; Seller *v.* Reed, 88 Va. 377; Patteson *v.* McKinney (1892), 88 Va. 748.

County Courts.—By 1st Rev. Code, sec. 55, there might be a *supersedeas* therefrom to a Circuit Court where the value of a judgment amounted to $33.33. Clapman *v.* Lewis (1789–1814), 1 Va. Cas. 182. By Rev. Code, ch. 69, sec. 9, County Courts have a maximum limit of $100 to review in any manner a magistrate's judgment, whether by appeal, writ of error, certiorari, or mandamus. Hay *v.* Pistor (1830), Leigh (Va.) 707.

Justices of the Peace, by Code, sec. 2939, have a maximum limit in claims generally of $100; in claims to recover fines their maximum is $20. Western Union Tel. Co. *v.* Pettyjohn (1891), 88 Va. 296.

Washington.—*Supreme Court*, by Code of Procedure, sec. 1402, is limited to a minimum of $200 in appeals in civil actions. Tom *v.* Sayward (1892), 5 Wash. 383; State *v.* Fisher (1892), 4 Wash. 382.

Superior Courts, by constitution, have a minimum of $100; below that sum justices of the peace take cognizance. Moore *v.* Perrott (Wash., 1891), 2 Wash. 1.

West Virginia.—*Supreme Court of Appeals* is limited by the constitution and statutes to a minimum jurisdiction of $100 in appeals, writs of error, certiorari, and mandamus. Tompkins *v.* Burgess (1867), 2 W. Va. 187; Clevenger *v.* Dawson (1879), 15 W. Va. 348; Farnsworth *v.* Baltimore, etc., R. Co. (1886), 28 W. Va. 815.

Wisconsin (Territory).—*Justices of the Peace.*—By organic law justices of the peace had a maximum limit of $50 in suits on accounts. Woodward *v.* Garner (1847), 2 Pin. (Wis.) 28; Syband *v*, Carson, 2 Pin. (Wis.) 33. By Wisconsin Rev. Statutes this was increased to $100. Keegan *v.* Singleton (1856), 5 Wis. 115. See also Felt *v.* Felt (1865), 19 Wis. 193. By the laws of 1870 this was still further increased to a maximum of $200. Howard *v.* Mansfield (1872), 30 Wis. 75. By subsequent enactment in actions of account the maximum limit was made $500. Cuer *v.* Ross (1880), 49 Wis. 652.

Wyoming Territory.—*Justices of the Peace* were limited by the organic law to a maximum jurisdiction of $100 in civil and criminal cases not involving land titles and not amounting to felonies. Wolcott *v.* Territory (1872), 1 Wyoming Ter. 67.

ANIMALS.—See article.

ANOTHER SUIT PENDING.

By C. C. Moore.

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I. As a Ground of Abatement—1. General Statement of the Rule—*a.* At Law.—It is an ancient rule of the common law that a man shall not be twice vexed for one and the same cause;[1] and the pendency of a former suit in the same jurisdiction[2] between

1. Sparry's Case, 5 Coke 61.

2. **Suit in Inferior Court.**—It was said in Sparry's Case, 5 Coke 62a, that "if a man brings an action of debt by bill in London or Norwich or in any other inferior court, and afterwards brings an action of debt in the Common Pleas, this suit in the higher court which is brought pending the suit by bill in an inferior court shall not abate, * * * but it is said that all the king's courts at Westminster have been time out of mind, etc., and so a man cannot tell which of them is the most ancient." It was said (*obi er*) in Browne *v.* Joy, 9 Johns. (N. Y.) 221, that according to the doctrine of Sparry's Case, 5 Coke 62a, a plea of the pendency of an action in the Court of Common Pleas of a county would not

the same parties for the same cause of action and relief[1] may be pleaded in abatement of a second suit.[2] The term "suit" as herein used is not confined to altercations at common law or in equity, but may extend to proceedings of a special nature where ample remedy is afforded thereby.[3]

abate a subsequent suit in the Supreme Court in the same state. Bullock *v.* Bolles, 9 R. I. 501, and Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 24, give similar currency to the ancient rule. But see Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380; Johnston *v.* Bower, 4 Hen. & M. (Va.) 487; Platt *v.* Platt, Col. & C. Cas. (N. Y.) 42.

1. **Actions in Rem and in Personam.**—A party may proceed by suit in a state court and by a proceeding *in rem* in admiralty at the same time. Certain Logs of Mahogany, 2 Sumn. (U. S.) 589; People *v.* Judges, 27 Mich. 406, 15 Am. Rep. 195; Russell *v.* Alvarez, 5 Cal. 48; Wolf *v.* Cook, 40 Fed. Rep. 432.

Suit Pending in Equity.—A former bill pending in equity cannot be pleaded in abatement of a subsequent action at law. Blanchard *v.* Stone, 16 Vt. 234; Hatch *v.* Spofford, 22 Conn. 498, 58 Am. Dec. 433; Colt *v.* Partridge, 7 Met. (Mass.) 575; Denny *v.* Gardner, 2 Brev. (S. Car.) 70; Mattel *v.* Conant, 156 Mass. 418; Moore *v.* Peirce (Va., 1889), 9 S. E. Rep. 1008; Williamson *v.* Paxton, 18 Gratt. (Va.) 475; Joslin *v.* Millspaugh, 27 Mich. 517; Kittredge *v.* Race, 92 U. S. 116; Black *v.* Lackey, 2 B. Mon. (Ky.) 257; Julian *v.* Pilcher, 2 Duv. (Ky.) 254; Copperthwait *v.* Dummer, 18 N. J. L. 256; Hogg *v.* Charlton, 25 Pa. St. 200; Graham *v.* Meyer, 4 Blatchf. (U. S.) 129; Gambling *v.* Haight, 59 N. Y. 354; Hall *v.* Bennett, 48 N. Y. Super. Ct. 302; Heath *v.* Bates, 70 Ga. 633; Haskins *v.* Lombard, 16 Me. 140, 33 Am. Dec. 645; Humphries *v.* Dawson, 38 Ala. 199. *Compare* Warner *v.* Hopkins, 111 Pa. St. 328, 56 Am. Dec. 266. And the same rule prevails where courts of law and equity are consolidated. Paige *v.* Wilson, 8 Bosw. (N. Y.) 294.

2. Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433; Wales *v.* Jones, 1 Mich. 254; Bond *v.* White, 24 Kan. 45; Gamsby *v.* Ray, 52 N. H. 513; Wentworth *v.* Barnum, 10 Johns. (N. Y.) 238; Rogers *v.* Hoskins, 15 Ga. 270; Thomas *v.* Freelon, 17 Vt. 138; Drea *v.* Cariveau, 28 Minn. 280; Pennsylvania R. Co. *v.* Davenport, 154 Pa. St. 111; Dick *v.* Gilmer, 4 La. Ann. 520; Ludewig's Succession, 3 Rob. (La.) 92; Gray *v.* Atlantic, etc., R. Co., 77 N. Car. 299; Claywell *v.* Sudderth, 77 N. Car. 287; Smith *v.* Moore, 79 N. Car. 82. In *Texas* it seems to be a mere question of costs. Payne *v.* Benham, 16 Tex. 364; Trawick *v.* Martin Brown Co., 74 Tex. 522.

Unauthorized Suit.—The pendency of a suit instituted against the plaintiff's instructions by an attorney with whom a note was left for collection will abate a second suit. Briggs *v.* Gardner (Supreme Ct.), 15 N. Y. Supp. 335.

As a Defense to Counterclaim.—A prior action pending may be pleaded as a defense to a counterclaim. Ansorge *v.* Kaiser, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 305.

Election of Remedies.—An action may constitute a conclusive election of remedies, in which case its pendency seems to be pleadable as a defense in bar of a subsequent suit. Morris *v.* Rexford, 18 N. Y. 552; Bach *v.* Tuch, 126 N. Y 53, 36 N. Y. St. Rep. 363; *aff'g* 47 Hun (N. Y.) 536, 32 N. Y. St. Rep. 941, 27 N. Y. St. Rep. 386, 7 N. Y. Supp. 611; Dickinson *v.* Van Horn, 9 Cal. 207. See also Witty *v.* Campbell, 44 N. Y. 410; Bowker Fertilizer Co. *v.* Cox, 106 N. Y. 555.

3. **What Constitutes an Action**—*Proceeding by Petition.*—A pending proceeding by petition, where full relief can be had thereon, will abate a subsequent suit. Groshon *v.* Lyon, 16 Barb. (N. Y.) 461. See also Garlock *v.* Vandevort, 128 N. Y. 374.

Mandamus.—In *California* a plea of the pendency of another suit is not applicable to proceedings for mandamus. Calaveras County *v.* Brockway, 30 Cal. 325. *Contra* in *Nebraska* and *Illinois*. State *v.* North Lincoln St. R. Co., 34 Neb. 634; State *v.* Matley, 17 Neb. 564; People *v.* Chicago, 53 Ill. 424. See also People *v.* Warfield, 20 Ill. 165; People *v.* Wiant, 48 Ill. 263.

Presentation of Claims against Estate.—Where a statute provided for filing

b. IN EQUITY.—The general rule in equity is the same as at law,[1] and a plea of a former suit pending will be good if it be in the same or in another court of equity in the same jurisdiction.[2]

2. A Former Suit.—It is the priority and not the mere pendency of a suit which abates a second; the pendency of a suit subsequently instituted cannot be pleaded either in abatement or in

claims against a decedent's estate by entering them upon the appearance docket and afterwards, if necessary, upon the issue docket, and a claim so presented was allowed by the administrator, the proceeding was held to be pleadable in abatement of a subsequent suit against the administrator. Morgan *v.* Squier, 8 Ind. 511.

Scire Facias.—A *scire facias* to make parties is merely a continuation of the principal case and will not abate under a plea setting up the pendency of another *scire facias* between the parties for the same purpose. Heath *v.* Bates, 70 Ga. 633.

Execution on Judgment.—A plea setting forth that an action on a judgment was commenced while the plaintiff therein was endeavoring to raise the money by execution would be good. Yantis *v.* Burdett, 3 Mo. 457.

Submission to Arbitration.—A common-law submission to arbitration will not abate a subsequent suit. Smith *v.* Compton, 20 Barb. (N. Y.) 262. *Contra* in case of statutory submission. Fahy *v.* Brannagan, 56 Me. 42.

Attachment Suit.—An attachment proceeding is a "suit at law," and is abatable by the pendency of a suit by petition and summons. McKinsey *v.* Anderson, 4 Dana (Ky.) 62. But see I, 5, note, *infra*, p. 761.

Executory Proceedings in Louisiana.—A plea of *lis pendens* cannot be pleaded to a second petition for executory process where no proceedings are actually pending on the first. Rousseau *v.* Bourgeois, 28 La. Ann. 186.

Petition for New Trial.—The pendency of a petition for a new trial will not abate a suit subsequently instituted by the petitioner. Hughes *v.* Elsher, 5 Fed. Rep. 263.

1. Mutual L. Ins. Co. *v.* Harris, 96 U. S. 588.

2. 1 Daniell Ch. Pr. (6th ed.) 633; Behrens *v.* Sieveking, 2 Myl. & C. 602; Moore *v.* Holt, 3 Tenn. Ch. 141; Johnston *v.* Bower, 4 Hen. & M. (Va.) 487; Curd *v.* Lewis, 1 Dana (Ky.) 353. See American Bible Soc. *v.* Hague, 4 Edw. Ch. (N. Y.) 117.

Pendency of Action at Law.—To afford good ground for a plea in equity the former suit must be in a court of equity and not in a court of law. Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147; Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358; Peak *v.* Bull, 8 B. Mon. (Ky.) 428; Curd *v.* Lewis, 1 Dana (Ky.) 353; Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433; *overruling* Hart *v.* Granger, 1 Conn. 154; Langstraat *v.* Nelson, 40 Fed. Rep. 783; Fulton *v.* Golden, 25 N. J. Eq. 353; Gillett *v.* Smith, 18 Hun (N. Y.) 10. See Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476; Peck *v.* Kirtz (Supreme Ct.), 15 N. Y. St. Rep. 598.

Where Law and Equity are Administered by the Same Court.—An action at law would not abate a subsequent bill on the equity side of the same court. Thorne *v.* Towanda Tanning Co., 15 Fed. Rep. 289. See also Paige *v.* Wilson, 8 Bosw. (N. Y.) 294; Guest *v.* Byington, 14 Iowa 30. *Compare* Sanford *v.* Cloud, 17 Fla. 532; Payne *v.* Benham, 16 Tex. 364; Trawick *v.* Martin Brown Co., 74 Tex. 522.

Action in Ecclesiastical Court.—In Howell *v.* Waldron, 2 Ch. Cas. 85, an action in an ecclesiastical court was held not to affect a suit in chancery.

Election.—A court of equity may in proper cases compel a plaintiff to elect between his suit in chancery and a pending action at law. 1 Beach Modern Eq. Pr. §§ 469, 470; 1 Foster Fed. Pr. (2d ed.) § 295; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147; Graham *v.* Meyer, 4 Blatchf. (U. S.) 129; Howard *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 471; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Blanchard *v.* Stone, 16 Vt. 234; Williamson *v.* Paxton, 18 Gratt. (Va.) 475; Peruvian Guano Co. *v.* Bockwoldt, 23 Ch. Div. 225; Blanchard *v.* Stone, 16 Vt. 234. See *Election of Remedies.*

bar to a prior suit between the same parties for the same cause of action.[1] If two writs be sued out the same day and served at different times, the one first served will abate the other;[2] and where both writs bear the same date, parol evidence is admissible to prove which was first served.[3]

Suits Simultaneously Commenced.—But if both suits are in fact commenced at the same point of time on the same day, each may be pleaded in abatement of the other, and both be defeated;[4] or the court may, in its discretion, quash both upon motion.[5]

1. Renner *v.* Marshall, 1 Wheat. (U. S.) 215; Bacon Abr., tit. Abatement, (M); Rizer *v.* Gillpatrick, 16 Kan. 564; Callanan *v.* Port Huron, etc., R. Co., 61 Mich. 15; Wood *v.* Lake, 13 Wis. 84; Sherwood *v.* Hammond, 4 Blackf. (Ind.) 504; Webster *v.* Randall, 19 Pick. (Mass.) 13; Humphries *v.* Dawson, 38 Ala. 199; Morton *v.* Webb, 7 Vt. 123; Bank of U. S. *v.* Merchants' Bank, 7 Gill (Md.) 415; Middlebrook *v.* Travis, 68 Hun (N. Y.) 155; King *v.* Phillips, 8 Bosw. (N. Y.) 603; Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423. See also Republic of Mexico *v.* Arrangois, 1 Abb. Pr. (N. Y.) 437; Ratzer *v.* Ratzer, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 461; Haight *v.* Holley, 3 Wend. (N. Y.) 263; Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 119; Wales *v.* Jones, 1 Mich. 254; Blumenthal *v.* Taylor, 44 Ill. App. 139; Greenwood *v.* Rector, 1 Hempst. (U. S.) 708; Hooton *v.* Holt, 139 Mass. 54. But a judgment in the second suit in favor of the plaintiff may be pleaded in bar of a recovery on the same cause of action. Nicholl *v.* Mason, 21 Wend. (N. Y.) 339; North Bank *v.* Brown, 50 Me. 214, 79 Am. Dec. 609.

Writ of Error Subsequently Sued Out.—A writ of error to a judgment in a prior action, operating as a *supersedeas*, if sued out after the commencement of the second action, will not abate the latter. McJilton *v.* Love, 13 Ill. 494, 54 Am. Dec. 449; Hailman *v.* Buckmaster, 8 Ill. 498; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312; Peynn *v.* Edwards, 1 Ld. Raym. 47. See also Althen *v.* Tarbox, 48 Minn. 18. *Compare* Buchanan *v.* Logansport, etc., R. W. Co., 71 Ind. 265. In such a case the proper course is to apply for an order to stay proceedings until the writ of error is disposed of. Hailman *v.* Buckmaster, 8 Ill. 498. A plea of the pendency of an appeal in the former suit "at the return term of the writ" in the second suit was held sufficient. Boswell *v.* Tunnell, 10 Ala. 958.

Appeal from Order Denying Injunction.—The pendency of an appeal from a judgment denying an injunction does not affect the right of the defendant to proceed against the plaintiff touching matters involved in the suit for injunction. The appeal does not have the effect of granting the injunction. Smith *v.* Tobener, 32 Mo. App. 601.

Subsequent Suit Inadmissible as Evidence.—The pendency of the second suit is not admissible in mitigation of damages upon the trial of the first. Sherwood *v.* Hammond, 4 Blackf. (Ind.) 504.

Certainty Required in Answer. — An answer alleging that there is another suit pending, etc., but not alleging when it was commenced, is bad on demurrer. Eiceman *v.* Leonard, 75 Ind. 46.

2. Morton *v.* Webb, 7 Vt. 123; Townsend *v.* Chase, 1 Cow. (N. Y.) 115.

3. Davis *v.* Dunklee, 9 N. H. 545.

4. Beach *v.* Norton, 8 Conn. 71; Davis *v.* Dunklee, 9 N. H. 545.

At Different Times on Same Day.—If they are served at different times on the same day, it seems that only the second will abate. Morton *v.* Webb, 7 Vt. 123; Davis *v.* Dunklee, 9 N. H. 545, *disapproving* of Pie *v.* Coke, Hobart 128, the authority of which was shaken in Combe *v.* Pitt, 3 Burr. 1434, 1 W. Bl. 437. *Compare* Middlebrook *v.* Travis, 68 Hun (N. Y.) 155, where both suits were commenced on the same day, and it was held that, as the law does not regard fractions of a day, the judge was not precluded, upon the second action being first ready for trial, from proceeding to judgment, although the defendant had pleaded the pendency of the first action.

5. Davis *v.* Dinklee, 9 N. H. 545, holding also that if the defendant can-

3. A Pending Suit—Commencement of Suit.—In order to constitute a former action pending, so as to abate a second, it must appear that the prior action had been technically "commenced" when the latter action was instituted;[1] and the plea must aver and the

not readily ascertain the priority he may apply to the court, and the plaintiff may be called upon to furnish evidence that one of the suits was in fact commenced before the other, and if this is not shown the court may well adjudge that the defendant shall answer neither; *citing* Pie *v.* Coke, Moore 864, Hobart 128.

1. Writ Not Returned. — Com. *v.* Churchhill, 5 Mass. 174, holds that the writ in the suit pleaded in abatement must be returned and entered before it can be pleaded, and that until then it cannot be said to be pending in court.

Distinctions between Writs.—After the writ was returned, however, the old books made a difference between writs which comprehend certainty, as a debt determined, and writs which comprehend no certainty, as in writs of trespass for goods, assize, etc. If certain, it was a good plea to say the writ was brought pending another; but in writs personal or mixed, where no certainty is contained, then it was no plea. But after declaration it was made certain, and then the plea was good, the generality being reduced to certainty. Bullock *v.* Bolles, 9 R. I. 503. See also Reg. *v.* Harris, Cro. Eliz. 261; Armitage *v.* Row, 12 Mod. 91.

When a Summons Insufficient Without a Complaint.—Where, in an action upon a note for $30 (among other things), the answer set up as a defense that there was another pending, etc., upon that note, and it appeared that an action had been brought by the plaintiff against the defendant, in which a summons had been issued and served, but in which no complaint had been served or filed, it was held that this proof was insufficient to sustain the plea, as it did not show that the first suit was pending on that note, and that this could only be shown by proving that, following the summons, a complaint had been made on the note. Hoag *v.* Weston (Supreme Ct.), 10 N. Y. Civ. Pro. Rep. 92. To the same effect see Phelps *v.* Gee, 29 Hun (N. Y.) 202.

Arrest upon Capias.—That the defendant was arrested upon a *capias* is not a good plea of a former action pending; and it not appearing that a declaration had been filed or served, the pleading is not helped by the averment that the *capias* was for the same identical cause of action. Gardner *v.* Clark, 21 N. Y. 399.

Process Necessary.—It is necessary to show that process was issued in the former action. Primm *v.* Gray, 10 Cal. 522. If no summons was issued on the former complaint, and there was no voluntary appearance on the part of the defendant therein, it is not pending. Weaver *v.* Conger, 10 Cal. 233; Warner *v.* Warner (Supreme Ct.), 27 N. Y. Supp. 160, 6 Misc. Rep. 249, an action for partition, in which no summons was served on one of the defendants, who subsequently brought a suit for the same matter against the other parties. Utica Clothes Dryer Mfg. Co. *v.* Otis, 37 Hun (N. Y.) 301, a similar case. Papers purporting to be a complaint and answer in an action similarly entitled, but not shown to have been filed, served, or used in any action, with no evidence of a summons, are insufficient to support a plea of another action pending. Woodard *v.* Stark (S. Dak., 1894), 57 N. W. Rep. 496. Where a complaint is set aside with leave to serve an amended complaint and summons on payment of costs, which is not done, the action is not deemed pending. Owens *v.* Loomis, 19 Hun (N. Y.) 606. Whether after an action has been commenced and an attachment made of the defendant's property, but no summons left and the action has not been entered, a plea in abatement for another action pending can be sustained, *quære*. Bennett *v.* Chase, 21 N. H. 570.

Defect of Jurisdiction.—Where the only jurisdiction over the defendant in the former suit (in equity) was acquired by an answer filed in his behalf without his consent, its pendency was held to be no bar to a suit by him as complainant for matters involved in the first suit. Cray *v.* Johnson (N. J., 1890), 20 Atl. Rep. 212.

As to What Constitutes the Commencement of a Suit, see generally ACTIONS, *ante*, p. 119.

proof affirmatively show that the former action is still pending.[1]

Discontinuance or Dismissal.—Formerly the only question was whether at the time of suing out the second writ there was a writ in being, and it was held to be no answer to the plea that the first suit was ended when the plea was put in;[2] but the prevailing rule now is that the discontinuance or dismissal of the first suit after the commencement of the second may be set up in reply to the plea, and thus defeat an abatement.[3] So where the former proceeding is

1. Bancroft *v.* Eastman, 7 Ill. 264; Hadden *v.* St. Louis, etc., R. Co., 57 How. Pr. (N. Y. Supreme Ct.) 390; O'Beirne *v.* Lloyd, 1 Sweeney (N. Y.) 19. "The effective part of such a plea is that the action is *still pending*. * * * There is no presumption of law that a suit once pending is still pending." Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 5 Am. St. Rep. 867; Toland *v.* Tichenor, 3 Rawle (Pa.) 323; Lewis *v.* Higgins, 52 Md. 614; Wales *v.* Jones, 1 Mich. 254; Fitzgerald *v.* Gray, 61 Ind. 109.

Sufficiency of Averment.—An averment that another action had been brought and removed to a federal court, that no order had been made dismissing it, and that the defendant had not stipulated that it should be dismissed does not fully aver that the action is pending. Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717. But if the plea states that the suit is still pending, it need not allege that it was not discontinued before the plea was filed. Nelson *v.* Foster, 5 Biss. (U. S.) 44. *Compare* on this point Craig *v.* Smith, 10 Colo. 220; Yentzer *v.* Thayer, 10 Colo. 63.

Parol Evidence of Pendency.—The pendency of a suit in a court of record can only be proved by record evidence, not by parol testimony. Smiley *v.* Dewey, 17 Ohio 156, where it was sought to introduce parol evidence that an appeal had been taken and was pending. Smith *v.* Ricketts, Liv. Opin. (N. Y.) 27; Wright *v.* Maseras, 56 Barb. (N. Y.) 521. *Compare* Damon *v.* Denny, 54 Conn. 253.

Erroneous Dismissal of Former Suit.—An erroneous dismissal puts an end to the suit; but as to the effect of an appeal from such dismissal in restoring the action, *quære*. Lord *v.* Ostrander, 43 Barb. (N. Y.) 337. If the appeal were void, doubtless it would be inoperative for any purpose. Bailey *v.* Bremond, 7 Tex. 537.

Where Former Summons Quashed.—Where a summons has been quashed the suit is no longer pending. Clark *v.* Ballou, 1 Pa. Dist. Rep. 430.

Judgment on Demurrer in Former Suit.—A suit which has proceeded to final judgment on demurrer against the plaintiff is no longer pending where no appeal has been taken; and an appeal taken subsequently to the institution of the second suit will not relate to the entry of the judgment appealed from so as to defeat the plaintiff's second action intermediate the judgment and the appeal. Porter *v.* Kingsbury, 77 N. Y. 165.

Former Action Abated by Death.—An action for damages for an injury to the person of the plaintiff abates by his death, and the pendency thereof cannot be pleaded in abatement of an action brought by his personal representative for damages resulting from his death. Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143.

2. Bac. Abr., tit. Abatement (M.); 39 Hen. VI, 12, pl. 16; Com. *v.* Churchill, 5 Mass. 174; Parker *v.* Colcord, 2 N. H. 36. See also Gamsby *v.* Ray, 52 N. H. 513.

3. Porter *v.* Kingsbury, 77 N. Y. 165; Crossman *v.* Universal Rubber Co., 131 N. Y. 636; Leavitt *v.* Mowse, 54 Md. 613; Adams *v.* Gardiner, 13 B. Mon. (Ky.) 197. See also Crossman *v.* Universal Rubber Co., 127 N. Y. 34; Hyatt *v.* Ingalls, 124 N. Y. 93; Clark *v.* Comford, 45 La. Ann. 502. *Contra*, Gamsby *v.* Ray, 52 N. H. 513; Parker *v.* Colcord, 2 N. H. 36.

Nunc Pro Tunc Order of Discontinuance.—An order of nonsuit in a former action, entered subsequently to the institution of the second suit, but *nunc pro tunc* as of a date prior thereto, operates to prevent the pendency of the first action, and cannot be impeached collaterally by plea in abatement in the second suit. Wilson *v.* Pearson, 102 N. Car. 290. The same point was

in rem, if it be shown that it has been finally disposed of without producing sufficient to pay the debt, the plaintiff may proceed to trial and judgment in the later action.[1]

Evidence of Termination.—But in all such cases the evidence of the termination of the earlier action or proceeding must be in the form of some judicial declaration to that effect.[2]

Writ of Error or Appeal.—The pendency of a writ of error or an appeal from a judgment in a former suit, where it operates as a

decided in Boland *v.* Benson, 50 Wis. 225.

Discontinuance After Plea.—According to the later cases, the objection of a former suit pending is removed by its dismissal or discontinuance, even after plea in abatement in the second suit. Beals *v.* Cameron, 3 How. Pr. (N. Y. Supreme Ct.) 414; Averill *v.* Patterson, 10 How. Pr. (N. Y. Ct. of App.) 85, 10 N. Y. 500; Marston *v.* Lawrence, 1 Johns. Cas. (N. Y.) 397; Smith *v.* White, 7 Hill (N. Y.) 520; Trow's Printing, etc., Co. *v.* New York Book-Binding Co. (City Ct.), 3 N. Y. Supp. 59; O'Beirne *v.* Lloyd, 1 Sweeney (N. Y.) 19; Warder *v.* Henry, 117 Mo. 530; Rogers *v.* Hoskins, 15 Ga. 270; Norfolk, etc., R. Co. *v.* Nunnally, 88 Va. 546; Chamberlain *v.* Eckert, 2 Biss. (U. S.) 124; Trawick *v.* Martin Brown Co., 74 Tex. 522; Payne *v.* Benham, 16 Tex. 367; Grider *v.* Apperson, 32 Ark. 332; Findlay *v.* Keim, 62 Pa. St. 112.

Contra.—Frogg *v.* Long, 3 Dana (Ky.) 157, 28 Am. Dec. 69. See also Demond *v.* Crary, 1 Fed. Rep. 480; Knight's Case, 1 Salk. 329; Hopkins *v.* Ludlow, 1 Phila. (Pa.) 272. Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 401, seems to adhere to the old and almost universally discarded rule. But *compare* Wilson *v.* Pearson, 102 N. Car. 290.

Discontinuance Before Trial.—Many cases go further and hold that a dismissal or discontinuance of the former action at any time before the question as to its pendency actually comes before the court for trial removes the bar. Moorman *v.* Gibbs, 75 Iowa 537; Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306; Rush *v.* Frost, 49 Iowa 183; *overruling* Rawson *v.* Guiberson, 6 Iowa 507; Dyer *v.* Scalmanim, 69 Cal. 637; Butler *v.* Jarvis, 51 Hun (N. Y.) 248; Nichols *v.* State Bank, 45 Minn. 102; Page *v.* Mitchell, 37 Minn. 368; Schmidt *v.* Braunn, 10 La. Ann. 26; Warder *v.* Henry, 117 Mo. 530, holding that the dismissal may be set up in an amended reply. See also Williamson *v.* Paxton, 18 Gratt. (Va.) 504.

In Swart *v.* Borst, 17 How. Pr. (N. Y. Supreme Ct.) 69, it was held that in order to make the discontinuance of the first suit effectual as an answer to the defendant's plea, the plaintiff must at least discontinue by the time that the issue is regarded as perfected and the cause noticed for trial in the second suit.

Striking Out Answer as Sham.—Where an answer sets up the defense of another action pending, which allegation, though true at the time the answer is served, is untrue at the time of noticing a motion to strike out the defense by reason of an order for discontinuance having been entered in the meantime, that part of the answer will be stricken out as sham. Clark *v.* Clark, 7 Robt. (N. Y.) 276.

1. Crossman *v.* Universal Rubber Co., 131 N. Y. 636, holding that there must be record evidence that the former proceeding has not resulted in a recovery of the debt.

2. Crossman *v.* Universal Rubber Co., 131 N. Y. 636; Averill *v.* Patterson, 10 How. Pr. (N. Y. Ct. of App.) 85, holding that a notice in writing is not equivalent in this behalf to an order of discontinuance, but that a reply setting up a discontinuance need not aver payment of costs where it does not appear that the defendants appeared in the first suit. O'Beirne *v.* Lloyd, 1 Sweeney (N. Y.) 19; Trow's Printing, etc., Co. *v.* New York Book-Binding Co. (City Ct.), 3 N. Y. Supp. 59, where the practice is stated. See also Gamsby *v.* Ray, 52 N. H. 513.

Payment of Costs in First Suit.—As to the necessity of payment of costs in the first suit to give validity to an order of discontinuance, see White *v.* Smith, 4 Hill (N. Y.) 166, *modified* on appeal in 7 Hill (N. Y.) 520; Trow's Printing, etc., Co. *v.* New York Book-Binding Co. (City Ct.), 3 N. Y. Supp. 59.

supersedeas, may be pleaded in abatement of a subsequent suit between the same parties for the same subject-matter.[1]

Reversal on Appeal.—A former suit is still pending although the judgment therein has been reversed on appeal and the cause remanded for further proceedings.[2]

4. Between the Same Parties.—Substantial Identity.—The pendency of a suit will not abate one subsequently brought unless there be a substantial identity of parties.[3]

1. Fisk *v.* Atkinson 71 Cal. 452; Hailman *v.* Buckmaster, 8 Ill. 498; Merritt *v.* Richey, 100 Ind. 416; Peck *v.* Hotchkiss, 52 How. Pr. (N. Y. Supreme Ct.) 226. *Compare* Walker *v.* Heller, 73 Ind. 46. As to the effect of a writ of error subsequently sued out, see I, 2, *supra*, p. 753, note 1.

Void Appeal.—A void appeal or motion for new trial cannot have the effect of protracting the pendency of the former suit. Bailey *v.* Bremond, 7 Tex. 537; Haviland *v.* Wehle, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 449, an appeal from a judgment of dismissal, the original court having no jurisdiction.

Bill to Reinstate an Appeal.—A bill in chancery to reinstate an appeal that has been dismissed is not available in abatement of an action upon the appeal bond. Evans *v.* Lingle, 55 Ill. 455.

Dismissal of Appeal from Order of Nonsuit.—Where an appeal from an order of nonsuit has been dismissed or abandoned, the order of nonsuit and not the dismissal of the appeal is to be regarded as the legal termination of the suit; and the pendency of the appeal cannot be pleaded in abatement of a new action brought in the interval between the order of nonsuit and the dismissal of the appeal. Trimmier *v.* Trail, 2 Bailey (S. Car.) 480.

Pleading.—A plea in abatement must show that the appeal has been perfected by the necessary steps. Fitzgerald *v.* Gray, 61 Ind. 109; Morgan County *v.* Holman, 34 Ind. 256; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312. And, in case of a writ of error, that all the necessary steps were taken to make it a *supersedeas*, as, for instance, in Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312, that a copy of the writ of error for the adverse party was lodged in the clerk's office within the time limited by statute; the same case holding that a plea of a pendin writ of error in abatement of a suit on the judgment must conclude clearly in abatement and not in bar. And that the appeal was taken and a *supersedeas* bond filed prior to the commencement of the present suit. Althen *v.* Tarbox, 48 Minn. 18; I, 2, note 1, p. 753, *supra*.

2. Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1.

Objection when Taken by Demurrer.—If such facts appear on the face of the complaint in the second suit, it is demurrable. Capehart *v.* Van Campen, 10 Minn. 158.

Final Reversal on Appeal.—A former judgment wholly reversed in error is no defense to a subsequent suit for the same cause of action. Smock *v.* Graham, 1 Blackf. (Ind.) 314.

3. *New York.*—Geery *v.* Webster, 11 Hun (N. Y.) 428; Egan *v.* Laemmle (C. Pl.), 25 N. Y. Supp. 330; Commercial Bank *v.* Heilbronner, 52 N. Y. Super. Ct. 388; Baker *v.* Baker (Supreme Ct.), 23 N. Y. Supp. 1083; Keeler *v.* Brooklyn El. R. Co., 9 Abb. N. Cas. (N. Y. Supreme Ct.) 166; Auburn City Bank *v.* Leonard, 20 How. Pr. (N. Y. Supreme Ct.) 193; Raven *v.* Smith (Supreme Ct.), 24 N. Y. Supp. 601.

Iowa.—Jones *v.* Brandt, 59 Iowa 332.

Connecticut.—Hatch *v.* Spofford, 22 Conn. 485.

Indiana.—Smith *v.* Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Bryan *v.* Scholl, 109 Ind. 367.

Nebraska.—McReady *v.* Rogers, 1 Neb. 124, 93 Am. Dec. 333.

West Virginia.—See *v.* Rogers, 31 W. Va. 473.

Pennsylvania.—Cornelius *v.* Vanarsdallen, 3 Pa. St. 435; Blackburn *v.* Watson, 85 Pa. St. 241; Streaper *v.* Fisher, 1 Rawle (Pa.) 155, 18 Am. Dec. 604; King *v.* Blackmore, 72 Pa. St. 347, 13 Am. Rep. 684.

California.—Calaveras County *v.* Brockway, 30 Cal. 325; Kerns *v.* McKean, 65 Cal. 416.

United States.—Massachusetts Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 13

Identity of Plaintiffs.—The plaintiffs, at least, in each suit must be the same.[1]

Fed. Rep. 857; Jenkins *v.* Eldridge, 3 Story (U. S.) 181, 183.

Kansas.—Mullen *v.* Mullock, 22 Kan. 598; Rizer *v.* Gillpatrick, 16 Kan. 564.

In Wood *v.* Lake, 13 Wis. 84, the rule was stated to be that the parties must be the same, as plaintiffs and defendants. Similar expressions are to be found in other cases. Hertell *v.* Van Buren, 3 Edw. Ch. (N. Y.) 20; Estes *v.* Worthington, 30 Fed. Rep. 465.

Election Contest and Quo Warranto.—The fact that a contest proceeding between two parties claiming a public office is pending does not affect the right of the state to proceed by information against the incumbent. Vogel *v.* State, 107 Ind. 374.

Test of Identity.—The identity of the parties, case, and relief must be such that a judgment therein can be pleaded in bar as a former adjudication. Watson *v.* Jones, 13 Wall. (U. S.) 679; Beyersdorf *v.* Sump, 39 Minn. 495, 12 Am. St. Rep. 678; Moore *v.* Holt, 3 Tenn. Ch. 141; Parsons *v.* Greenville, etc., R. Co., 1 Hughes (U. S.) 279; Dawson *v.* Vaughan, 42 Ind. 395; Mattel *v.* Conant, 156 Mass. 418. The pendency of an action of trespass against a deputy sheriff for his wrongful act done under color of his office cannot be pleaded in abatement of an action against the sheriff for the same cause. Severy *v.* Nye, 58 Me. 246.

1. Thomas *v.* Freelon, 17 Vt. 138; O'Connor *v.* Blake, 29 Cal. 312; Ayres *v.* Bensley, 32 Cal. 620; Felch *v.* Beaudry, 40 Cal. 440; Loyd *v.* Reynolds, 29 Ind. 299; Langham *v.* Thomason, 5 Tex. 127; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589; Wadleigh *v.* Veazie, 3 Sumn. (U. S.) 165; Wood *v.* Lake, 13 Wis. 84; Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413; Casey *v.* Harrison, 2 Dev. (N. Car.) 244; Hall *v.* Holcombe, 26 Ala. 720; Dawson *v.* Vaughan, 42 Ind. 395; Moore *v.* Holt, 3 Tenn. Ch. 141; Bennett *v.* Chase, 21 N. H. 584; Wadleigh *v.* Pillsbury, 14 N. H. 373. See also Brooks *v.* Mills County, 4 Dill. (U. S.) 524; Fink *v.* Allen, 36 N. Y. Super. Ct. 350; Mandeville *v.* Avery, 124 N. Y. 376, 21 Am. St. Rep. 678; Copley Iron Co. *v.* Pope, 3 Daly (N. Y.) 144, 108 N. Y. 232; Horton *v.* Bassett, 17 R. I. 129; Treasurers *v.* Bates, 2 Bailey (S. Car.) 382; Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y. Super. Ct.) 453; Hood *v.* Hayward (Supreme Ct.) 1 N. Y. Supp. 566; Redfearn *v.* Austin, 88 N. Car. 413; Converse *v.* Michigan Dairy Co., 45 Fed. Rep. 18. "That the plaintiffs are different is *prima facie* an objection to the plea." Smith *v.* Blatchford, 2 Ind. 184, 52 Am. Dec. 504.

Co-plaintiffs.—In Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, it was held that the plaintiffs must be entirely the same; and where, being originally the same in the first action, a co-plaintiff was added therein by amendment, a plea in abatement in the second action was overruled. See, however, Ritter *v.* Worth, 58 N. Y. 627. Davis *v.* Hunt, 2 Bailey (S. Car.) 412, holds that the plaintiffs must not only be the same, but the same on the record. On this point see the query in Bennett *v.* Chase, 21 N. H. 570.

Plaintiff Not a Party.—The second suit will not abate although the plaintiff therein, not a party to the first suit, might upon application have been admitted as a defendant in the same, and could thereby have litigated the matters involved in the second suit. Loyd *v.* Reynolds, 29 Ind. 299. See also Parsons *v.* Greenville, etc., R. Co., 1 Hughes (U. S.) 279; Fink *v.* Allen, 36 N. Y. Super. Ct. 350; and especially Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413.

Where Parties Are Reversed.—Where the parties are reversed, the plaintiff in one suit being defendant in the other, both suits may be maintained at the same time. Walsworth *v.* Johnson, 41 Cal. 61; Pierce *v.* Feagans, 39 Fed. Rep. 587; Washburne, etc., Mfg. Co. *v.* Scutt, 22 Fed. Rep. 710; New England Screw Co. *v.* Bliven, 3 Blatchf. (U. S.) 240; Colt *v.* Partridge, 7 Met. (Mass.) 570; Barr *v.* Chapman, 5 Ohio Cir. Ct. Rep. 69. *Contra*, Crane *v.* Larsen, 15 Oregon 349, both cases pending in equity. *Compare* Danvers *v.* Dorrity, 14 Abb. Pr. (N. Y. Supreme Ct.) 206.

In Actions for Account.—In actions for an accounting it is held that both parties are actors, so that the defendant cannot subsequently make one of the items of the account the subject of suit by him against the plaintiff. Coubrough *v.* Adams, 70

There are, however, several well-established exceptions to this rule, as in *qui tam* actions for penalties,[1] actions for breach of official bonds,[2] in certain cases of set-off and counterclaim,[3] and in suits by one of a class[4] or by different plaintiffs in privity of

Cal. 374, conceding, however, the general rule as stated in the text. Ward *v.* Gore, 37 How. Pr. (N. Y. C. Pl.) 119, reciprocal actions between partners for an accounting. See also the exception in cases of compulsory set-off in note 3, below.

1. **In Qui Tam Actions for Penalties** it is held that the first proceeding must abate or bar the second even though the prosecutors be different. Combe *v.* Pitt, 3 Burr. 1423; Sparry's Case, 5 Coke 61; Sparry's Case, Cro. Eliz. 261; Gilbert History of C. B. 205; Com. *v.* Churchill, 5 Mass. 174; Bennett *v.* Chase, 21 N. H. 584; Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 281.

2. **Actions for Breach of Official Bonds.**—Where a statute provides that in an action on an official bond by one party, any other person aggrieved may file his suggession and declare for such breaches as he thinks proper, one action so brought will abate a subsequent action, the statute being construed as mandatory and exclusive. Hartz *v.* Com., 1 Grant's Cas. (Pa.) 359; Com. *v.* Cope, 45 Pa. St. 161; Com. *v.* Staub, 35 Pa. St. 137. In the absence of such a statute the foregoing exception does not apply. Com. *v.* Cope, 45 Pa. St. 165; Treasurer *v.* Bates, 2 Bailey (S. Car.) 362, holding, however, that when one judgment has been obtained on the bond, all subsisting suits will be ordered to be consolidated. In Harmon *v.* McRae, 91 Ala. 401, it was held that an action by a creditor against a sheriff for the simultaneous levy of attachments in the interest of separate creditors (including the plaintiff) against a common debtor might be pleaded in abatement of a second action by another of those creditors, the levy being deemed to be for the joint benefit of all.

3. **In Cases of Compulsory Set-off.**—Where the statute of set-off is compulsory a plea in abatement that another action had been previously commenced, etc., against the plaintiff in which the matters sued for might be set off is good. Schenck *v.* Schenck, 10 N. J. L. 276; Slyhoof *v.* Flitcraft, 1 Ashm. (Pa.) 171; Lord *v.* Ostrander, 43 Barb. (N. Y.) 339. See also Douglas *v.* Hoag, 1 Johns. (N. Y.) 283. But this exception is based upon a mandatory construction of the statute, and does not hold where it is merely permissive. Tompkins *v.* Gerry, 43 Ill. App. 255; unless the matter has been in fact pleaded as a set-off in the former action. Pennsylvania R. Co. *v.* Davenport, 154 Pa. St. 111. And, moreover, to be available as ground of abatement, the set-off must be of a demand against the plaintiff or plaintiffs alone, and not against him or them together with others. Compton *v.* Green, 9 How. Pr. (N. Y. Supreme Ct.) 228. Pendency of a suit is no objection to a set-off of the debt upon which the suit is founded in another action between the same parties. Stroh *v.* Uhrich, 1 W. & S. (Pa.) 57.

Counterclaims, etc.—A pending action for damages is no bar to a counterclaim for the same demand in a suit afterward brought against the plaintiffs in the first action. Copley Iron Co. *v.* Pope, 13 Daly (N. Y.) 144, 108 N. Y. 232. A prior action pending on a cause set up in the present action as a counterclaim for which affirmative judgment is demanded is a defense in abatement of the counterclaim. Ansorge *v.* Kaiser, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 305; *distinguishing* Naylor *v.* Schenck, 3 E.D. Smith (N.Y.) 135. Plaintiff's action for $300, the unpaid portion of $525 to be paid by defendant for certain services, was not barred by the pendency in another court of an action against him by defendant to recover the amount paid on the ground of failure of consideration, the sum of $300 remaining not being set up by way of counterclaim, nor put in issue in the suit first brought. Carlin *v.* Richardson (Super Ct.), 1 N. Y. Supp. 772.

A counterclaim made in a prior action is pleadable in abatement of an action upon the counterclaim against the plaintiff; and the allowance of a motion upon the hearing of the second action (both causes being in the same court) to withdraw the counterclaim will not defeat the plea in abatement. Demond *v.* Crary, 1 Fed. Rep. 480.

4. **Suits by One of a Class.**—A bill filed by distributees of an estate against the

title.[1] Whether a pending attachment may be pleaded by a garnishee therein in abatement of a suit against him for the debt by the original debtor is not settled.[2]

Identity of Defendants.—But it is not essential that the defendants be entirely the same; if the actions are based upon substantially the same facts, the first will abate the second, at least as to those defendants who are named in both, although there are more defendants in one action than in the other.[3]

administrator to charge him with a *devastavit* is a good bar to a suit afterwards brought by a creditor for the same *devastavit*, Green *v.* Neal, 2 Heisk. (Tenn.) 220, on the ground that the creditor's remedy was by petition in the first suit. The same principle was applied in Groshon *v.* Lyon, 16 Barb. (N. Y.) 461. One who has made himself a party to a decree on a creditor's bill cannot thereafter file a bill on behalf of himself and all others. Rowley *v.* Williams, 5 Wis. 151, stating the rule and applying it to a case where a subsequent mortgagee commenced a suit for foreclosure, making a prior mortgagee a party, and the latter came in and answered, setting up his interest, and afterward commenced a suit for foreclosure. But it seems that creditors' bills by different creditors will not conflict with each other where one is brought in a state and another in a federal court. Parsons *v.* Greenville, etc., R. Co., 1 Hughes (U. S.) 279. And furthermore, that until there has been a decree in the first authorizing the others to come in and obtain satisfaction, its pendency will not affect a subsequent suit by another plaintiff. Bloodgood *v.* Bruen, 2 Bradf. (N. Y.) 8; Rogers *v.* King, 8 Paige (N. Y.) 210.

1. **Parties in Privity**—"If a man institutes a suit and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit pending touching the whole property will hold." Story Eq. Pl. (10th ed.) § 738; Holloway *v.* Holloway, 103 Mo. 274. See also Gardner *v.* Clark, 21 N. Y. 399. The same doctrine is preserved under Code provisions, the term "parties" being construed to include "privies." Crane *v.* Larsen, 15 Oregon 349. Where a promissory note was made payable to B., who at the date of its execution was the wife of A., it was held that a suit on the note could not be maintained by A. as the administrator of B. pending a former suit by him in his individual capacity. Beach *v.* Norton, 8 Conn. 71. Where a corporation brings a suit on behalf of the company, a stockholder, while such suit is pending, cannot maintain another suit against the same parties grounded on the same cause of action and seeking the same relief. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 118.

2. **Pendency of Garnishments.**—The following cases hold that it is pleadable in abatement; Crawford *v.* Clute, 7 Ala. 157, 41 Am. Rep. 92; Philadelphia Sav. Bank *v.* Sinethurst, 2 Miles (Pa.) 439; Brown *v.* Somerville, 8 Md. 444; but not in bar until judgment and execution, *Id.* See Irvine *v.* Lumberman's Bank, 2 W. & S. (Pa.) 190; Adams *v.* Avery, 2 Pittsb. (Pa.) 77; Navigation Co. *v.* Navigation Co., 3 Phila. (Pa.) 214; Kase *v.* Kase, 34 Pa. St. 128; Brown *v.* Scott, 51 Pa. St. 357; Wilson *v.* Murphy, 45 Mo. 409.

Contra.—Hugg *v.* Brown, 6 Whart. (Pa.) 468; Patterson *v.* Hankins, 9 Phila. (Pa.) 105; Noble *v.* Thompson Oil Co., 69 Pa. St. 409; Winthrop *v.* Carlton, 8 Mass. 456, holding, however, that it is ground for a continuance; Wadleigh *v.* Pillsbury, 14 N. H. 373. See also Shealy *v.* Toole, 56 Ga. 210; Wilson *v.* Rutland, etc., F. Ins. Co., 19 Vt. 177. The fact of issue being joined in an action pending will not *per se* prevent the defendant from being summoned as the trustee of the plaintiff in a process of foreign attachment. Smith *v.* Barker, 10 Me. 458.

3. Atkinson *v.* State Bank, 5 Blackf. (Ind.) 85, and Beyersdorf *v.* Sump, 39 Minn. 495, 12 Am. St. Rep. 678, where there were additional defendants in the first suit; Rehman *v.* New Albany, etc., R. Co. (Ind., 1893), 35 N. E. Rep. 292, where the second contained additional defendants. See also Jennings *v.* Warnock, 37 Iowa 278; Rogers *v.* Hoskins, 15 Ga. 273; Wadleigh *v.* Veazie, 3 Sumn. (U. S.) 165. *Compare*

5. For the Same Cause of Action.—The Rule Stated.—In order to support a plea of another action pending it must appear that the two suits are for the same cause or causes of action.[1]

Estes *v.* Worthington, 30 Fed. Rep. 465. Nor can the effect as an abatement be avoided by raising a new question as to a new party in the second suit along with the old question as to the defendant in both suits. Memphis *v.* Dean, 8 Wall. (U. S.) 64.

1. *Minnesota.*—Mathews *v.* Hennepin County Bank, 44 Minn. 442; Wilson *v.* St. Paul, etc., R. Co., 44 Minn. 445; Majerus *v.* Hoscheid, 11 Minn. 243.

United States.—Sharon *v.* Hill, 22 Fed. Rep. 28; Marshall *v.* Otto, 59 Fed. Rep. 299; Wheeler *v.* McCormick, 8 Blatchf. (U. S.) 267; Steiger *v.* Heidelberger, 18 Blatchf. (U. S.) 426; Pierce *v.* Feagans, 39 Fed. Rep. 587; Massachusetts Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 13 Fed. Rep. 857; Jenkins *v.* Eldrege, 3 Story (U. S.) 183.

New York.—Hyatt *v.* Ingalls, 124 N. Y. 93; Golden *v.* Metropolitan El. R. Co. (C. Pl.), 20 N. Y. Supp. 630; Fink *v.* Allen, 36 N. Y. Super. Ct. 350; Mandeville *v.* Avery, 124 N. Y. 376; Raven *v.* Smith, 24 N. Y. Supp. 601; Hood *v.* Hayward, 1 N. Y. Supp. 567; Maloy *v.* Associated Lace-makers' Co., 8 N. Y. Supp. 815; Hertel *v.* Van Buren, 3 Edw. Ch. (N. Y.) 20; Keeler *v.* Brooklyn El. R. Co., 9 Abb. N. Cas. (N. Y. Supreme Ct.) 166; Geery *v.* Webster, 11 Hun (N. Y.) 428; Commercial Bank *v.* Heilbronner, 52 N. Y. Super. Ct. 388.

Missouri.—Carroll *v.* Campbell, 110 Mo. 557.

California.—Calaveras County *v.* Brockway, 30 Cal. 325; Thompson *v.* Lyon, 14 Cal. 39; Martin *v.* Splivalo 69 Cal. 611; Larco *v.* Clements, 36 Cal. 132; Coburn *v.* Pacific Lumber, etc., Co., 46 Cal. 32.

Georgia.—Augusta R. Co. *v.* Glover (Ga., 1893), 18 S. E. Rep. 406.

Pennsylvania.—Clark *v.* Wilder, 25 Pa. St. 314; Stewart's Appeal, 56 Pa. St. 413; Ralph *v.* Brown, 3 W. & S. (Pa.) 395; King *v.* Blackmore, 72 Pa. St. 347, 13 Am. Rep. 684; Streaper *v.* Fisher, 1 Rawle (Pa.) 155, 18 Am. Dec. 604; Watson *v.* Maroney, 6 W. N. C. (Pa.) 345.

Kentucky.—Flint *v.* Spurr, 17 B. Mon. (Ky.) 499.

Alabama.—Hall *v.* Holcombe, 26 Ala. 720.

Nebraska.—McReady *v.* Rogers, 1 Neb. 124, 93 Am. Dec. 333.

Iowa.—Jones *v.* Brandt, 59 Iowa 332; Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413; Ætna Iron Works *v.* Firmenich Mfg. Co. (Iowa, 1894), 57 N. W. Rep. 904.

New Jersey.—Parcell *v.* Demorest, 48 N. J. Eq. 524.

Indiana.—Bryan *v.* Scholl, 109 Ind. 367.

See also Peck *v.* Kirtz (Supreme Ct.), 15 N. Y. St. Rep. 598; *affirmed* 113 N. Y. 669; Wiley *v.* Tarrytown (Supreme Ct.), 5 N. Y. Supp. 241; Dwight *v.* Central Vt. R. Co., 9 Fed. Rep. 785, 20 Blatchf. (U. S.) 200; Biggs *v.* Cox, 4 B. & C. 920, 10 E. C. L. 471. "It is of no importance that the evidence is the same." Jacobs *v.* Lewis, 47 Mo. 346. But see Montgomery *v.* Harrington, 58 Cal. 274.

Illustrations. — Supplementary proceedings are not a bar to a creditor's bill to set aside a fraudulent conveyance by the judgment debtor. Faber *v.* Matz (Wis., 1893), 57 N. W. Rep. 39. A suit to administer the separate estate of a deceased partner for the benefit of the separate creditors is not the same as a suit to administer the partnership property for the benefit of partnership creditors. Robinson *v.* Allen, 85 Va. 721. A writ of assistance and an action for forcible entry and detainer are not for identical relief. Kessinger *v.* Whittaker, 82 Ill. 22.

The pendency of a common-law action for partition is no objection to a proceeding in the Orphans' Court for partition under the statute. Rex *v.* Rex, 3 S. & R. (Pa.) 533. Nor can the pendency of a common-law action by a creditor of a decedent be set up in abatement of proceedings for account in the Orphans' Court. *In re* Evans's Estate, 3 W. N. C. (Pa.) 519. Although a defendant pleading in abatement produced the record of another suit on a note corresponding in every particular with the note sued on, except in the date of the assignment thereon, the record was held not to support his plea. Thomas *v.* Thomas, 3 J. J. Marsh. (Ky.) 589.

The pendency of an action upon notes will not abate a subsequent action on a foreign judgment obtained upon

Test of Identity.—The identity of the matters involved must be such that a judgment in the first could be pleaded in bar as a former adjudication.[1]

the notes. Steers *v.* Shaw, 53 N. J. L. 358.

Parol Evidence of Identity. — Parol evidence is admissible in determining whether the first suit is for the same cause of action as the second. Damon *v.* Denny, 54 Conn. 253. *Compare* Phelps *v.* Gee, 29 Hun (N. Y.) 202.

1. Per Shaw, C. J., in Newell *v.* Newton, 10 Pick. (Mass.) 470; Vance *v.* Olinger, 27 Cal. 358, per Sawyer, J.; Maule *v.* Murray, 7 T. R. 466; Moore *v.* Holt, 3 Tenn. Ch. 141; Watson *v.* Jones, 13 Wall. (U. S.) 679; Hall *v.* Wallace, 25 Ala. 438. See also Ballou *v.* Ballou, 26 Vt. 673; State *v.* North Lincoln St. R. Co., 34 Neb. 634.

It must appear that the court would have power to render such a judgment. Trimmier *v.* Hardin, 32 S. Car. 600.

Under Code Practice.—The test of identity of causes of action under the Codes is the same as that at common law. Kelsey *v.* Ward, 16 Abb. Pr. (N. Y. Supreme Ct.) 98; Julian *v.* Pilcher, 2 Duv. (Ky.) 254; Redfearn *v.* Austin, 88 N. Car. 413.

Actions for Instalments.—Separate suits for foreclosure may be brought for nonpayment of successive instalments of the mortgage debt. Jacobs *v.* Lewis, 47 Mo. 344. See also Blauvelt *v.* Powell, 59 Hun (N. Y.) 179, actions for instalments of rent.

Subsequent Suit upon a New or Different Title.—An action for divorce on the ground of adultery will not abate a second action for the same relief for alleged adulteries with the same person charged to have occurred after the commencement of the first action. Cordier *v.* Cordier, 26 How. Pr. (N. Y. Supreme Ct.) 187 (Sutherland, J., *dissenting*). Nor will a libel for divorce from bed and board for desertion abate a subsequent libel for divorce *a vinculo* on the same ground. Stevens *v.* Stevens, 1 Met. (Mass.) 279. A plaintiff may have two suits against the same defendant for the recovery of the possession of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first, Leonard *v.* Flynn, 89 Cal. 535; Vance *v.* Olinger, 27 Cal. 358; Mann *v.* Rogers, 35 Cal. 318; Larco *v.* Clements, 36 Cal. 132; Murray *v.* Green, 64 Cal. 368; or upon a different title, Martin *v.* Splivalo, 69 Cal. 611; Steele *v.* Grand Trunk Junction R. Co., 125 Ill. 385. Villavaso *v.* Barthet, 39 La. Ann. 247, and Kelsey *v.* Ward, 16 Abb. Pr. (N. Y. Supreme Ct.) 98, are applications of the same principle.

Attachments in Chancery.—An attachment in chancery obtained in one county and levied upon property not sufficient to pay the debt is no objection to the prosecution of another attachment in chancery in another county against other property. Savary *v.* Taylor, 10 B. Mon. (Ky.) 334. *Compare* James *v.* Dowell, 7 Smed. & M. (Miss.) 333.

Attachment Suits and Personal Actions.—A pending attachment against a nonresident will not be abated by a pending action by summons in the same court. Stockham *v.* Boyd (Pa., 1888), 12 Atl. Rep. 258; Branigan *v.* Rose, 8 Ill. 123. *Contra*, McKinsey *v.* Anderson, 4 Dana (Ky.) 62. Nor *vice versa*. Morton *v.* Webb, 7 Vt. 123; Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463. After the attachment suit is pursued to judgment and order of sale, but before actual sale, it will abate a personal action unless it be shown that the first proceeding is a failure in whole or in part. Challiss *v.* Smith, 25 Kan. 563.

Splitting of Actions.—The pendency of an action upon a part only of an entire and indivisible demand is pleadable in abatement of a subsequent action upon the residue. Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Hughes *v.* Dundee Mortgage Trust Invest. Co., 26 Fed. Rep. 831; O'Beirne *v.* Lloyd, 1 Sweeney (N. Y.) 19. As to what constitutes an entire cause of action, see ACTIONS.

Upon the kindred subject of the right to maintain a joint action against several, and at the same time a separate action against each, and the distinctions herein between joint, joint *and* several, and joint *or* several liabilities, see Blackburn *v.* Watson, 85 Pa. St 241; Weil *v.* Guerin, 42 Ohio St. 299, cases of defendant partners; Oneida County Bank *v.* Bonney, 101

Different Relief.—Where the relief obtainable in the two suits is essentially different, they may be prosecuted at the same time, although the same questions may be to some extent involved in both.[1]

Formal Differences.—But it may be laid down as a general proposition that where the substantial fact or facts upon which the plaintiff's right to relief is based are identical in the two actions, and the relief obtainable in the first includes all the relief sought in the second action, the first will abate the second, although the actions differ in matters of form, and in the relations of the defendant to the infringement of the plaintiff's rights.[2]

N. Y. 173, joint contractors; Graves *v.* Dale, 1 T. B. Mon. (Ky.) 191, joint obligors; Turner *v.* Whitmore, 63 Me. 526, joint and several promisors,—*disapproved* in Weil *v.* Guerin, 42 Ohio St 299; State Bank *v.* Weller, 3 Pick. (Mass.) 15.

1. Coles *v.* Yorks, 31 Minn. 213; Mathews *v.* Hennepin County Sav. Bank, 44 Minn. 442; Colt *v.* Partridge, 7 Met. (Mass.) 575; Scottish Am. Mortgage Co. *v.* Follansbee, 9 Biss. (U. S.) 482; Carpenter *v.* Talbot, 33 Fed. Rep. 537; Pacific Express Co. *v.* Haven, 41 La. Ann. 811; Ayres *v.* Bensley, 32 Cal. 620; Pullman *v.* Alley, 53 N. Y. 637; Haire *v.* Baker, 5 N. Y. 357; Danvers *v.* Dorrity, 14 Abb. Pr. (N. Y. Supreme Ct.) 206; Hogg *v.* Charlton, 25 Pa. St. 200; Wurtz *v.* Hart, 13 Iowa 515; Savary *v.* Taylor, 10 B. Mon. (Ky.) 334; Goff *v.* Welborn (Ky., 1894), 24 S. W. Rep. 871; State *v.* Dougherty, 45 Mo. 294. An action to quiet title and an action to recover possession of the same land are for different relief, although the same facts are involved. Bolton *v.* Landers, 27 Cal. 104.

Enforcement of Liens or Mortgages and Personal Actions for the Debt.—A suit to enforce a lien, and an action for the claim upon which the lien is founded, may be prosecuted at the same time. Raven *v.* Smith (Supreme Ct.), 24 N. Y. Supp. 601; Gambling *v.* Haight, 59 N. Y. 354; Gridley *v.* Rowland, 1 E. D. Smith (N. Y.) 670; Maxey *v.* Larkin, 2 E. D. Smith (N. Y.) 540; Pollock *v.* Ehle, 2 E. D. Smith (N. Y.) 541; Delahay *v.* Clement, 4 Ill. 201; Black *v.* Lackey, 2 B. Mon. (Ky.) 257; Julian *v.* Pilcher, 2 Duv. (Ky.) 254; Peak *v.* Bull, 8 B. Mon. (Ky.) 428; Heath *v.* Bates, 70 Ga. 633. See also Thielman *v.* Carr, 75 Ill. 385. Likewise a foreclosure suit and an action at law for the debt. Joslin *v.* Millspaugh, 27 Mich. 517; Spence *v.* Ins. Co., 40 Ohio St. 517; Copperthwait *v.* Dummer, 18 N. J. L. 258.

But where the statute provides for a personal judgment in a suit to foreclose a lien or mortgage, it precludes a subsequent suit for the debt. Witter *v.* Neeves, 78 Wis. 547; Ogden *v.* Bodle, 2 Duer (N. Y.) 611.

A mortgagee cannot foreclose his mortgage in a state court after a federal court has acquired jurisdiction over the property in bankruptcy proceedings to which he has made himself a party, and directed a sale and distribution of the proceeds. Levy *v.* Haake, 53 Cal. 267.

2. Per Brewer, J., in Mullen *v.* Mullock, 22 Kan. 598; Ward *v.* Gore, 37 How. Pr. (N. Y. C. Pl.) 119; Dawley *v.* Brown, 65 Barb. (N. Y.) 107; Stone *v.* Tucker, 12 La. Ann. 726. See also Buffum *v.* Tilton, 17 Pick. (Mass.) 510; Allen *v.* Malcolm, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 335; Carr *v.* Casey, 20 Ill. 637. A proceeding by attachment and another by bail writ cannot stand at the same time. Clark *v.* Tuggle, 18 Ga. 604. A plea setting forth that an action on a judgment was commenced while the plaintiff in the same judgment was endeavoring to raise the money by execution would be good. Yantis *v.* Burdett, 3 Mo. 457.

Proceedings Growing out of Replevin.—A constable levied an execution issued upon a judgment in favor of B. upon certain property as the property of the defendant in execution. M. claimed the property and brought an action of replevin therefor against B. Before the justice, M. obtained judgment for the return of the property, or its value in case a return could not be had. From this judgment B. appealed, and

6. In the Same Jurisdiction—Suits in Foreign Jurisdictions.—The doctrine is well settled that an action *in personam* in a foreign jurisdiction cannot be pleaded in abatement of another action commenced in a domestic forum, even if there be identity of parties, of subject-matter, and of the relief sought.[1]

What Jurisdictions Regarded as Foreign.—In the application of this rule the states of the Union are regarded as foreign to one another,[2]

the case was pending in the District Court. M. thereupon commenced an action against the constable and his sureties, of whom B. was one, to recover the value of the property. *Held*, that as to B. the pendency of the first action abated the second. Mullen *v.* Mullock, 22 Kan. 598.

Adequacy of Remedy a Criterion.—"It seems to us that if such plea can be sustained when the parties stand in different relations, it can only be so when the first suit affords a full, plain, and adequate remedy to the defendant in such suit, and opens all the grounds set up as the foundation of the second suit." Per Dewey, J., in Colt *v.* Partridge, 7 Met. (Mass.) 570. Where the pending suit is one in which it is legally possible for a judgment to be rendered upon the cause of action alleged in the second, and is brought for the purpose of obtaining such judgment, the plaintiff is bound to exhaust the possibilities of that suit before bringing another. Damon *v.* Denny, 54 Conn. 253.

1. Mexican Cent. R. Co. *v.* Charman (Tex. Civ. App., 1894), 24 S. W. Rep. 958; Lyman *v.* Brown, 2 Curt. (U. S.) 559; Radford *v.* Folsom, 14 Fed. Rep. 97; Williams *v.* Ayrault, 31 Barb. (N. Y.) 364; Bowne *v.* Joy, 9 Johns. (N. Y.) 221; Maule *v.* Murray, 7 T. R. 466. See also Bayley *v.* Edwards, 3 Swanst. 703; McHenry *v.* Lewis, 22 Ch. Div. 397, *affirming* 21 Ch. Div. 202; Peruvian Guano Co. *v.* Bockwoldt, 23 Ch. Div. 225, *criticising* Cox *v.* Mitchell, 7 C. B. N. S. 55, 97 E. C. L. 55; Scott *v.* Lord Seymour, 31 L. J. Exch. 461, and the cases cited in the following notes.

2. *Alabama.*—Humphries *v.* Dawson, 38 Ala. 199.

Arkansas.—Grider *v.* Apperson, 32 Ark. 332.

Connecticut.—Hatch *v.* Spofford, 22 Conn. 496, 58 Am. Dec. 433, *overruling* Hart *v.* Granger, 1 Conn. 154.

Delaware.—See Howard *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 471.

Georgia.—Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676.

Illinois.—McJilton *v.* Love, 13 Ill. 494, 54 Am. Dec. 449; Allen *v.* Watt, 69 Ill. 655.

Indiana.—Bradley *v.* State Bank, 20 Ind. 528; Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 468; De Armond *v.* Bohn, 12 Ind. 607.

Kentucky.—Davis *v.* Morton, 4 Bush (Ky.) 442, 96 Am. Dec. 309; Salmon *v.* Wooton, 9 Dana (Ky.) 424.

Louisiana.—Stone *v.* Vincent, 6 Martin N. S. (La.) 517.

Maryland.—Seevers *v.* Clement, 28 Md. 435. See also Cole *v.* Flitcraft, 47 Md. 312.

Massachusetts.—In Colt *v.* Partridge, 7 Met. (Mass.) 574, it is said that the question has not been decided in *Massachusetts*. See *dictum* in Newell *v.* Newton, 10 Pick. (Mass.) 470. In Moore *v.* Spiegel, 143 Mass. 413, it was held that the pendency of a suit in another state, if it can be pleaded at all, can be pleaded only in abatement and not in bar.

Minnesota.—Sandwich Mfg. Co. *v.* Earl (Minn., 1894), 57 N. W. Rep. 938.

New Hampshire. — Yelverton *v.* Conant, 18 N. H. 123; Goodall *v.* Marshall, 11 N. H. 99, 35 Am. Dec. 472.

New Jersey.—Kerr *v.* Willetts, 48 N. J. L. 78.

New York.—Bowne *v.* Joy, 9 Johns. (N. Y.) 221; Walsh *v.* Durkin, 12 Johns. (N. Y.) 99; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330; Williams *v.* Ayrault, 31 Barb. (N. Y.) 364; Crossman *v.* Universal Rubber Co. (Super. Ct.), 16 N. Y. Supp. 609; Douglass *v.* Phœnix Ins. Co., 138 N. Y. 218; Lorillard F. Ins. Co. *v.* Meshural, 7 Robt. (N. Y.) 308; Hadden *v.* St. Louis, etc., R. Co., 57 How. Pr. (N. Y. Supreme Ct.) 390. See also Oneida County Bank *v.* Bonney, 101 N. Y. 173; Osgood *v.* Maguire, 61 N. Y. 524, *affirming* 61 Barb. (N. Y.) 54.

North Carolina.—Sloan *v.* McDowell, 75 N. Car. 29; Casey *v.* Harrison, 2 Dev. (N. Car.) 244 (*quære*).

as are also the courts of a state and a federal court held in another state or district.[1] Whether the pendency of a suit in a state or federal court in the same district may be successfully pleaded to the prosecution of a like suit in the other court is a question upon which the authorities are conflicting;[2] and the effect of a suit pending in a federal court upon a suit subsequently brought in another federal court seems not to have been determined.[3]

7. Garnishments in Foreign Jurisdictions.—The pendency of a garnishee process in another state whereby the debt for which an action is subsequently brought in a domestic forum has been attached at the suit of another plaintiff against the plaintiff in the second suit is not generally pleadable in strict abatement of the latter,[4] although it may be good ground for granting a continu-

Pennsylvania.—Smith *v.* Lathrop, 44 Pa. St. 326. See also Hogg *v.* Charlton, 25 Pa. St. 200; Ralph *v.* Brown, 3 W. & S. (Pa.) 395. *Contra*, Hopkins *v.* Ludlow, 1 Phila. (Pa.) 272.

Texas.—Drake *v.* Brander, 8 Tex. 352. See also Mexican Cent. R. Co. *v.* Charman (Tex. Civ. App., 1894), 24 S. W. Rep. 958.

The Rule not Changed by Code Provisions.—Code provisions for pleading the pendency of another suit are not construed as modifying the former rule, and are confined to suits pending in the same state. Burrows *v.* Miller, 5 How. Pr. (N. Y. Supreme Ct.), 51; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330; Oneida County Bank *v.* Bonney, 101 N. Y. 173; De Armond *v.* Bohn, 12 Ind. 607; Davis *v.* Morton, 4 Bush (Ky.) 442, 96 Am. Dec. 309; Sloan *v.* McDowell, 75 N. Car. 29.

1. Marshall *v.* Otto, 59 Fed. Rep. 249; Briggs *v.* Stroud, 58 Fed. Rep. 717; White *v.* Whitman, 1 Curt. (U. S.) 494; Loring *v.* Marsh, 2 Cliff. (U. S.) 311; Crescent City Live-Stock, etc., Co. *v.* Butchers' Union Live-Stock, etc., Co., 12 Fed. Rep. 225; Rawitzer *v.* Wyatt, 40 Fed. Rep. 609; Stanton *v.* Embrey, 93 U. S. 548; Mutual L. Ins. Co. *v.* Harris, 96 U. S. 592; Walsh *v.* Durkin, 12 Johns. (N. Y.) 99, *distinguishing* Imlay *v.* Ellefsen, 2 East 453; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Parsons *v.* Greenville, etc., R. Co., 1 Hughes (U. S.) 279. See also Wadleigh *v.* Veazie, 3 Sumn. (U. S.) 165; Dwight *v.* Central Vt. R. Co., 9 Fed. Rep. 785; Wood *v.* Lake, 13 Wis. 84.

2. That it is not a ground of abatement, see Gordon *v.* Gilfoil, 99 U. S. 168, per Bradley, J.; Washburn, etc., Mfg. Co. *v.* Scutt, 22 Fed. Rep. 710, per Acheson, J.; Pierce *v.* Feagans, 39 Fed. Rep. 587, per Thayer, J.; Sharon *v.* Hill, 22 Fed. Rep. 28, per Sawyer, J.; Latham *v.* Chafée, 7 Fed. Rep. 520, per Colt, D.J.; Hughes *v.* Elsher, 5 Fed. Rep. 263, per Lowell, C.J.; Brooks *v.* Mills County, 4 Dill. (U. S.) 524 (*quære*), per Love, J.; Oneida County Bank *v.* Herrenden, 3 How. Pr. N. S. (N. Y. Ct. of App.) 446.

Contra.—Nelson *v.* Foster, 5 Biss. (U. S.) 44, per Miller, J.; Radford *v.* Folsom, 14 Fed. Rep. 97, per Shiras, D.J.; Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 21, per Perley, J. See also Earl *v.* Raymond, 4 McLean (U. S.) 233; *Ex p.* Balch, 3 McLean (U. S.) 221; Loyd *v.* Reynolds, 29 Ind. 299, where the court did not find it necessary to decide the point.

3. In Wheeler *v.* McCormick, 8 Blatchf. (U. S.) 267, a suit pending in another federal Circuit Court was pleaded in abatement, but overruled because it appeared that the remedy in the former suit was not sufficiently complete and effectual. So in Steiger *v.* Heidelberger, 4 Fed. Rep. 455, the court overruled a like plea in abatement, holding that bill for infringement and account of profits against an employer was not abatable by the pendency in another Circuit Court of a bill for injunction and account against the employer, the parties and relief being different. See also Mass. Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 13 Fed. Rep. 857.

4. Lynch *v.* Hartford F. Ins. Co., 17 Fed. Rep. 627; Cole *v.* Flitcraft, 47 Md. 312. See also Lewis *v.* Higgins, 52 Md. 614; New England Screw Co. *v.* Bliven, 3 Blatchf. (U. S.) 240. In

ance.[1]

8. Where the Former Suit is Defective.—Where the court in which the former suit is pending has no jurisdiction of the subject-matter,[2] or the suit or proceeding is otherwise so defective as to

Lynch *v.* Hartford F. Ins. Co., 17 Fed. Rep. 627, quoted in the following note, the weight of authority is declared to be as stated in the text.

Contra.—Embree *v.* Hanna, 5 Johns. (N. Y). 101; Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, *overruling* the answer, however, for want of sufficient allegations; O'Neil *v.* Nagle, 14 Daly (N. Y.) 492. See also Donovan *v.* Hunt, 7 Abb. Pr. (N. Y. Supreme Ct.) 29. *Compare* Gould *v.* Chicago, etc., R. Co. (Supreme Ct.), 10 N. Y. St. Rep. 921. But it must appear that the foreign court had acquired jurisdiction under its laws. Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209; Missouri Pac. R. Co. *v.* Sharitt, 43 Kan. 375, 19 Am. St. Rep. 143.

Pleading.—And it has been held that the pleading must allege the statute by authority of which the attachment was issued, and exhibit the proceedings at large, that it may be seen that the right to attach the debt existed, and that the law has been strictly pursued. Sargent *v.* Sargent Granite Co. (Com. Pl.), 26 N. Y. Supp. 737; in connection with which see Williams *v.* Ingersoll, 89 N. Y. 508. For the form of a common-law plea in abatement of a foreign attachment pending, see Wheeler *v.* Raymond, 8 Cow. (N. Y.) 315, n.

Attachments in Other States.—Furthermore, that the pendency of an action aided by attachment in the court of another state is not pleadable in abatement of an action in *New York* by the same plaintiff for the same cause against the same defendant, see Sargent *v.* Sargent Granite Co. (C. Pl.), 26 N. Y. Supp. 737, *reversing* 23 N. Y. Supp. 886; Osgood *v.* Maguire, 61 N. Y. 524, *affirming* 61 Barb. (N.Y.) 54; Nason Mfg. Co. *v.* Rankin Ice Mfg. Co., 1 Rob. C. C. (N. Y.) 455; Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y. Super. Ct.) 453; Buffalo Coal Co. *v.* Rochester, etc., R. Co., 8 W. N. C. (Pa.) 126; Parsons *v.* Columbia Ins. Co., 2 Phila. (Pa.) 21. See Lawrence *v.* Remington, 6 Biss. (U. S.) 44; Noble *v.* Thompson Oil Co., 69 Pa. St. 409; Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488.

Contrary Authorities.—Baltimore *v.* May, 25 Ohio St. 347, holds that the foreign garnishment is a good defense. Likewise German Bank *v.* American F. Ins. Co., 83 Iowa. 491. And Harvey *v.* Great Northern R. Co., 50 Minn. 405, states that the majority of the courts sustain the same rule; the court granting a continuance, however, in that case. See also Lowry *v.* Hall, 2 W. & S. (Pa.) 129, 38 Am. Dec. 495.

1. Harvey *v.* Great Northern R. Co., 50 Minn. 405. See also Chatzel *v.* Bolton, 3 McCord (S. Car.) 28.

Summary Statement.—"The courts when called upon to decide this question have uniformly held that a creditor ought to be at liberty to secure himself by action against his debtor, who may be apt to become insolvent or abscond, or who may be in collusion with the foreign plaintiff, notwithstanding the earlier foreign attachment, and that the only protection which the defendant can require is to have a continuance of the action or a moulding of the judgment in such a form that he should not be obliged to pay the same debt twice. This I understand to be the decided law of *Massachusetts*, *Alabama*, *California*, *New Hampshire*, *Vermont*, *Georgia*, *Indiana*, and *Louisiana*. Winthrop *v.* Carlton, 8 Mass. 456; Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463; McFadden *v.* O'Donnell, 18 Cal. 160; McKeon *v.* McDermott, 22 Cal. 667, 83 Am. Dec. 86; Wadleigh *v.* Pillsbury, 14 N. H. 373; Drew *v.* Towle, 27 N. H. 412; Hicks *v.* Gleason, 20 Vt. 139; Shealy *v.* Toole, 56 Ga. 610; Smith *v.* Blatchford, 2 Ind. 183, 52 Am. Dec. 504; Carroll *v.* McDonogh, 10 Martin (La.) 609." Per Lowell, J., in Lynch *v.* Hartford F. Ins. Co., 17 Fed. Rep. 627.

2. Rood *v.* Eslava, 17 Ala. 430; Ernst *v.* Hogue, 86 Ala. 502; Phillips *v.* Quick, 68 Ill. 324; Stroh *v.* Uhrich, 1 W. & S. (Pa.) 57. See also Haviland *v.* Wehle, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 449.

Where Want of Jurisdiction is Not Obvious.—In Merriam *v.* Baker, 9 Minn. 40 (Flandrau, J., *dissenting*), it was held that if the court where an action is

be ineffectual, its pendency will not abate a second suit between the same parties for the same cause of action.[1] But the accidental destruction of the papers in a suit does not authorize the bringing of a new suit.[2]

II. **As a Ground for Continuance or Stay**—1. **Continuance—Garnishment of Defendant.**—It is a proper ground for continuance that the debt for which the suit is brought has been attached in a prior and pending action in the same or in another state by a creditor of the plaintiff.[3]

Appeal Pending.—So where an appeal is pending, a judgment in which will operate as an estoppel upon the plaintiff in the second suit.[4]

commenced has authority to determine actions of that class or character, such action will be deemed to be pending therein, notwithstanding the existence of a question as to whether the court acquired jurisdiction of the parties or the particular case, so long as the question remains undecided and until the court decides against its jurisdiction.

1. Rogers *v.* Hoskins, 15 Ga. 270; Heath *v.* Bates, 70 Ga. 633. The language of the court in the *Georgia* cases is that "where the former action is so defective that no recovery can possiby be had," etc., "the second action will not abate." Reynolds *v.* Harris, 9 Cal. 338, where the former suit was so radically defective that a judgment rendered therein would have been a nullity. See also Ward *v.* Curtiss, 18 Conn. 290.

Void Process.—Minniece *v.* Jeter, 65 Ala. 222, where the process by which the original action was commenced was issued by an unauthorized person.

Invalid Attachment.—In an early case in *Connecticut*, where property may be attached upon mesne process, an attachment not legally served so as to hold the estate taken thereby was held not to abate a second action. Durand *v.* Carrington, 1 Root (Conn.) 355.

Married Woman Suing Alone.—Where a *feme covert* instituted a suit without right or authority, a second suit properly brought was held not to be abatable. Langham *v.* Thomason, 5 Tex. 127.

Suit in Erroneous Representative Character.—An administrator suing as the representative of the wrong party is not precluded during the pendency of the suit from bringing another suit as the representative of the right party. Cornelius *v.* Vanarsdallen, 3 Pa. St. 434.

Defective Writ of Error.—Quinebaug Bank *v.* Tarbox, 20 Conn. 510, where a writ of error, ineffectual by reason of the omission of the court to allow and sign a bill of exceptions as therein stated, was abandoned and a new writ of error brought and sustained.

Amendable Defects in Pleading.—A suit is not defective because of a misjoinder of counts in the declaration, where the defect can be remedied by amendment. Prosser *v.* Chapman, 29 Conn. 515.

Omission to Serve a Party.—The first suit is not a mere nullity, although one of the defendants resided out of the jurisdiction and was not served. White *v.* Smith, 4 Hill (N. Y.) 166.

Misjoinder of Defendants.—Nor does a mere misjoinder of defendants in the former suit render it ineffectual. Atkinson *v.* State Bank, 5 Blackf. (Ind.) 85.

2. The lost record should be supplied. Tolle *v.* Alley (Ky., 1893), 24 S. W. Rep. 113, where the second suit was abated.

3. Winthrop *v.* Carlton, 8 Mass. 456; Harvey *v.* Great Northern R. Co., 50 Minn. 405, where it was said to make no difference that the garnishee process was subsequent instead of prior. Blair *v.* Hilgedick, 45 Minn. 23; Lynch *v.* Hartford F. Ins. Co., 17 Fed. Rep. 627; Douglass *v.* Phœnix Ins. Co., 138 N. Y. 218; Smith *v.* Barker, 10 Me. 458; McCarthy *v.* Peake, 9 Abb. Pr. (N. Y. Supreme Ct.) 164. But the case should proceed until the rights of the parties are ascertained. Wilson *v.* Rutland, etc., Ins. Co., 19 Vt. 177.

4. Standard Imp. Co. *v.* Stevens, 51 Kan. 530; Willard *v.* Ostrander, 51 Kan. 481. See also Chatzel *v.* Bolton, 3 McCord (S. Car.) 28.

Cross-Actions.—Where cross-actions are pending, either of them may be continued on the defendant's motion until he shall obtain judgment in his action.[1]

Concurrent Attachments.—Where the same land is attached by several creditors, the subsequent attaching creditors may continue their actions until the actions on which the prior attachments were issued are determined.[2]

Appeal Between Other Parties.—A continuance will not be granted because an appeal is pending in another suit between one of the parties and third persons which, it is alleged, will determine the questions raised in the present suit.[3]

Suit in Equity.—Nor by reason of the pendency of a suit in equity for the same matter, where a plea of such suit would not avail in abatement.[4]

2. Stay of Proceedings—In General.—In order to authorize any court to stay proceedings on account of a suit pending in another court, the two proceedings must be practically identical.[5]

1. Adams *v.* Manning, 17 Mass. 178; Winslow *v.* Hathaway, 1 Pick. (Mass.) 211; Goodenow *v* Buttrick, 7 Mass. 140. Where the object of two legal proceedings is the same, the proceedings should be continued where process was first served. Schuehle *v.* Reiman, 86 N. Y. 270; and this although the second action was commenced without notice of the pendency of the first. Kimball *v.* Mapes, 19 N. Y. Wkly. Dig. 481.

2. Barnard *v.* Fisher, 7 Mass. 71; Hoyt *v.* Gelston, 8 Johns. (N. Y.) 179.

3. Cates *v.* Mayes (Tex., 1889), 12 S. W Rep. 51. Nor because an appeal has been taken in another case between the same parties. Peters *v.* Banta, 120 Ind. 416; intimating that a stay of proceedings might be granted; on which point see also Bryan *v.* Scholl, 109 Ind. 369.

In the Federal Courts.—Although the federal courts follow the construction of the statutes and constitution adopted by the courts of a state wherein they sit, yet when a suit in equity in a federal court involving such a construction has been set for hearing, the court will not on motion of a party postpone the trial to await the decision of the Supreme Court of the state in a suit pending before it and alleged to involve the same question, where it is not clear that the precise point will be determined in the latter suit, and it is uncertain when it will come on for adjudication. Detroit *v.* Detroit City R. Co., 55 Fed. Rep. 571.

But if the same question be at issue in another suit pending in the *United States* Supreme Court, a Circuit Court will continue the cause in the absence of special reasons to the contrary. Friedman *v.* Harrington, 56 Fed. Rep. 860.

4. Davis *v.* Hunt, 2 Bailey (S. Car.) 412; Loring *v.* Marsh, 2 Cliff. (U. S.) 311. As a ground for abatement, see I, 1, *a*, *supra*.

Suits at Law and Equity in Same Court.—Where both an action at law and a proceeding in chancery between the same parties and about the same subject-matter are pending in the same court, it is not an improper exercise of discretion to postpone the trial of that suit which depended upon strict legal right, until those equities which the defendant had been compelled to set up in a separate action could be heard and determined. In case of such postponement, however, the defendant should be required to prosecute his suit in equity with diligence; and when he fails in this respect the action at law may properly be tried. Purington *v.* Frank, 2 Iowa 565.

5. Proceedings in an action at law in a state court will not be stayed on account of a pending proceeding *in rem* in admiralty. People *v.* Judges, 27 Mich. 406, 15 Am. Rep. 195, where Campbell, J., collates the following authorities in support of the general principle: The Kalorama, 10 Wall. (U. S.) 204; Toby *v.* Brown, 11 Ark. 308; Harmer *v.* Bell (The Bold Buccleugh), 22 Eng. L. & Eq. 62; The

Pendency of Writ of Error.—A suit may be stayed to await the decision on a writ of error sued out during its pendency from a judgment in a prior suit between the same parties for the same matter.[1]

Bengal, Swabey 469; The John & Mary, Swabey 471; Nelson *v.* Couch, 15 C. B. N. S. 99, 109 E. C. L. 99; Sowter *v.* Dunston, 1 M. & R. 508, 17 E. C. L. 269; Wise *v.* Prowse, 9 Price 393; Henry *v.* Nash, 1 Exch. 826; Giles *v.* Tooth, 3 C. B. 665, 54 E. C. L. 665; Newton *v.* Belcher, 9 Q. B. 612, 58 E. C. L. 611; Newton *v.* Liddiard, 9 Q. B. 616, 58 E. C. L. 616; Great Northern R. Co. *v.* Kennedy, 4 Exch. 417; Inglis *v.* Great Northern R. Co., 16 Eng. L. & Eq. 55; Covington *v.* Hogarth, 7 M. &. G. 1013, 49 E. C. L. 1011; Wade *v.* Simeon, 1 C. B. 610, 50 E. C. L. 610; Ostell *v.* Le Page, 21 Eng. L. & Eq. 640; Miles *v.* Bristol, 3 B. & Ad. 945, 23 E. C. L. 22; Dicas *v.* Jay, 6 Bing. 519, 19 E. C. L. 155; Davis *v.* Salter, 2 C. & M. 466; Murphy *v.* Cadel, 2 Bos. & P. 137; Smidt *v.* Ogle, 6 Taunt. 74; Laughton *v.* Taylor, 6 M. &. W. 695; The Ann & Mary, 2 W. Rob. 189; General Steam Nav. Co. *v.* Tonkin, 4 Moore 321. To the same point see Smith *v.* College of St. Francis Xavier (Super. Ct.), 20 N. Y. Supp. 533; Ludeke *v.* McKeever (Supreme Ct.), 9 N. Y. St. Rep. 827; Auburn City Bank *v.* Leonard, 20 How. Pr. (N. Y. Supreme Ct.) 193; People *v.* Northern R. Co., 53 Barb. (N. Y.) 98; Carlisle *v.* Cooper, 18 N. J. Eq. 241; Mercantile Trust Co. *v.* Lamoille Valley R. Co., 16 Blatchf. (U. S.) 324; Converse *v.* Michigan Dairy Co., 45 Fed. Rep. 18. The question is considered in Hurd *v.* Moiles, 28 Fed. Rep. 897, and the rule is stated in terms more favorable to a stay. See Estes *v.* Worthington, 30 Fed. Rep. 465; Sanford *v.* Cloud, 17 Fla. 532; Avery *v.* Contra Costa County, 57 Cal. 247; Dunphy *v.* Belden, 57 Cal. 427; Lawrence *v.* Hale, 24 N. J. L. 43; Adamson *v.* Tuff, 44 L. T. N. S. 420; Murphy *v.* Cadell, 2 Bos. & P. 137.

Extent of Discretion.—Where several actions are brought for the same cause, proceedings may be stayed in all but one. Jones *v.* Pritchard, 6 D. &. L. 529, 18 L. J. Q. B. 104; Sowter *v.* Dunston, 1 M. & R. 508, 17 E. C. L. 269; Carne *v.* Legh, 6 B. & C. 124, 9 D. & R. 126, 13 E. C. L. 118; Burlingame *v.* Parce, 12 Hun (N. Y.) 149; Flanagan *v.* Flanagan (Supreme Ct.), 13 N. Y. St. Rep. 432; Cushman *v.* Leland, 93 N. Y. 652; Brown *v.* May, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 205; Parmalee *v.* Wheeler, 32 Wis. 429; Orville, etc., R. Co. *v.* Plumas County, 37 Cal. 354. Or in all until plaintiff elects to discontinue in all but one. Hammond *v.* Baker, 3 Sandf. (N. Y.) 704; Litchfield *v.* Smith, 7 Robt. N. Y. 306. And this may be done where the plaintiff of record is not the same in all, if they are under the control of one person and for his benefit. Soule *v.* Corning, 11 Paige (N. Y.) 412; Mariposa Co. *v.* Garrison, 26 How. Pr. (N. Y. Supreme Ct.) 448; McFarlan *v.* Clark, 2 Sandf. (N. Y.) 699.

Where several actions are pending, the court has no power to compel the parties to be bound by the result of the trial of one of them. Doyle *v.* Anderson, 1 Ad. & El. 635, 28 E. C. L. 169; Rex *v.* Cousins, 7 Ad. & El. 285, 34 E. C. L. 92; McGregor *v.* Horsfall, 3 M. & W. 320; Sherman *v.* McNitt, 4 Cow. (N. Y.) 85. *Compare* Jackson *v.* Schauber, 4 Cow. (N. Y.) 78.

In Case of Defective Answer in Abatement.—Where the answer shows the pendency of another suit, but does not properly plead the necessary facts, it is error to allow the two cases to proceed independently of each other. The latter should be stayed until the determination of the former, or the two cases should be consolidated and tried together. Crane *v.* Larsen, 15 Oregon 345, a suit in equity where another suit in equity was pending. See also Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Tenn.) 600.

1. Scott *v.* Herald, 8 Blackf. (Ind.) 129; Hailman *v.* Buckmaster, 8 Ill. 498, *citing* Christie *v.* Richardson, 3 T. R. 78; Myer *v.* Arthur, 1 Stra. 419; Cressy *v.* Kell, 1 Wils. 120. See also Porter *v.* Kingsbury, 77 N. Y. 165; Waring *v.* Yale, 1 Hun (N. Y.) 492; Brady *v.* New York (Super. Ct.), 5 N. Y. Supp. 181; Den *v.* Fen, 17 N. J. L. 354.

Stipulation to abide the event of an appeal in another case operates as a stay. Murphy *v.* Keyes, 2 Hun (N.Y.) 375.

Pendency of Garnishment.—Where the defendant in an action is garnisheed by a creditor of the plaintiff, the proper practice is for the court in which the action is pending to grant a stay of proceedings in the action before judgment; or if judgment is entered, to stay execution as to the whole or part thereof until the garnishment proceedings are disposed of.[1]

Suit in Foreign Jurisdiction.—The court may, in its discretion, stay proceedings on account of the pendency of another action in a foreign jurisdiction between the same parties involving the same matter.[2]

In Equity.—Where two or more suits are instituted in equity on behalf of an infant for the same matter, the court will, upon representation of the fact, direct an inquiry as to which suit is most for the infant's benefit, and when that point is ascertained will stay proceedings in the other suits.[3] And after a decree for an account in a suit by creditors against an executor or administrator, the court will, upon motion of the defendant, stay proceedings in a subsequent suit by other creditors.[4]

III. TAKING THE OBJECTION—1. At Common Law—*a.* OBJECTION, HOW TAKEN.—The pendency of a former action merely defeats the present proceeding and must ordinarily be pleaded in abatement,[5]

1. Blair *v.* Hildedick, 45 Minn. 23; Shealy *v.* Toole, 56 Ga. 210; Harvey *v.* Great Northern R. Co., 50 Minn. 405; Crawford *v.* Clute, 7 Ala. 157, 41 Am. Dec. 92; Drake on Attachment (6th ed.) § 701; McFadden *v.* O'Donnell, 18 Cal. 160; Pierson *v.* McCahill, 21 Cal. 123; McKeon *v.* McDermott, 22 Cal. 667, 83 Am. Dec. 86; Hixon *v.* Schooley, 26 N. J. L. 461. See Barker *v.* Haskell, 9 Cush. (Mass.) 218; Blumenthal *v.* Taylor, 44 Ill. App. 139; Wood *v.* Lake, 13 Wis. 84.

2. McHenry *v.* Lewis, 22 Ch. Div. 397, *affirming* 21 Ch. Div. 202; Peruvian Guano Co. *v.* Bockwoldt, 23 Ch. Div. 225, *criticising* Cox *v.* Mitchell, 7 C. B. N. S. 55, 97 E. C. L. 55; Parmalee *v.* Wheeler, 32 Wis. 429; Kerr *v.* Willetts, 48 N. J. L. 78; Lewis *v.* Higgins, 52 Md. 614; Bell *v.* Donohue, 47 N. Y. Super. Ct. 458. *Contra*, *dictum* in Cole *v.* Flitcraft, 47 Md. 316.

Review of Discretion on Appeal.—In People *v.* Northern R. Co., 53 Barb. (N. Y.) 98, it was held that in so far as the question is addressed to the discretion of the court, the decision at special term cannot be overhauled on appeal.

3. 1 Daniell Ch. Pr. (5th ed.) 69; Mortimer *v.* West, 1 Swanst. 358. Under special circumstances the court may make an order upon motion and notice without directing an inquiry. 1 Daniell Ch. Pr. (5th ed.) 70; Staniland *v.* Staniland, M. R. 21 Jan. 1864. See Frost *v.* Ward, 12 W. R. 285, 2 DeG., J. & S. 70.

4. 1 Daniell Ch. Pr. (5th ed.) 635.

5. Stephens *v.* Monongahela Bank, 111 U. S. 197, holding also in accordance with the provisions of § 1011 U. S. Rev. Sts. that the decision of the court on the plea is not subject to review. Morton *v.* Sweetser, 12 Allen (Mass.) 135; Percival *v.* Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210; Moore *v.* Spiegel, 143 Mass. 413; Bank of U. S. *v.* Merchants' Bank, 7 Gill (Md.) 415; Kempton *v.* Sullivan Sav. Inst., 53 N. H. 581; Harris *v.* Johnson, 65 N. Car. 478; and cases in the following notes. It cannot be taken advantage of by motion to dismiss. Morton *v.* Sweetser, 12 Allen (Mass.) 135. And cannot be pleaded under leave of the court to plead double. Davis *v.* Grainger, 3 Johns. (N. Y.) 258. Where defendants are sued jointly one alone cannot plead in abatement of the whole suit. DeForest *v.* Jewett, 1 Hall (N. Y.) 137.

In *In re* Linn's Estate, 2 Pearson (Pa.) 487, it was held that as there are no written pleadings in the Orphans' Court, an objection of another suit pending may be taken therein *ore tenus*.

and not in bar,[1] and is not admissible in evidence under the general issue.[2]

b. AT WHAT STAGE OF PROCEEDINGS.—The plea in abatement cannot be filed after pleading to the merits of the action.[3]

c. REQUISITES OF THE PLEA.—The greatest strictness and accuracy are required in a plea of this kind.[4] It must be certain to every intent,[5] not argumentative,[6] and free from duplicity[7] or repugnancy.[8] The plea must state in what court the prior action is pending,[9] and refer to the record thereof, the usual formulary being "as by the record thereof remaining in said court appears;"[10]

1. Morton *v.* Sweetser, 12 Allen (Mass.) 135; Sullings *v.* Goodyear Dental Vulcanite Co., 36 Mich. 313; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312; Near *v.* Mitchell, 23 Mich. 382, where the prior suit was a garnishee process; Moore *v.* Spiegel, 143 Mass. 413; Mattel *v.* Conant, 156 Mass. 418; Findlay *v.* Keim, 62 Pa. St. 112.

Qui Tam Actions.—The rule is different in the case of *qui tam* actions for penalties where the property in the thing in action is vested in the person who first sues for it, and that suit may be pleaded in bar of a second. Engle *v.* Nelson, 1 P. & W. (Pa.) 442; Morton *v.* Sweetser, 12 Allen (Mass.) 137; Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 281. See also Com. *v.* Cope, 45 Pa. St. 161; Derham *v.* Berry, 5 Phila. (Pa.) 475.

2. Smock *v.* Graham, 1 Blackf. (Ind.) 314; Percival *v.* Hickey, 18 Johns, (N. Y.) 257, 9 Am. Dec. 210; Near *v.* Mitchell, 23 Mich. 382; Williamson *v.* Paxton, 18 Gratt. (Va.) 504; Sherwood *v.* Hammond, 4 Blackf. (Ind.) 504. See also Gregory *v.* Kenyon, 34 Neb. 640.

3. Hartz *v.* Com., 1 Grant's Cas. (Pa.) 359; Engle *v.* Nelson, 1 P. & W. (Pa.) 442; Com. *v.* Cope, 45 Pa. St. 164; Morton *v.* Sweetser, 12 Allen (Mass.) 137; Drake *v.* Brander, 8 Tex. 352; Maxwell *v.* First Nat. Bank (Tex. Civ. App., 1894), 24 S. W. Rep. 848. See also People *v.* Smith, 65 Mich. 1; Trawick *v.* Martin Brown Co., 74 Tex. 522. See ABATEMENT IN PLEADING, *ante*, p. 1.

General or Special Imparlance. — It cannot be pleaded after a general imparlance, but may be after a special imparlance. Coates *v.* McCarney, 2 Browne (Pa.) 173; Ralph *v.* Brown, 3 W. & S. (Pa.) 395; M'Carney *v.* Mc Camp, 1 Ashm. (Pa.) 4, holding that a plea in abatement filed out of time may be treated as a nullity.

After Removal of Action.—In Colt *v.* Partridge, 7 Met. (Mass.) 570, it was held that the defendant may plead in abatement in the supreme judicial court after removing an action into that court pursuant to Mass. Sts. 1840, c. 87, § 3. Colt *v.* Partridge, 7 Met. (Mass.) 570.

4. Severy *v.* Nye, 58 Me. 246; Ballou *v.* Ballou, 26 Vt. 673; Thompson *v.* Lyon, 14 Cal. 39. Defect in form may be taken advantage of by general demurrer. Clifford *v.* Cony, 1 Mass. 495.

5. Severy *v.* Nye, 58 Me. 246; Wales *v.* Jones, 1 Mich. 254.

6. Severy *v.* Nye, 58 Me. 246, holding that such a defect may be reached by general demurrer.

7. Wadleigh *v.* Pillsbury, 14 N. H. 373.

8. Bigelow *v.* Farmer, 5 Blackf. (Ind.) 31.

9. Bullock *v.* Bolles, 9 R. I. 501. See also Berger *v.* Moessinger, 5 Ohio Cir. Ct. Rep. 432; Miller *v.* Rigney, 16 Ind. 327. The name and style of the court are indispensable. Fahy *v.* Brannagan, 56 Me. 44, holding that a plea of a pending statute submission of all demands must not only set out the name of the referee, but allege his acceptance.

10. Bullock *v.* Bolles, 9 R. I. 501; Clifford *v.* Cony, 1 Mass. 494; Com. *v.* Churchill, 5 Mass. 174.

Rule in New Hampshire.—"If both actions were pending in the same court, it was sufficient for the plea to state that the parties and cause of action were the same, and to refer the court to their own record; and the trial in such case was by inspection of the record and not by proof *aliunde*. The plaintiff was entitled to oyer of the record remaining in the court. Theobalds *v.* Langs, Ld. Raym. 847; Cremer *v.* Wickett, Ld. Raym. 550; Bond *v.* Barnes, 3 Ld. Raym. 77. If the prior

and it must aver that the action is still pending,[1] and show that both suits are for the same cause and matter,[2] and that the court wherein the former suit is pending has jurisdiction thereof.[3] The plea must conclude with a prayer of judgment of the writ,[4] and should be verified by affidavit.[5] See ABATEMENT IN PLEADING, *ante*, p. 1.

d. PROCEEDINGS SUBSEQUENT TO PLEA—**Demurrer.**—If the plea is insufficient in form or substance, the proper course is to demur.[6]

Replication.—The only replication to the plea is that of *nul tiel record.*[7]

action was pending in another court, to furnish means of determining the truth of the plea by inspection, the rule of pleading requires that the plea should set out the record in the prior action literally *sub pede sigilli*. Carwen *v.* Fletcher, 1 Stra. 520; Petre *v.* University of Cambridge, 3 Lev. 332." Per Perley, J., in Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 25, followed in Ladd *v.* Stratton, 59 N. H. 200.

In *Connecticut* it seems that the same practice obtains, Beach *v.* Norton, 8 Conn. 71; and certainly in *Maine*, Fahy *v.* Brannagan, 56 Me. 42; Turner *v.* Whitmore, 63 Me. 526; Brastow *v.* Barrett, 82 Me. 166.

New Jersey.—In Trenton Bank *v.* Wallace, 9 N. J. L. 83, it was held that an exemplification of the record *sub pede sigilli*, duly authenticated, must accompany the plea and be filed therewith as matter of evidence.

1. I, 3, *supra;* Wales *v.* Jones, 1 Mich. 254; Pew *v.* Yoare, 12 Mich. 16. But see Lee *v.* Hefley, 21 Ind. 98.

Evidence of Pendency.—The pendency of a prior action can only be proved by record evidence. Smith *v.* Ricketts, Liv. Opin. (N. Y.) 27; Smiley *v.* Dewey, 17 Ohio 156; Wright *v.* Maseras, 56 Barb. (N. Y.) 521. See Bond *v.* White, 24 Kan. 45; Craig *v.* Smith, 10 Colo. 220; Hixon *v.* Schooley, 26 N. J. L. 461.

2. I, 5, *supra;* Tracy *v.* Reed, 4 Blackf. (Ind.) 56; Calaveras County *v.* Brockway, 30 Cal. 325; Llano Imp., etc., Co. *v.* Cross, 5 Tex. Civ. App. 175; Bourland *v.* Nixon, 27 Ark. 315.

On plea in abatement to the entire action, if the proof shows that the first suit is only for part of the matter sued for in the second suit, the plea fails. Thompson *v.* Lyon, 14 Cal. 39.

3. *Ex p.*, Balch, 3 McLean (U. S.) 221; White *v.* Whitman, 1 Curt. (U. S.) 494. But see Newell *v.* Newton, 10 Pick. (Mass.) 470.

4. Fahy *v.* Brannagan, 56 Me. 42; Yelverton *v.* Conant, 18 N. H. 123; Clark *v.* Brown, 6 N. H. 434. A prayer that it may be quashed, without praying judgment, is bad. Hazzard *v.* Haskell, 27 Me. 549; Crawford *v.* Slade, 9 Ala. 892, holding the defect fatal on demurrer. A plea which began by praying judgment of the writ and declaration and ended with a prayer for judgment of the writ only was held good on demurrer. Buckles *v.* Harlan, 54 Ill. 361.

5. Hall *v.* Wallace, 25 Ala. 438, holding the want of affidavit fatal on demurrer. See also Trenton Bank *v.* Wallace, 9 N. J. L. 83; White *v.* Whitman, 1 Curt. (U. S.) 494. *Contra*, Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 25.

Want of Verification cannot be taken advantage of by demurrer. Buchanan *v.* Logansport, etc., R. Co., 71 Ind. 265. Nor, it seems, will an objection be entertained for the first time after the jury are sworn. Wilson *v.* Poole, 33 Ind. 443.

6. Ralph *v.* Brown, 3 W. & S. (Pa.) 395; Pittsburg, etc., R. Co. *v.* Mt. Pleasant, etc., R. Co., 76 Pa. St. 481. Formal objections not made in the court below will not be considered on appeal. Rawson *v.* Guilberson, 6 Iowa 507.

7. Pittsburg, etc., R. Co. *v.* Mt. Pleasant, etc., R. Co., 76 Pa. St. 481; Merriam *v.* Baker, 9 Minn. 40. But see Buffum *v.* Tilton, 17 Pick. (Mass.) 510. A bad replication may upon demurrer be a sufficient reply to a bad plea. Leavitt *v.* Mowe, 54 Md. 613. A replication that, at the commencement of the suit in which the plea was interposed, there was not another suit pending for the same cause of action was held good in Haight *v.* Holley, 3 Wend. (N. Y.) 258.

Dismissal on Motion.—The court cannot dismiss a case on motion on the ground of a former suit pending, when a plea in abatement therefor has been replied to and the issue thereon remains undisposed of.[1]

Judgment.—The proper judgment on sustaining a demurrer to a plea in abatement is not final, but only *quod respondeat ouster.*[2] The rule is different when issue is joined upon such plea and the jury finds for the plaintiff. In that case he is entitled to a verdict on the merits.[3] The judgment for the defendant on a plea in abatement, whether it be on an issue in fact or in law, is that the writ be quashed.[4]

2. In Equity—Demurrer.—If it appears upon the face of the bill that there is another suit pending in another court of equity in the same jurisdiction between the same parties for the same cause of action, the objection may be taken by demurrer.[5]

Plea.—Otherwise the objection must be taken by plea in abatement and not by answer[6] or motion,[7] except when two suits are brought in the name of an infant, in which case it is a motion of course to obtain a reference on the statement of counsel that both suits are for the same purpose, to see which of them is most for the infant's benefit, and so most proper to be proceeded with.[8]

Form of Plea.—The plea should set forth the commencement of the former suit, its general nature, character, and objects, the relief prayed, and how far it has progressed.[9] It should state that there have been proceedings in the former suit, such as an appearance, or process requiring an appearance at least.[10] It should

1. Gruler *v.* McRoberts, 48 Mich. 316.

2. Gould Pl. 300; Atkinson *v.* State Bank, 5 Blackf. (Ind.) 85; Haight *v.* Holley, 3 Wend. (N. Y.) 263; Branigan *v.* Rose, 8 Ill. 123.

3. Stephen Pl. 105; Gould Pl. 300; Atkinson *v.* State Bank, 5 Blackf. (Ind.) 85; Haight *v.* Holley, 3 Wend. (N. Y.) 263.

4. 1 Chitty Pl. 457; Blackburn *v.* Watson, 85 Pa. St. 241.

5. 1 Foster Fed. Pr. (2d ed.) § 108.

6. Pierce *v.* Feagans, 39 Fed. Rep. 587; Battell *v.* Matot, 58 Vt. 271.

A Preliminary Matter.—As an incident among other matters in an answer on the merits it will not avail. Curd *v.* Lewis, 1 Dana (Ky.) 353. The right to rely on a plea in abatement is waived by including in the same pleading an answer to the merits. Marshall *v.* Otto, 59 Fed. Rep. 249. It is not too late when filed after a continuance made with express reservation of the right to make defense. Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Kan.) 600.

Plea Standing for Answer. — A plea may be ordered to stand for an answer; and under the *Massachusetts* practice the plea, if inserted in an answer, must be taken to be part of it and true for all the purposes of the case if the case is set down by the plaintiff for hearing upon the bill and answer. Tansey *v.* McDonnell, 142 Mass. 220.

7. Murray *v.* Shadwell, 17 Ves. Jr. 353, *disapproving* Anonymous, Mosely 268. See also Hertell *v.* Van Buren, 3 Edw. Ch. (N. Y.) 20; Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Tenn.) 600.

8. Daniell Ch. Pr. (5th ed.) 69, 634; Sullivan *v.* Sullivan, 2 Mer. 40; Battell *v.* Matot, 58 Vt. 281.

9. Crescent City Live Stock, etc., Co. *v.* Butchers' Union Live Stock, etc., Co., 12 Fed. Rep. 225; Foster *v.* Vassall, 3 Atk. 590; Story Eq. Pl. § 737; 1 Foster Fed. Pr. (2d ed.) § 129.

10. Story Eq. Pl. § 737; Moore *v.*

then aver specifically that the second suit is for the same subject-matter[1] as the first and seeks the same or similar relief,[2] and that the former suit is still pending.[3]

Verification.—A plea of this kind is not put in upon oath.[4]

Proceedings upon Plea.—The usual course is not to reply to the plea,[5] or to have the plea set down and argued, but to refer it on motion of the plaintiff at once, and of course to a master, to look into the two suits and report whether or not they are both for the same matter.[6] If he reports that they are, the plea is allowed;[7] but if he reports that they are not, the plea is then

Welsh Copper Co., 1 Eq. Abr. 39, pl. 14.

1. Devil *v.* Brownlow, 2 Dick. 611; Mitford Pl. Ch. 2, § 2, part 2; Story Eq. Pl. § 737; Crane *v.* Larsen, 15 Oregon 349. The averment may be omitted, provided facts are stated sufficient to show the identity of subject-matter. Davison *v.* Johnson, 16 N. J. Eq. 112; McEwen *v.* Broadhead, 11 N. J. Eq. 129.

Annexing Former Bill by Reference.—Although the terms of the plea import that the former suit is for the same cause of action, if a part of the former bill is annexed to the plea by reference, the plea must be read precisely as it would had the former bill been introduced in its very terms into the body of the plea. Wheeler *v.* McCormick, 8 Blatchf. (U. S.) 267.

2. Behrens *v.* Sieveking, 2 Myl. & C. 602; Wheeler *v.* McCormick, 8 Blatchf. (U. S.) 267; Jenkins *v.* Eldridge, 3 Story (U. S.) 183; Story Eq. Pl. § 737.

3. Story Eq. Pl. § 737. See Urlin *v.* Hudson, 1 Vern. 332; Mitford Pl. ch. 2, § 2, part 2. Great strictness is required. Moss *v.* Ashbrooks, 12 Ark. 369.

4. Green *v.* Neal, 2 Heisk. (Tenn.) 217; Mitford Pl. ch. 2, § 2, part 2, *citing* Urlin *v.* Hudson, 1 Vern. 332. But see United States Equity Rule 31.

Certificate of Counsel that the plea is well founded is not required. Nelson *v.* Foster, 5 Biss. (U. S.) 44.

5. Battell *v.* Matot, 58 Vt. 281; 1 Daniell Ch. Pr. (5th ed.) 637. See Jones *v.* Segueira, 1 Ph. 82, 6 Jur. 183. In *New Jersey* the complainant may take issue upon the facts or have a reference to a master. If he does neither, then the defendant must set the plea down for argument. McEwen *v.* Broadhead, 11 N. J. Eq. 129. A general replication does no harm, and a motion to take it off the files will be dismissed. Allen *v.* Allen, 3 Tenn. Ch. 145.

6. 1 Daniell Ch. Pr. (5th ed.) 637; Battell *v.* Matot, 58 Vt. 281. The plaintiff may admit as much of the plea as he chooses and take a reference for the remainder. 1 Daniell Ch. Pr. 797. See also Searight *v.* Payne, 1 Tenn. Ch. 186. The court may refuse a motion for reference where the pleadings clearly show that different questions are raised in the two suits. Loring *v.* Marsh, 2 Cliff. (U. S.) 311. In *Wisconsin* there were no masters in chancery, and the plea was disposed of by the court. Rowley *v.* Williams, 5 Wis. 151. By the practice in the *New York* Court of Chancery the defendant was required to obtain an order of reference. 1 Hoff. Ch. Pr. 225. According to the English chancery practice, if the plaintiff did not obtain an order of reference and report within one month, the defendant could have, as of course, an order to dismiss the bill with costs. 1 Daniell Ch. Pr. (5th ed.) 637. See Long *v.* Storie, 9 Hare 542; Hart *v.* Philips, 9 Paige (N. Y.) 293. The setting of a plea for hearing on its sufficiency, or taking issue upon it, is a "step necessary to the progress of the cause," and a rule may be made on the plaintiff to take such step under the *Tennessee* Code, § 4390, during the term. Montgomery *v.* Olwell, 1 Tenn. Ch. 183.

7. 1 Daniell Ch. Pr. (5th ed.) 637, 638. *Compare* American Bible Soc. *v.* Hague, 4 Edw. Ch. (N. Y.) 117; Crofts *v.* Wortley, 1 Ch. Cas. 241; Leigh *v.* Turner, 14 W. R. 361; Savary *v.* Taylor, 10 B. Mon. (Ky.) 334. Where the plea is found true it seems that the bill must be dismissed without reference to the equity arising from any facts stated in the bill. Briggs *v.*

overruled.[1] If, however, the plaintiff considers the plea defective in form he may set it down for argument,[2] which is deemed an admission of the truth of the plea, and it must be allowed unless defective in form.[3]

3. Under Code Systems—*a.* OBJECTION, HOW TAKEN.—Under the Code systems the objection of a former suit pending is taken by demurrer if the facts appear upon the face of the complaint;[4] and if not so appearing, then by answer.[5]

b. AT WHAT STAGE OF PROCEEDINGS.—The objection of a former action pending is matter of abatement, and must be interposed before pleading to the merits.[6]

Stroud, 58 Fed. Rep. 717; Farley *v.* Kittson, 120 U. S. 314. Consequently where the court has any doubt, the plea will be overruled. Briggs *v.* Stroud, 58 Fed. Rep. 721.

1. 1 Daniell Ch. Pr. (5th. ed.) 638. The plea may be allowed to stand as a good defense to so much of the bill as is covered by the former suit, and overruled as to the rest. Searight *v.* Payne, 1 Tenn. Ch. 186.

2. Tarleton *v.* Barnes, 2 Keen 636.

3. 1 Daniell Ch. Pr. (5th ed.) 637; Ld. Red. 247; Story Eq. Pl. (10th ed.) § 74. In the *New York* Court of Chancery the practice was regulated by an order of court. 1 Hoff. Ch. Pr. 225. In *New Jersey* by statute. McEwen *v.* Broadhead, 11 N. J. Eq. 129; Matthews *v.* Roberts, 2 N. J. Eq. 338. In *Tennessee* by the Code, § 4393. Montgomery *v.* Olwell, 1 Tenn. Ch. 183; Green *v.* Neal, 2 Heisk. (Tenn.) 217; Macey *v.* Childress, 2 Tenn. Ch. 23; Allen *v.* Allen, 3 Tenn. Ch. 145; Searight *v.* Payne, 1 Tenn. Ch. 186.

4. Hornfager *v.* Hornfager, 6 How. Pr. (N. Y. Supreme Ct.) 279, 1 Code Rep. N. S. (N. Y.) 412; Ansorge *v.* Kaiser, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 305; Ward *v.* Ward, 12 How. Pr. (N. Y. Supreme Ct.) 193; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 401; Smith *v.* Moore, 79 N. Car. 85; De Armond *v.* Bohn, 12 Ind. 607; Aiken *v.* Bruen, 21 Ind. 137, holding a demurrer "for want of sufficient facts" insufficient; Ætna Iron Works *v.* Firmenich Mfg. Co. (Iowa, 1894), 57 N. W. Rep. 904.

5. Wright *v.* Maseras, 56 Barb. (N. Y.) 521; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 29; O'Beirne *v.* Lloyd, 1 Sweeney (N. Y.) 19; Bruckheimer *v.* Merchants' Ins. Co., 1 Rob. C. C. (N. Y.) 363; Hornfager *v.* Hornfager, 6 How. Pr. (N. Y. Supreme Ct.) 279, 1 Code Rep. N. S. (N. Y.) 412; Ward *v.* Ward, 12 How. Pr. (N. Y. Supreme Ct.) 193; Weil *v.* Guerin, 42 Ohio St. 299; Larco *v.* Clements, 36 Cal. 132; Lake Merced Water Co. *v.* Cowles, 31 Cal. 215; Coubrough *v.* Adams, 70 Cal. 374; Harris *v.* Johnson, 65 N. Car. 478; Ætna Iron Works *v.* Firmenich Mfg. Co. (Iowa, 1894), 57 N. W. Rep. 904.

Not by Motion.—The objection cannot be made by motion. Champ *v.* Kendrick, 130 Ind. 549; Central, R. etc., Co. *v.* Coleman, 88 Ga. 294; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614; Kennon *v.* Petty, 59 Ga. 175. Where one of several defendants has successfully pleaded pendency of a former suit in abatement it is not a ground for a motion to dismiss as to all of the defendants. Williams *v.* McGrade, 18 Minn. 82.

Waiver.—It must be pleaded in some way or it is considered as waived. Hollister *v.* Stewart, 111 N. Y. 644; Bishop *v.* Bishop, 7 Robt. (N. Y.) 194; Bernecker *v.* Miller, 44 Mo. 102; Williams *v.* Rawlins, 33 Ga. 117; Welchel *v.* Thompson, 39 Ga. 559; Smith *v.* Moore, 79 N. Car. 82; Blackwell *v.* Dibbrell, 103 N. Car. 270; Walsworth *v.* Johnson, 41 Cal. 61.

Dismissal Sua Sponte.—In Long *v.* Jarratt, 94 N. Car. 443, it was held that where the relief sought can be obtained by motion in the original cause pending in the same court, the second action ought to be dismissed *ex mero motu* without prejudice.

Objection on Appeal.—The objection cannot be first raised on appeal. Aiken *v.* Bruen, 21 Ind. 137.

In Louisiana a former suit pending is set up by declinatory exception. Fleitas *v.* Cockrem, 101 U. S. 301.

6. Estep *v.* Marsh, 21 Ind. 196; Montague *v.* Brown, 104 N. Car. 161; Maxwell *v.* First Nat. Bank (Tex. Civ. App., 1894), 24 S. W. Rep. 848. See, however, the next heading in the text.

Amendment of Answer.—It is discretionary with the court to permit the

c. ANSWERS IN ABATEMENT—**Necessary Averments.**—The answer should state when the former action was commenced[1] and in what court,[2] and that it is still pending;[3] and it must clearly allege or show that the cause of action in the first suit is identical with that in the second.[4]

Joinder with Matter in Bar.—The matter in abatement may be properly joined in the answer with a defense in bar.[5]

Separate Findings.—But where the case goes to the jury upon both defenses the court should require a separate verdict upon them.[6]

d. JUDGMENT ON SUSTAINING ANSWER.—Where the answer is sustained the proper judgment to be entered is one abating the subsequent action,[7] and not a judgment that the plaintiff take nothing thereby.[8]

4. In the Admiralty.—The objection is taken in the admiralty by a special plea in the nature of a plea in abatement, known as a dilatory or declinatory exception,[9] which is always brought forward before the general defense in bar or general answer on the merits.[10]

defendant at the close of the trial to amend his answer by setting up a former action pending. Coubrough *v.* Adams, 70 Cal. 374.

1. Otherwise it is demurrable. Eiceman *v.* Leonard, 75 Ind. 46.

In *Indiana* answers in abatement must be verified. Morgan County *v.* Holman, 34 Ind. 256. They are strictly construed in *California*. Larco *v.* Clements, 36 Cal. 132.

2. Berger *v.* Moessinger, 5 Ohio Cir. Ct. Rep. 432.

3. Moore *v.* Kessler, 59 Ind. 152; Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 118; I, 3, *supra*.

4. Wilson *v.* St. Paul, etc., R. Co., 44 Minn. 445; Larco *v.* Clements, 36 Cal. 132; Calaveras County *v.* Brockway, 30 Cal. 325; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 401, See also I. 5, *supra*.

General Allegation.—An answer alleging that "there is another action now pending between the same parties for the same identical cause of action mentioned in the complaint in this action" was held sufficiently definite and certain by Harris, J., in Ward *v.* Ward. 12 How. Pr. (N. Y. Supreme Ct.) 193.

Annexing Copy of Record.—Annexing a copy of the record of the former suit does not dispense with the necessity of a trial and introduction of the record in evidence, even though both cases are pending in the same court. People *v.* De la Guerra, 24 Cal. 73.

5. Sweet *v.* Tuttle, 14 N. Y. 465; Gardner *v.* Clark, 21 N. Y. 399; Warder *v.* Henry, 117 Mo. 530; Erb *v.* Perkins, 32 Ark. 428; Grider *v.* Apperson, 32 Ark. 332. Conflicting views have been expressed in *North Carolina*, Woody *v.* Jordan, 69 N. Car. 189; Montague *v.* Brown, 104 N. Car. 161; and in *Indiana*, Kenyon *v.* Williams, 19 Ind. 47; Bond *v.* Wagner, 28 Ind. 462.

Ambiguity.—But the averments must clearly indicate that the former action, etc., is relied upon as an abatement and not as a defense in bar. O'Beirne *v.* Lloyd, 1 Sweeney (N. Y.) 23. See also Ætna Iron Works *v.* Firmenich Mfg. Co. (Iowa, 1894), 57 N. W. Rep. 905; Warder *v.* Henry, 117 Mo. 530.

6. Gardner *v.* Clark, 21 N. Y. 399. Or instruct the jury to refrain from passing on the merits if the matter in abatement be found true. Montague *v.* Brown, 104 N. Car. 161.

7. Coubrough *v.* Adams, 70 Cal. 374.

8. Coubrough *v.* Adams, 70 Cal. 374. It should not be in bar. Larco *v.* Clements, 36 Cal. 132. See also Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 401.

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9. Certain Logs of Mahogany, 2 Sumn. (U. S.) 589.

10. Certain Logs of Mahogany, 2 Sumn. (U. S.) 589.

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I. INTRODUCTORY—CONTENTS OF ANSWER.—All the Codes prescribe what the answer shall contain. Some Codes provide that the answer of the defendant shall contain: first, a general or specific denial of each material allegation of the petition controverted by the defendant, or a denial of any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.[1]

With the exception of a few verbal changes, and sometimes of other matters which are indicated as being proper in an answer,

1. *Missouri*, Rev. Sts. § 2049; *New York*, Bliss Ann. Code, § 500; *North Dakota*, Levisee's Rev. Code, § 118; *South Carolina*, Code Civ. Proc., § 170; *South Dakota*, Levisee Rev. Code, § 118; *Washington*, Code Civ. Proc. 194; *Wisconsin*, Ann. Sts. § 2655.

all the Codes are similar to the foregoing in their provisions; they recognize the distinction between "denials" and "new matter."[1]

1. **Arkansas.**—The answer shall contain:

First. The style of the court and the style of the action, followed by the word "Answer." But where there are several plaintiffs and defendants, it shall only be necessary to give the one first named of each class, with the words "and others."

Second. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

Third. A statement of any new matter constituting a defense, counterclaim, or set-off, in ordinary and concise language, without repetition. Digest of the Statutes of Ark. (1884) § 5033.

California, Idaho, and Utah.—The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim.

If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint. Code Civ. Proc. California, § 437; Rev. Sts. Idaho (1887), § 4183; Utah Code Civ. Proc. § 300.

Colorado.—The answer of the defendant shall contain:

First. A general or specific denial of each material allegation in the complaint intended to be controverted by the defendant.

Second. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without unnecessary repetition.

In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegations in issue for the defendant to state, as to such allegation, that he has not and cannot obtain sufficient knowledge or information upon which to base a belief. Code Civ. Proc. Colorado, § 56.

Connecticut.—The defendant in his answer shall specially deny such allegations of the complaint as he intends to controvert, admitting the truth of the other allegations, unless he intends, in good faith, to controvert all the allegations, in which case he may deny them generally, as follows: "The defendant denies the truth of the matters contained in the plaintiff's complaint." He may also, in his answer, state special matters of defense, and shall not give in evidence matter in avoidance, or of defense, consistent with the truth of the material allegation of the complaint, unless in his answer he states such matter specially. Under a general denial the plaintiff shall be bound to prove the material facts alleged in the complaint. If the defendant intends to controvert the right of the plaintiff to sue as executor, or as trustee, or in any other representative capacity, or as a corporation, or the execution or delivery of any written instrument or recognizance sued upon, he shall deny the same in his answer specifically. Gen. Sts. of Connecticut (1888), § 874.

Indiana.—The answer shall contain: First. A denial of each allegation of the complaint controverted by the defendant. Second. A statement of any new matter constituting a defense, counterclaim, or set-off, in plain and concise language. Rev. Sts. Indiana (1881), § 347.

Iowa.—The answer shall contain:

1. The name of the court of the county, and of the plaintiffs and defendants; but where there are several plaintiffs and defendants, it shall only be necessary to give the first name of each class, with the words, and others.

2. A general denial of each allegation of the petition, or else of any knowledge or information thereof sufficient to form a belief.

II. **Form of a Denial**—1. **Introductory Words.**—When the pleader in response to the plaintiff's complaint desires to interpose a denial, he may make use of any common form of words

3. A specific denial of each allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief.

4. A statement of any new matter constituting a defense.

5. A statement of any new matter constituting a counterclaim. Rev. Code of Iowa, § 2655.

Kansas.—The answer shall contain: First. A general or specific denial of each material allegation of the petition controverted by the defendant. Second. A statement of any new matter constituting a defense, counterclaim, or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. Gen. Sts. Kansas, vol. 2, § 4177.

Minnesota.—The answer of the defendant shall contain:

First. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

Second. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

Third. All equities existing at the time of the commencement of any action, in favor of a defendant therein, or discovered to exist after such commencement, or intervening before a final decision in such action. Sts. of Minnesota, § 4771.

Montana.—The answer of the defendant shall contain:

First. A specific denial of the material allegations of the complaint controverted by the defendant.

Second. A statement of any new matter constituting a defense or counterclaim.

If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively or according to the information and belief of the defendant. Compiled Sts. of Montana (1887), § 89.

Nebraska, Ohio, and Wyoming.—The answer shall contain: First. A general specific denial of each material allegation of the petition controverted by the defendant. Second. A statement of any new matter constituting a defense, counterclaim, or set-off, in ordinary and concise language, without repetition. Consolidated Sts. of Nebraska, § 4639; Rev. Sts. of Ohio, § 5070; Wyoming Rev. Sts. § 2457.

North Carolina.—The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer, and proved on the trial. This provision shall apply to similar actions when brought by employees against their employers. Code Civ. Proc. North Carolina, § 243.

Arizona and Georgia.—The Codes of *Arizona* and *Georgia* differ materially in language from the others; there seem to be no statutory provisions which define an answer, but there are cognate statutes dealing with answers.

Arizona.—The defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time: * * * 4. Matters in bar of the action. 5. Matters of counterclaim and set-off. Arizona Rev. Sts. § 734.

Georgia.—The general issue is a denial of the allegations in the plaintiff's declaration, and shall be considered as filed in all cases which are answered to at the first term; and no other evidence is admissible under such plea except such as disproves the plaintiff's cause of action; all other matters in satisfaction or avoidance must be specially pleaded. Code, § 3458. See, however, Laws 1894.

to introduce it. It may be in the form, "Defendant for answer says he denies."[1]

2. What Constitutes a Good General Denial.—Any words which fairly import a denial of all the averments of the complaint constitute a good general denial.[2]

"Each and Every" Allegation Denied.—A general denial of each and every allegation of the complaint is sufficient.[3]

Denial of "Material" Allegations.—A denial of all the "material" allegations of the complaint does not constitute a good general denial.[4]

1. Town of Denver *v.* City, 7 Wash. 226; Espinosa *v.* Gregory, 40 Cal. 58; Chapman *v.* Chapman, 34 How. Pr. (N. Y. Supreme Ct.) 281; Jones *v.* Ludlum, 74 N. Y. 61; Moen *v.* Eldred, 22 Minn. 538. *Contra*, "says that he denies" is bad. Arthur *v.* Brooks, 14 Barb. (N. Y.) 533; Blake *v.* Eldred, 18 How. Pr. (N. Y. Supreme Ct.) 240.

"States and Shows."—An answer which alleges that defendant "states and shows that he denies each and every allegation, etc.," is sufficient, although objectionable in form. Moen *v.* Eldred, 22 Minn. 538.

2. Hoffman *v.* Eppers, 41 Wis. 251; Kingsley *v.* Gilman, 12 Minn. 515.

Form Immaterial.—The mere form of the denial is immaterial. Morrison *v.* O'Reilly, 2 Utah 165.

Not Guilty.—In an action for assault and battery, an answer, "that defendant is not guilty of the grievances alleged in the complaint, or any or either of them, or any part thereof," is a sufficient general denial. Hoffman *v.* Eppers, 41 Wis. 251.

Non Est Factum.—In an action upon a promissory note, an answer concluding, "and he [defendant] says that he did not execute said note in manner and form as set out in said plaintiff's complaint herein, and that the same is not his note," is sufficient to constitute a good plea of *non est factum*. Hine *v.* Shiveley, 84 Ind. 136.

Must be Explicit.—A general denial must be explicit, and must not be loaded down with explanations. Creighton *v.* Kellermann, 1 Disney (Ohio) 548.

Georgia. — The marking on the docket at the first term of the names of counsel for the defendant is equivalent to answering, and is in effect a plea of the general issue. Price *v.* Bell, 88 Ga. 740; Simon *v.* Myers, 68 Ga. 74.

The general issue is considered filed in all cases which are answered at the appearance term. National Bank *v.* Southern Porcelain Mfg. Co., 59 Ga. 157.

3. Fetz *v.* Clark, 7 Minn. 217; Kellogg *v.* Church, 4 How. Pr. (N. Y. Supreme Ct.) 339. But it was not so under the N. Y. Code of 1851, which only authorized a specific denial. Rosenthal *v.* Brush, 1 Code Rep. N. S. (N. Y.) 228.

With an Exception.—A denial of each and every allegation, except what the court may construe to be admitted by the statements in the answer, is a bad form. Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68.

Denying "Generally" Every Allegation.—In an action for real estate commissions, an averment that defendant "denies generally each and every allegation" of the complaint is a good general denial. Penter *v.* Staight, 1 Wash. 365.

Form Prescribed.—Where the denial is general, it should be not simply of "all," but of "each and all," or "each and every" of the allegations referred to. Lewis *v.* Coulter, 10 Ohio St. 452.

North Carolina.—An answer denying "the said complaint and each and every allegation contained therein" is bad. Schehan *v.* Malone, 71 N. Car. 4[illegible].

4. Lewis *v.* Coulter, 10 Ohio St. 452; Thomas *v.* Cline, 1 Cleve. Rep. (Ohio) 123; Pry *v.* Hannibal, etc., R. Co., 73 Mo. 123; Edmonson *v.* Phillips, 73 Mo. 57; Smith *v.* Lindsey, 89 Mo. 76; Collins *v.* Trotter, 81 Mo. 275; Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88; Dodge *v.* Chandler, 13 Minn. 114; Dole *v.* Burleigh, 1 Dakota 218. "A pleader ought not to be permitted, by the use of the qualifying word 'material' to assume to himself the

Counter-Averment.—In *California* a counter-averment may make a general denial.[1]

Form of the General Issue.—A general denial cannot be framed as was the general issue at common law. Denying the allegations of the complaint "in manner and form as therein alleged" is insufficient.[2]

"No Allegation True."—An averment that "no allegation of the complaint is true" is not a good answer.[3]

3. What Constitutes a Good Specific Denial—Generally.—The form which a specific denial should take is, of course, wholly dependent upon the allegations of the complaint. The general rule is that it must be certain and definite as to the fact denied.[4] It should

determination of the question as to what facts are material, and thus render a conviction for perjury, on a wilfully false verification, difficult or impossible." *Per curiam* in Lewis *v.* Coulter, 10 Ohio St. 452. But such a denial is good as against a demurrer, though not good against a motion to make more certain and specific. Lewis *v.* Coulter, 10 Ohio St. 452.

Contra.—Such a denial is good. Ingle *v.* Jones, 43 Iowa 286; Bailey *v.* Warren, 1 Oregon 357; Goodridge *v.* Union Pac. R. Co., 37 Fed. Rep. 182. This last case applied the law of *Colorado*, holding such denial good under the *Colorado* Code.

1. Jackson *v.* Feather River, etc., Water Co., 14 Cal. 19; Frisch *v.* Caler, 21 Cal. 71; Goddard *v.* Fulton, 21 Cal. 430; Woodworth *v.* Knowlton, 22 Cal. 164; Hill *v.* Smith, 27 Cal. 476; Thompson *v.* Lynch, 29 Cal. 189; Siter *v.* Jewett, 33 Cal. 92; Way *v.* Oglesby, 45 Cal. 655; Clink *v.* Thurston, 47 Cal. 21; Miller *v.* Brigham, 50 Cal. 615; Thompson *v.* Thompson, 52 Cal. 154.

But probably this in other states amounts to an argumentative denial, which is bad. See *post*, VI. ARGUMENTATIVE DENIALS.

Recital of Facts.—In ejectment the recital in the answer of the series of facts through which the defendant claims a right to the land amounts to no more than a general denial. Clink *v.* Thurston, 47 Cal. 21.

Pleading Contract in Different Terms.—Denial of contract as alleged and pleading it in different terms are equivalent to a denial of any other terms. Gilman *v.* Bootz, 63 Cal. 120.

Inconsistent Matter.—It is not necessary that a traverse should be in negative words. An averment in the answer of the contrary of what is alleged in the complaint is equivalent to a denial. Even where the averment is not of the direct contrary of the allegation, but is inconsistent with its truth, it may, under certain circumstances, be held to raise an issue. Perkins *v.* Brock, 80 Cal. 320.

Contra.—But that allegations of fact merely inconsistent with the pleading are not equivalent to a denial, and are not as a general rule allowable under the Code, see Swinburne *v.* Stockwell, 58 How. Pr. (N. Y. Supreme Ct.) 312; Wood *v.* Whiting, 21 Barb. (N. Y.) 190.

Explaining Custom.—An answer stating that a custom alleged in the petition is inconsistent with the terms of the policy sued on, and contrary to settled principles of law, is simply a general denial with an epithet, and is not demurrable. Shillito *v.* Merchants, etc., Ins. Co., 3 W. L. G. (Ohio) 296.

2. Clark *v.* Gramling, 54 Ark. 525; Rumbough *v.* Southern Imp. Co., 106 N. Car. 461; Lawrence *v.* Cooley, 1 Cleve. Rep. (Ohio) 178.

But such an answer is good against demurrer. Lawrence *v.* Cooley, 1 Cleve. Rep. (Ohio) 178. *Contra*, it is demurrable. Clark *v.* Gramling, 54 Ark. 525.

"As Alleged in the Petition."—A denial of the facts averred in the petition, "as alleged in the petition," is not a denial of the allegations. Phœnix Ins. Co. *v.* Meier, 28 Neb. 124.

3. Flack *v.* Dawson, 69 N. Car. 42; Heyer *v.* Beatty, 76 N. Car. 28.

4. "From its very name and nature it is the special traverse of some particular averment found in the plaintiff's pleading, and must therefore depend to

so describe the allegations of the complaint which are intended to be controverted that any person of intelligence can identify them.[1]

Denial of What is Between Certain Specified Words, or in Folios or Paragraphs.—It is bad pleading to deny portions of the complaint merely by reference to the first and last words of such portions, and to the folio where they are to be found.[2] Likewise a reference in the denial simply to certain paragraphs of the complaint as containing the averments which are controverted is improper.[3]

Must be Categorical.—The specific denial must be categorical. There must be no room to doubt what the pleader intends to deny.[4]

a very great degree upon the matter and shape of the statement which is thus controverted." Pomeroy Code Remedies, § 613.

1. Mattison *v.* Smith, 1 Robt. (N. Y.) 706.

Texas.—Under a statute providing that a verified account shall be *prima-facie* evidence unless defendant file a denial under oath that the account is not true, in whole or in part, it is not necessary that the words "in whole or in part" be used in the denial. Hensley *v.* Degener (Tex. Civ. App.), 25 S. W. Rep. 1130.

Sufficient on Demurrer.—If the substance of the defense clearly shows to which cause of action it is addressed, it is sufficient on demurrer. Willis *v.* Haggard, 6 How. Pr. (N. Y. Supreme Ct.) 433.

Specific Denials Construed.—In replevin the answer denied "that at the time stated in the complaint, or at any other time, the property described in the complaint came into defendant's possession, or that the same was or remained in his possession at the commencement of this action, as alleged in said complaint." *Held*, a sufficient denial of possession. Roberts *v.* Johannas, 41 Wis. 616.

To an allegation in a complaint that the net earnings of a railroad company were over a specified sum, and more than sufficient to pay a specified debt, an answer denying that the net income, with or without regard to interest, was over such sum, or that it was more than sufficient to pay such debt, was *held* proper in form. Hughes *v.* Chicago, etc., R. Co., 45 N. Y. Super. Ct. 114.

2. Williams *v.* Lindblom (Supreme Ct.), 22 N. Y. Supp. 678; Avery *v.* New York Cent., etc., R. Co. (Super. Ct.), 6 N. Y. Supp. 547. It is not a compliance with the Code requiring a general or specific denial. Collins *v.* Singer Mfg. Co., 53 Wis. 305. *Contra*, such a denial is good. Gassett *v.* Crocker, 9 Abb. Pr. (N. Y. C. Pl.) 39.

3. Baylis *v.* Stimson, 110 N. Y. 21. See Caulkins *v.* Bolton, 98 N. Y. 511; Crosley *v.* Cobb, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 37; Varnum *v.* Hart, 47 Hun (N. Y.) 18.

But where the answer denies the truth of a complaint as contained in certain enumerated paragraphs (being all the paragraphs in the complaint), it is sufficient. Brown *v.* Cooper, 89 N. Car. 237. See Rumbough *v.* Southern Imp. Co., 106 N. Car. 461, where only one paragraph was denied: *held* insufficient.

4. Smith *v.* Woodruff, 1 Handy (Ohio) 276; Verzan *v.* McGregor, 23 Cal. 339; Bomberger *v.* Turner, 13 Ohio St. 263; Building Assoc. *v.* Clark, 43 Ohio St. 427; West *v.* American Exch. Bank, 44 Barb. (N. Y.) 175.

"**It Is Not True.**"—A denial which begins by saying "It is not true," etc., is evasive, and does not specifically deny the averment. Verzan *v.* McGregor, 23 Cal. 339.

"**Do Not Admit.**"—An answer which reads "these defendants do not admit" is not a good denial. Bomberger *v.* Turner, 13 Ohio St. 263.

"**Neither Denied nor Admitted.**"—An allegation that the truth of the matter "is neither denied nor admitted" is no denial. Building Assoc. *v.* Clark, 43 Ohio St. 427; Lake *v.* Steinbach, 5 Wash. 659.

"**Know Nothing.**"—A statement that the parties "know nothing of the taking of the lien by the said J. & D. except what they learn from the said answer and counterclaim" is not a suf

Hypothetical Denial.—A hypothetical denial is bad.[1]

May be Denied as Alleged.—But if a material fact is not directly alleged, it may be denied substantially as alleged.[2]

May Contain Explanation.—A denial may be coupled with averments of explanation. This corresponds to the *special traverse* of the common law. Such a denial is good.[3]

III. Specific Denials and their Scope.—1. Optional to Use Specific Denial.—The pleader may always elect to specifically deny all the material allegations of the complaint, instead of using the general denial.[4] But the use of a specific denial precludes a general denial. Specific and general denials in the same answer are improper.[5] The general rule is that a general denial is always good,[6] but some states do not adhere to this rule, and require a specific denial, either in all cases or when the complaint is verified.[7] And in some jurisdictions a specific denial is required

ficient denial. Smith *v.* Woodruff, 1 Handy (Ohio) 276.

Two Counts.—Where the complaint contained two counts, each upon a note, an answer referring simply to "the note mentioned in the complaint" is bad for uncertainty. Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y. Supreme Ct.) 67.

1. Wies *v.* Fanning, 9 How. Pr. (N. Y. Supreme Ct.) 543.

Intended to be Hypothetical.—The whole pleading must be construed together; it is not proper to eliminate a single paragraph from an answer and give effect to it as a denial when it appears from the context and other portions of the answer that the denial was intended to be hypothetical. Alemany *v.* Petaluma, 38 Cal. 553.

2. Bassett *v.* Enwright, 19 Cal. 636.

3. **May Enumerate Particulars.**—Gee *v.* Culver, 12 Oregon 228. An answer which denies the performance of a contract by plaintiff may also specifically enumerate several particulars in which such failure to perform consists. Mehurin *v.* Stone, 37 Ohio St. 49. See Stephen Pl. 181.

4. Everett *v.* Waymire, 30 Ohio St. 308.

"The Code also allows a special traverse; but there is this difference between the special traverse of the Code and that of the common law—the latter must always have been taken upon a single point, whereas now the defendant may put in issue in one defense as many of the allegations of the complaint as he chooses, leaving the residue unanswered." Per Selden, J., in Benedict *v.* Seymour, 6 How. Pr. (N. Y. Supreme Ct.) 302.

5. School Dist. *v.* Holmes, 16 Neb. 486; Davenport *v.* Ladd, 38 Minn. 545. The specific denials should be struck out. Dennison *v.* Dennison, 9 How. Pr. (N. Y. Supreme Ct.) 246; Lippencott *v.* Goodwin, 8 How. Pr. (N. Y. Supreme Ct.) 242; Wies *v.* Fanning, 9 How. Pr. (N. Y. Supreme Ct.) 543. But see Homan *v.* Byrne, 14 N. Y. Wkly. Dig. 175, where it was held that an answer is not redundant by containing both.

6. Keeney *v.* Lyon, 10 Iowa 546.

A general denial cannot be struck out as sham unless the pleadings themselves show that it is false. Upton *v.* Kennedy, 36 Neb. 66; Ransom *v.* Anderson, 9 S. Car. 438; Brooks *v.* Chilton, 6 Cal. 641; Reynolds *v.* Craus (Supreme Ct.), 16 N. Y. Supp. 792; Wayland *v.* Tysen, 45 N. Y. 281; Thompson *v.* Erie R. Co., 45 N. Y. 468; Claflin *v.* Jaroslauski, 64 Barb. 463.

7. **Alabama.**—See Moog *v.* Barrow, 13 So. Rep. 665.

Arkansas.—In *Arkansas* the general denial is abolished. All denials must be specific. Gwynn *v.* McCauley, 32 Ark. 97; McIlroy *v.* Buckner, 35 Ark. 555; Trapnall *v.* Hill, 31 Ark. 345; Shirk *v.* Williamson, 50 Ark. 562; Hecht *v.* Caughron, 46 Ark. 132. But after trial it is too late to object that the denial was general. Tyner *v.* Hays, 37 Ark. 599.

California.—If the complaint is sworn to, a general denial thereto is a nullity. Pico *v.* Colimas, 32 Cal. 578; Dewey *v.* Bowman, 8 Cal. 150; Patter-

when an instrument for the payment of money is sued on.[1]

son *v.* Ely, 19 Cal. 28; Rupley *v.* Welch, 23 Cal. 455; Schenk *v.* Evoy, 24 Cal. 113; People *v.* Hagar, 52 Cal. 171; Greenbaum *v.* Turrill, 57 Cal. 289; Brooks *v.* Chilton, 6 Cal. 641; Dennis *v.* Table Mountain Water Co., 10 Cal. 370; Horn *v.* Volcano Water Co., 13 Cal. 62; Hastings *v.* Dollarhide, 18 Cal. 391; Sacramento County *v.* Bird, 31 Cal. 67; Corcoran *v.* Doll, 32 Cal. 83.

The following was construed as a general denial within the meaning of the rule: "The defendant further says that he is not guilty of the supposed trespasses and ejectment in the complaint mentioned, nor of any part thereof." Schenk *v.* Evoy, 24 Cal. 104. And so was an answer where the defendant admitted the making of the note sued on, but denied, "to the best of his knowledge, information, and belief, all and singular the other allegations in the said complaint." Stewart *v.* Street, 10 Cal. 373. And likewise an answer which contained a general denial of the averments of a verified complaint, with the qualification of "except as hereinafter admitted." Levinson *v.* Schwartz, 22 Cal. 230. And it seems that any answer which resembles the general denial is insufficient when the complaint is verified. Hensley *v.* Tartar, 14 Cal. 508.

When an insufficient denial is treated as sufficient by the admission of evidence without objection, objection is waived. Pinkham *v.* McFarland, 5 Cal. 137; Reniff *v.* The Cynthia, 18 Cal. 669; Kalkman *v.* Baylis, 23 Cal. 304; Racouillat *v.* Rene, 32 Cal. 450; Tynan *v.* Walker, 35 Cal. 634, 95 Am. Dec. 152; Green *v.* Lake Superior, etc., Fuse Co., 46 Cal. 408; White *v.* San Rafael, etc., R. Co., 50 Cal. 417; Cave *v.* Crafts, 53 Cal. 135; Tulley *v.* Tranor, 53 Cal. 274; Spiers *v.* Duane, 54 Cal. 176; Pacific Bridge Co. *v.* Kirkham, 54 Cal. 558; Crowley *v.* City R. Co., 60 Cal. 628; Hiatt *v.* Trustees, 65 Cal. 481; Clark *v.* Child, 66 Cal. 91; Scott *v.* Sierra Lumber Co., 67 Cal. 71. But not if the answer is unverified, and no evidence is introduced to sustain it. Stockton *v.* Dahl, 66 Cal. 377.

Service of an answer to a verified complaint, consisting of a general denial only, was admitted by plaintiff's attorney and "verification thereof waived." *Held*, that the waiver of verification did not admit the sufficiency of the answer or dispense with the necessity of a specific denial. Harney *v.* Porter, 62 Cal. 511.

But a general denial to a verified complaint commenced before a justice of the peace is sufficient. Henderson *v.* Allen, 23 Cal. 519; Minturn *v.* Burr, 20 Cal. 49; Sullivan *v.* Cary, 17 Cal. 80.

A general denial may be pleaded to an unverified complaint. Davanay *v.* Eggenhoff, 43 Cal. 395; Elder *v.* Spinks, 53 Cal. 293; Booth *v.* Chapman, 59 Cal. 148.

Georgia.—A late statute requires defendant to answer each paragraph of the complaint, and forbids a mere general denial.

Idaho.—When the complaint is verified the answer must deny specifically every material allegation of the complaint. Pence *v.* Durbin, 1 Idaho 550.

New York—*Old Code.*—Under the Code of 1851, which required, "in respect to each allegation," a specific denial thereof, an answer saying that defendant denies specifically each and every matter is not sufficient. Seward *v.* Miller, 6 How. Pr. (N. Y. Supreme Ct.) 312.

1. **Texas.**—The execution of an instrument must be specifically denied by an affidavit. Pasch. Dig. art. 1443; Sawyer *v.* Dulany, 30 Tex. 479; May *v.* Pollard, 28 Tex. 677; Drew *v.* Harrison, 12 Tex. 279; Kelly *v.* Kelly, 12 Tex. 452; Reid *v.* Reid, 11 Tex. 585; Brashear *v.* Martin, 25 Tex. 202; Herndon *v.* Ennis, 18 Tex. 410; Close *v.* Judson, 34 Tex. 288; Alexander *v.* Lewis, 47 Tex. 482; Houston, etc., R. Co. *v.* Chandler, 51 Tex. 416; Burleson *v.* Burleson, 15 Tex. 423; Yeary *v.* Cummins, 28 Tex. 91; Fisk *v.* Miller, 13 Tex. 224; Austin *v.* Townes, 10 Tex. 24; Compton *v.* Western Stage Co., 25 Tex. Supp. 67; Bishop *v.* Honey, 34 Tex. 245; Persons *v.* Frost, 25 Tex. Supp. 129; Ferguson *v.* Wood, 23 Tex. 177; Wilson *v.* Skaggs, 10 Tex. 298; Johnston *v.* Jefferson, 31 Tex. 332; Primm *v.* Stewart, 7 Tex. 178; Parr *v.* Johnston, 15 Tex. 294; Barnett *v.* Logue, 29 Tex. 282; Tarpley *v.* Poage, 2 Tex. 139; Wells *v.* Moore, 15 Tex. 521; Lee *v.* Hamilton, 12 Tex. 413; Muckleroy *v.* Bethany, 23 Tex.

2. Construction.—Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation.[1] Where an averment, taken in the sense in which it is intended by the pleader, is not denied, no issue is raised thereon.[2]

In the construction of a specific denial the courts are liberal, and allow any evidence to be given in support thereof which may be fairly implied in the allegation.[3]

A specific denial of the execution of a contract puts in issue its validity and legal existence.[4]

Suits on Notes.—In the construction of denials interposed to suits on notes the courts are rather technical, and probably construe the answer less liberally than they would in other cases.[5]

163; Van Hook *v.* Litchford, 35 Tex. 598; Eborn *v.* Zimpelman, 47 Tex. 504, 26 Am. Rep. 315; Keeble *v.* Black, 4 Tex. 69.

1. Racouillat *v.* Rene, 32 Cal. 450. "As each specific denial is aimed at a particular averment, it should expressly and unmistakably point out the statement of fact intended to be traversed; it should deny that allegation fully and explicitly, so that the plaintiff may be forced to establish it by proofs; and it should leave no doubt as to the matter at which it is aimed, and as to the issue intended to be made." Pomeroy Rem. § 614.

2. Fellows *v.* Webb, 43 Iowa 133.

3. Sawyer *v.* Warner, 15 Barb. (N. Y.) 282, where the defendant denied that he ever *gave* plaintiff the note sued on, and he was allowed to show the circumstances of the transaction, which seemed to negative the idea of his having ever *made* a note. But see Cogswell *v.* Hayden, 5 Oregon 22, where it was held that the allegation that a note was "made, executed, and delivered" was not put in issue by an answer denying that the note was "delivered."

Suit for Rent.—An averment in a complaint for rent that "the rent was, as it became due, duly demanded," is put at issue by a denial, in the answer, of "each and every allegation in the complaint, wherein and whereby defendant is charged with being liable for any rent to the plaintiffs, or of any sum being due or owing from him to them." New York Academy of Music *v.* Hackett, 2 Hilt. (N. Y.) 217.

Not Given to Plaintiff.—The bond being set out in the complaint, a denial in the answer that defendant executed such bond *to the plaintiff* is not a denial that he executed the bond in suit, but only a denial that the obligee therein was identical with the plaintiff. Joint School *v.* Lyford, 27 Wis. 506.

Denial of Rendition of Service.—A denial of the rendition of service is not a denial of employment. Ryan *v.* New York, 42 N. Y. Super. Ct. 202.

4. Browning *v.* Berry, 107 N. Car. 231.

Pleading Legal Effect Differently.—The fact that the defendant pleads the legal effect of an instrument differently from the plaintiff does not deny its execution. Cox *v.* Volkert, 86 Mo. 505.

5. Young *v.* Miller, 63 Cal. 302; Randolph *v.* Harris, 28 Cal. 562, 87 Am. Dec. 139; Morrill *v.* Morrill, 26 Cal. 289; Watson *v.* Barr, 37 S. Car. 463; Murphy *v.* Dunning, 30 Wis. 296; Buell *v.* Burlingame, 11 Colo. 164.

Denying Legal Notice.—The answer of the indorser denied that he had due or legal notice of the presentment of the note for payment, or of the non-payment thereof. *Held*, that no issue of fact was raised by this denial. Young *v.* Miller, 63 Cal. 302.

Denial of Assignment.—Where the allegation is that, by an instrument in writing, the note in suit was assigned by the payee to the plaintiff for a valuable consideration, the fact of the assignment is not put in issue by a denial that the assignment was in writing and for a valuable consideration. Randolph *v.* Harris, 28 Cal. 562.

Assignment Not Denied.—Where the complaint avers that defendant's note and mortgage to a railroad company

Plaintiff's Right to Sue.—When the defendant means to deny or question the plaintiff's title, or his right to sue, he must do so explicitly. The courts will not help him by a liberal construction of his answer.[1]

Contracts.—Where the action is for a breach of contract, the denial is construed most liberally. The allegations of the denial are taken in their popular rather than in any technical sense.[2]

Ownership and Possession.—Allegations of ownership and possession in the complaint must be very explicitly denied.[3]

Torts.—In an action for tort the denial may consist of an averment that the defendant did not commit the act charged, or that

were sold, assigned, and delivered to plaintiffs by such company, and the answer merely alleges that said company never *indorsed* said note to any person by writing its name thereon for that purpose, and that said company has at all times refused to *indorse* the note or to do any act which would make it negotiable, this is not a denial of the assignment by the company as alleged in the complaint, but merely a denial that such assignment was by indorsement. Murphy *v.* Dunning, 30 Wis. 296. But see Bennett *v.* Crowell, 7 Minn. 385; Kennedy *v.* Moore, 17 S. Car. 464; Williams *v.* Mellon, 56 Mo. 262.

In Bennett *v.* Crowell, 7 Minn. 385, it was held that, in the case of a complaint on a note, a denial that the defendant "promised to pay plaintiff or order" raises a material issue. And in Williams *v.* Mellon, 56 Mo. 262, where the answer stated that "the said note was made without any consideration whatever," it was held to sufficiently raise the defense of no consideration.

1. Fosdick *v.* Groff, 22 How. Pr. (N. Y. Supreme Ct.) 158; Byington *v.* Hogan, 58 Mo. 509.

In Fosdick *v.* Groff, 22 How. Pr. (N. Y. Supreme Ct.) 158, it was held that a mere averment that the plaintiff is not the real party in interest does not deny the assignment of the cause of action to him. But see Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 630; Northern Pac. R. Co. *v.* McCormick, 55 Fed. Rep. 601, applying *Montana* law; Raymond *v.* Wimsette, 12 Mont. 551.

2. Jones *v.* Eddy, 90 Cal. 147; De Wein *v.* Osborn, 12 Colo. 407; Corning *v.* Haight, 1 Code Rep. (N. Y.) 71; Robinson *v.* Corn Exch., etc., Ins. Co., 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 186; Reed *v.* Hayt, 109 N. Y. 659, 17 N. E. Rep. 418; Brennan *v.* Griffiths (City Ct.), 18 N. Y. Supp. 145.

Denial of Value.—A paragraph in an answer denied "that the work, labor, and services so rendered, and the materials so furnished, were of the value, and at the agreed price, in the aggregate, of eighty dollars"—*held*, to raise the issue as to the value of the materials and labor. Parker *v.* Tillinghast (City Ct.), 1 N. Y. St. Rep. 296. See Wahl *v.* Murphy (Ky., 1888), 9 S. W. Rep. 355.

A Denial Construed.—Where the allegation was that "the plaintiff never performed the services claimed at defendant's request, and defendant never promised to pay for any such services," *held*, an admission that the services were rendered as claimed, and that the question whether they were voluntary or were rendered at the defendant's request was alone in issue. Smiley *v.* Anderson, 28 Neb. 100.

Contra.—Where a complaint alleged that the "defendant was indebted to the plaintiff for money laid out and expended by the plaintiff for the defendant at his request," giving a large number of items; and the answer denied that "the plaintiff had laid out or expended any money for the defendant except such sums as had been delivered by him to the plaintiff for that purpose"—*held*, that such answer was not a denial. Robbins *v.* Lincoln, 12 Wis. 1.

3. Richardson *v.* Smith, 29 Cal. 530; Bothe *v.* Dayton, etc., R. Co., 37 Ohio St. 147. See Gillam *v.* Sigman, 29 Cal. 638. But see Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441, where, in an action under the statute to determine adverse claims to real estate, it was held that a denial of plaintiff's possession raised a material issue.

the fact alleged to exist does not exist. Such averments traverse the matters alleged and are good denials.[1]

Deeds.—The denial of the execution of a deed is the denial of its delivery.[2]

Rules of Construction Limited.—A denial must not be evasive. The courts, under their most liberal construction, will not allow a denial to stand if there is room for argument that it was interposed as a mere quibble.[3]

IV. ALLEGATIONS ADMITTED BY A FAILURE TO DENY—1. Generally.—It is an established rule of code pleading that all the material allegations of the complaint not denied by the answer are, for the purposes of the action, admitted.[4]

1. Hill *v.* Smith, 27 Cal. 476.

The rule given in the text will prevent a negative pregnant. Thus, where the allegation was that the defendant "wrongfully and unlawfully entered upon and dispossessed" plaintiff, an answer which denied that "defendant wrongfully and unlawfully entered and dispossessed" plaintiff was held insufficient. Busenius *v.* Coffee, 14 Cal. 91. See Kinsey *v.* Wallace, 36 Cal. 463; Brooks *v.* Haslam, 65 Cal. 421.

For Diversion of Water.—If the complaint in an action to enjoin a diversion of water alleges that the plaintiff has appropriated and used the water for more than five years, and the answer denies that the plaintiff ever at any time used or took up or appropriated the water, the denial is sufficient. Wilkins *v.* McCue, 46 Cal. 656. See Jones *v.* St. John Irrigating Co., 2 Idaho 58.

Slander.—Where the petition in an action for slander alleges the effect of words spoken and the intent of the speaker to have been to charge plaintiff with a crime, a denial that defendant intended to or did charge plaintiff with the commission of a crime by the language used raises a material issue. Wilkin *v.* Tharp, 55 Iowa 609.

Defective Highway.—In an action for injuries resulting from a defective highway, a denial in the answer, that on the day specified the highway was "in a dangerous condition to travelers exercising ordinary care and diligence," *held* not a sufficient denial that it was out of repair. Cuthbert *v.* Appleton, 24 Wis. 383.

2. Thompson *v.* Lynch, 29 Cal. 189. But see Landers *v.* Bolton, 26 Cal. 394, where it seems to be held that a denial that the premises were conveyed is not a denial of the execution and delivery of a deed.

The Original Instruments Required.—The mere statement in an answer, that the originals of certain instruments are required, is not a denial. Murray *v.* New York L. Ins. Co., 85 N. Y. 236.

Copy Not a True One.—When a petition refers to the copy of an instrument as part thereof, an answer which avers that the defendant cannot state whether the copy is a true one, and calls for proof, is not, in form or substance, a denial of a material allegation. Bentley *v.* Dorcas, 11 Ohio St. 398.

3. Fuhn *v.* Weber, 38 Cal. 636, where the answer denied that there was such a street as the one mentioned in the complaint. See Finch *v.* Finch, 10 Ohio St. 501; Dendy *v.* Gamble, 59 Ga. 434; Williams *v.* Smith, 22 Wis. 594; Downer *v.* Read, 17 Minn. 493; Henry *v.* Hinman, 21 Minn. 378.

4. *Ohio.*—Bradford *v.* Andrews, 20 Ohio St. 208, 5 Am. Rep. 645.

Kentucky.—Morton *v.* Waring, 18 B. Mon. (Ky.) 72.

Wisconsin.—Bonnell *v.* Jacobs, 36 Wis. 59; Marsh *v.* Pugh, 43 Wis. 597.

Iowa.—Fargo *v.* Ames, 45 Iowa 494.

Indiana. — Lafayette *v.* Wortman, 107 Ind. 404.

Nebraska. — Harden *v.* Atchison, etc., R. Co., 4 Neb. 521; Dillon *v.* Russel, 5 Neb. 488; Williams *v.* Evans, 6 Neb. 218; Payne *v.* Briggs, 8 Neb. 78; Hanson *v.* Lehman, 18 Neb. 564; Linch *v.* State, 30 Neb. 740; Maxwell *v.* Higgins (Neb.), 57 N. W. Rep. 388.

South Dakota.—Calkins *v.* Seabury-Calkins Co. (S. Dakota), 58 N. W. Rep. 797.

2. What are Material Allegations.—Only those allegations in a complaint are material, within the meaning of this rule, which

California.—De Ro *v.* Cordes, 4 Cal. 118; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; Anderson *v.* Parker, 6 Cal. 197; Osborn *v.* Hendrickson, 8 Cal. 31; Dewey *v.* Bowman, 8 Cal. 145; Thompson *v.* Lee, 8 Cal. 276; Walker *v.* Sedgwick, 8 Cal. 402; Curtis *v.* Richards, 9 Cal. 34; Humphreys *v.* Mc Call, 9 Cal. 59, 70 Am. Dec. 621; San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453; Dennis *v.* Table Mountain Water Co., 10 Cal. 370; Stewart *v.* Street, 10 Cal. 373; White *v.* Moses, 11 Cal. 70; Burke *v.* Table Mountain Water Co., 12 Cal. 403; Horn *v.* Volcano Water Co., 13 Cal. 62; Ord *v.* Steamer Uncle Sam, 13 Cal. 370; Garfield *v.* Knight's Ferry, etc., Water Co., 14 Cal. 36; Busenius *v.* Coffee, 14 Cal. 91; Kinney *v.* Osborne, 14 Cal. 112; Powell *v.* Oullahan, 14 Cal. 115; Hensley *v.* Tartar, 14 Cal. 508; Smith *v.* Doe, 15 Cal. 101; Blankman *v.* Vallejo, 15 Cal. 639; Castro *v.* Wetmore, 16 Cal. 379; Kuhland *v.* Sedgwick, 17 Cal. 123; Higgins *v.* Wortell, 18 Cal. 331; Patterson *v.* Ely, 19 Cal. 29; Mathewson *v.* Fitch, 22 Cal. 87; Woodworth *v.* Knowlton, 22 Cal. 164; McLaughlin *v.* Kelly, 22 Cal. 212; Levinson *v.* Schwartz, 22 Cal. 230; Ghirardelli *v.* McDermott, 22 Cal. 539; Towdy *v.* Ellis, 22 Cal. 651; Nelson *v.* Murray, 23 Cal. 338; Verzan *v.* McGregor, 23 Cal. 339; DeUprey *v.* DeUprey, 23 Cal. 352; Rupley *v.* Welch, 23 Cal. 453; Hughes *v.* Devlin, 23 Cal. 502; Morrill *v.* Morrill, 26 Cal. 289; Stoddard *v.* Treadwell, 26 Cal. 294; Landers *v.* Bolton, 26 Cal. 393; More *v.* Del Valle, 28 Cal. 170; Randolph *v.* Harris, 28 Cal. 562, 87 Am. Dec. 139; Cassacia *v.* Phœnix Ins. Co., 28 Cal. 629; Treadway *v.* Semple, 28 Cal. 653; Emery *v.* Bradford, 29 Cal. 75; Richardson *v.* Smith, 29 Cal. 530; Camden *v.* Mullen, 29 Cal. 565; Fitch *v.* Bunch, 30 Cal. 210; Blood *v.* Light, 31 Cal. 115; Fish *v.* Redington, 31 Cal. 186; Leffingwell *v.* Griffing, 31 Cal. 232; Burke *v.* Carruthers, 31 Cal. 468; Reed *v.* Calderwood, 32 Cal. 109; Pico *v.* Colimas, 32 Cal. 578; Burnett *v.* Stearns, 33 Cal. 468; Lightner *v.* Menzel, 35 Cal. 452; Lee *v.* Figg, 37 Cal. 328, 99 Am. Dec. 271; Doll *v.* Good, 38 Cal. 287; Fuhn *v.* Weber, 38 Cal. 636: DeGodey *v.* Godey, 39 Cal. 157; Taylor *v.* Shew, 39 Cal. 536, 2 Am. Rep. 478; Patterson *v.* Sharp, 41 Cal. 133; Gregory *v.* Nelson, 41 Cal. 278; Scott *v.* Umbarger, 41 Cal. 410; Feeley *v.* Shirley, 43 Cal. 369; Hellman *v.* Howard, 44 Cal. 100; Huston *v.* Twin, etc., Turnpike R. Co., 45 Cal. 550; Bradbury *v.* Cronise, 46 Cal. 287; Jones *v.* Spears, 47 Cal. 20; Howard *v.* Throckmorton, 48 Cal. 482; Leroux *v.* Murdock, 51 Cal. 541; Manly *v.* Howlett, 55 Cal. 94; Marsters *v.* Lash, 61 Cal. 622; Young *v.* Miller, 63 Cal. 302; Walker *v.* Buffandeau, 63 Cal. 312; Grossini *v.* Perazzo, 66 Cal. 545; Pomeroy *v.* Gregory, 66 Cal. 572; Campe *v.* Lassen, 67 Cal. 139; Taylor *v.* Central Pac. R. Co., 67 Cal. 165; Taylor *v.* Middleton, 67 Cal. 656; Hanson *v.* Fricker, 79 Cal. 283.

Missouri.—Whittlesey *v.* Brohammer, 31 Mo. 98; Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62; Shockley *v.* Fischer, 21 Mo. App. 551; Thomas *v.* Liebke, 13 Mo. App. 389.

And see other cases cited in this section.

Duty of Court to Instruct.—The plaintiff may ask the court to instruct the jury that the material allegations of the complaint not denied are admitted; and it is the duty of the court to so instruct. Steele *v.* Russell 5 Neb. 211.

Proper Mode to Make Admission.—Under the code system of pleading, an answer must either deny allegations found in the complaint or state new matter, and the proper mode of making an admission is by silence. Gould *v.* Williams, 9 How. Pr. (N. Y. Supreme Ct.) 53.

Judgment on the Pleadings.—When the answer fails to put in issue the allegations of the complaint, the plaintiff is entitled to judgment on the pleadings without evidence. Smith *v.* Faust, 1 Utah 90; Wallace *v.* Baisley, 22 Oregon 572.

Equivalent to Demurrer.—An answer which controverts no material allegation of fact in the complaint should be regarded as a demurrer. Charlotte, etc., R. Co. *v.* Gibbes, 23 S. Car. 370.

Amendment and Withdrawal.—Averments of an amended complaint, which are not denied by the amended answer, stand as admitted. Putnam *v.* Lyon, 3 Colo. App. 144.

And where an answer is withdrawn

the plaintiff must prove upon the trial in order to maintain his action.[1] No allegation in a complaint should be held "material" which will not prevent a plaintiff from recovering if proved to be untrue, or which when denied he is not obliged to prove to entitle himself to a verdict.[2]

3. Denial of Immaterial Allegations.—Immaterial averments need not be denied. They are not admitted by a failure to deny.[3]

the traversable allegations of the petition are admitted. Price *v.* Page, 24 Mo. 65. See Robinson *v.* Lawson, 26 Mo. 69.

Neither Admitted nor Denied.—Where an answer neither admits nor denies an allegation, the allegation is admitted. Anderson *v.* Parker, 6 Cal. 197.

Nullifying the Effect of an Admission.—Affirmative matter of defense pleaded may nullify the effect of an admission by failure to deny. Newell *v.* Doty, 33 N. Y. 83; Sands *v.* St. John, 36 Barb. (N. Y.) 628.

But, conversely, an admission by an attorney of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in the answer. Taylor *v.* Randall, 5 Cal. 80.

Redundant Denials.—The denial of a material fact raises an issue, though accompanied by further insufficient denials. Craig *v.* Bateman, 49 Cal. 71.

Idaho.—In *Idaho* a general denial is a nullity when the complaint is verified; therefore a failure to deny specifically each material allegation of a verified complaint admits the truth of the allegation. Norris *v.* Glenn, 1 Idaho 590.

Iowa.—Likewise in *Iowa* the function of a general denial has been much curtailed. A general denial by a defendant, in an action on a contract, of each and every allegation in a petition which sets forth the contract, and avers that the plaintiff has duly performed all the conditions on his part to be performed, admits the performance of a condition precedent in the contract, that the plaintiff should deposit a sum of money for his faithful performance thereof. Halferty *v.* Wilmering, 112 U. S. 713. See also Mayes *v.* Turley, 60 Iowa 407; Steer *v.* City, 41 Iowa 353; Coates *v.* Galena, etc., R. Co., 18 Iowa 277; Blackshire *v.* Iowa Homestead Co., 39 Iowa 624; Gates *v.* Carpenter, 43 Iowa 152.

1. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54. Where a complaint in a foreclosure suit alleges that the defendants did "execute under their hands and seals, and deliver," the mortgage, an answer of one of the defendants, denying that she executed the mortgage referred to, is sufficient to put in issue the fact of the delivery and every other fact necessary to its execution, although no specific denial of the delivery is made. Le Mesnager *v.* Hamilton, 101 Cal. 533.

2. Oechs *v.* Cook, 3 Duer (N. Y.) 161. "Every allegation in a pleading at law which might be put in issue by the adverse party was always taken as true if not denied. And it is in this sense that the term 'material allegation' is used in that section [168 of the Code]. It means an allegation without proof of which the plaintiff must fail in his action. All such allegations may be denied. They were formerly put in issue by the general issue, and no others were put in issue by that plea; and those, and no others, were admitted by being left unanswered." Per Woodruff, J., in Connoss *v.* Meir, 2 E. D. Smith (N. Y.) 316.

Allegations Anticipating a Defense.—Allegations inserted for the purpose of intercepting and cutting off an anticipated defense are superfluous and immaterial, and do not require an answer. Canfield *v.* Tobias, 21 Cal. 349.

3. Canfield *v.* Tobias, 21 Cal. 349; Doyle *v.* Franklin, 48 Cal. 537; Pink *v.* Catanich, 51 Cal. 420; Adams Express Co. *v.* Darnell, 31 Ind. 22; Baker *v.* Kistler, 13 Ind. 63. An answer to immaterial matter is frivolous, and raises no issue. Goldstein *v.* Krause, 2 Idaho 273; Leffingwell *v.* Griffing, 31 Cal. 232; Elder *v.* Spinks, 53 Cal. 293; Hunter *v.* Martin, 57 Cal. 365; Kidder *v.* Stevens, 60 Cal. 414.

Failure to State a Cause of Action.—If a complaint contains more than one count, and one of the counts does not state a cause of action, the answer need not deny the allegations of such

4. Findings.—There is no necessity of a finding by the court as to a fact admitted by the pleadings.[1]

5. Evidentiary Matters.—Allegations of matters of evidence are not issuable facts. They are not admitted by a failure to deny.[2]

6. Value and Damages.—Allegations of value in a pleading are not to be taken as true because of a failure to deny them.[3] And

count, and objections may be made to it for the first time in the appellate court. Haskell *v.* Moore, 29 Cal. 437.

Striking Out Denial.—If immaterial allegations are denied, the court will not strike out the denial. King *v.* Utica Ins. Co., 6 How. Pr. (N. Y. Supreme Ct.) 485.

Immaterial Denials.—The denial itself may be immaterial without reference to anything in the complaint. Thus, for the purpose of an action on a contract, the allegation of the contract in the complaint, if not controverted by the answer, is to be taken as true, and the allegation in the answer of a different contract has no effect. Marx *v.* Gross (Super. Ct.), 22 N. Y. Supp. 393.

Leave to amend and insert an immaterial denial may be refused. Newman *v.* Springfield F., etc., Ins. Co., 17 Minn. 123.

1. Swift *v.* Muygridge, 8 Cal. 445; Grossini *v.* Pirazzo, 66 Cal. 545; Pomeroy *v.* Gregory. 66 Cal. 572; Walker *v.* Brem, 67 Cal. 599; Taylor *v.* Central Pac. R. Co., 67 Cal. 615; Burnet *v.* Stearns, 33 Cal. 468; Gregory *v.* Nelson, 41 Cal. 279; Bradbury *v.* Cronise, 46 Cal. 287; McDonald *v.* Mission View Homestead Assoc., 51 Cal. 210; Tracy *v.* Craig, 55 Cal. 91. And if the court finds contrary to the facts admitted by the answer, the finding must be disregarded. Bradbury *v.* Cronise, 46 Cal. 287. And a finding which negatives the existence of a fact admitted by the pleadings is a finding against evidence, and the judgment is erroneous. Silvey *v.* Neary, 59 Cal. 97; Campe *v.* Lassen, 67 Cal. 139; Walker *v.* Brem, 67 Cal. 599.

An appellate court will not look to a bill of exceptions for the purpose of ascertaining whether a finding based upon a failure to answer is sustained by the proof made. Moore *v.* Sauborin, 42 Mo. 495.

2. Edmunds *v.* St. Louis R. Co., 3 Mo. App. 603; Moore *v.* Murdock, 26 Cal. 515; Siter *v.* Jewett, 33 Cal. 93; Nudd *v.* Thompson, 34 Cal. 39; Lowell *v.* Lowell, 55 Cal. 316; Racouillat *v.* Rene, 32 Cal. 455.

When an ultimate fact is admitted on the record, probative facts tending to establish, modify, or overcome it will not be considered by the court. Mulford *v.* Estudillo, 32 Cal. 131.

Aggravation.—Circumstances of aggravation are not traversable. Schnaderbeck *v.* Worth, 8 Abb. Pr. (N. Y. Supreme Ct.) 37; Gilbert *v.* Rounds, 14 How. Pr. (N. Y. Supreme Ct.) 46; Lane *v.* Gilbert, 9 How. Pr. (N. Y. Supreme Ct.) 150; Foland *v.* Johnson, 16 Abb. Pr. (N. Y. Supreme Ct.) 235; Saltus *v.* Kipp, 5 Duer (N. Y.) 646; Maretzek *v.* Cauldwell, 2 Robt. (N.Y.), 715.

Deraignment of Title.—Averments in the complaint of the facts constituting a deraignment of title are but averments of evidence, and are not admitted by a failure to deny them in the answer. Siter *v.* Jewett, 33 Cal. 93. See Moore *v.* Murdock, 26 Cal. 525.

3. Campbell *v.* Brosius, 36 Neb. 792; Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675; Connoss *v.* Meir, 2 E. D. Smith (N. Y.) 314; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 202; Butterworth *v.* Kennedy, *cited* in 4 Bosw. (N. Y.) 202; Starr *v.* Cragin, 24 Hun (N. Y.) 177; Wood *v.* Steamboat, 19 Mo. 529; Field *v.* Barr, 27 Mo. 417.

Quantum Meruit.—In all cases founded upon a *quantum meruit*, where the value of the services is not expressly admitted, the question of value is in issue and must be proved. Campbell *v.* Brosius, 36 Neb. 792.

Trover, Trespass, and Replevin.—In trover, trespass, or replevin it is not necessary for the defendant to deny the value alleged in the complaint. Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675; Connoss *v.* Meir, 2 E. D, Smith (N. Y.) 314; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 202; Butterworth *v.* Kennedy, *cited* in 4 Bosw. (N. Y.) 202; Starr *v.* Cragin, 24 Hun (N. Y.) 177; Wood *v.* Steamboat, 19 Mo. 529; Field *v.* Barr, 27 Mo. 417.

in an action to recover unliquidated damages, the allegations of damage are not traversable.[1]

7. Time.—Generally, allegations of time are not admitted by a failure to deny them.[2]

8. Legal Conclusions.—Legal conclusions need not be denied.[3]

9. Possession and Ownership.—Where a complaint makes an allegation of *actual* possession of property, the mere denial of possession admits actual possession.[4] And an answer in an ejectment

Amounts to No Denial.—The denial of the value of property sued for in the terms of the allegation is evasive, and in fact is no denial at all. Marsters *v.* Lash, 61 Cal. 622.

Value Material.—But where the value of a thing sued for is material, the allegation of value must be denied. Thus, in an action upon one of several insurance policies on a steamboat, the averment that she was worth more than all the insurance thereon is a material averment, and if not denied in the answer stands admitted. Marshall *v.* Thames F. Ins. Co., 43 Mo. 586.

Where the question of value is material, and the defendant wants to controvert it, he must allege that the article is of no value, or of such value as he claims it to be. Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79. See Ames *v.* First Division St. Paul R. Co., 12 Minn. 412, where the form of a denial of value was approved. See also Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507; Dean *v.* Leonard, 9 Minn. 190; Hecklin *v.* Ess, 16 Minn. 51; Pottgieser *v.* Dorn, 16 Minn. 204; Moulton *v.* Thompson, 26 Minn. 120; and Coleman *v.* Pearce, 26 Minn. 123, where the denials were held bad because they were negatives pregnant.

Utah.—Allegations in a sworn complaint of value and damage not specifically denied in the answer are admitted. It is not error to so instruct the jury. Snell *v.* Crowe, 3 Utah 26.

1. Hackett *v.* Richards, 3 E. D. Smith (N. Y.) 13; Connoss *v.* Meir, 2 E. D. Smith (N. Y.) 314; Raymond *v.* Traffarn, 12 Abb. (Justices' Ct. N. Y.) 52; German-American Bank *v.* White, 38 Minn. 471; Pullen *v.* Wright, 34 Minn. 314.

But allegations of damage, like allegations of value, may be material, and when so they must be denied. Thus, where in an ejectment action the complaint avers that the value of the use and occupation of the premises is a certain sum, this is a material allegation which, if not specifically denied, is admitted. Patterson *v.* Ely, 19 Cal. 29. And see McLaughlin *v.* Kelly, 22 Cal. 212; Snell *v.* Crowe, 3 Utah 26.

2. The date when an account sued upon accrued is not a material averment, and is not admitted by a failure to deny it. Sutter *v.* Streit, 21 Mo. 157.

Where the petition upon a mechanic's lien alleged that ten days' notice had been given, as required by law, and the answer took issue on the sufficiency of the notice generally, the allegation as to time was admitted. Gorman *v.* Dierkes, 37 Mo. 576.

3. Larson *v.* Oregon R., etc., Co., 19 Oregon 240.

Where a complaint demands an accounting, without showing that plaintiff is entitled thereto, defendant, in order to raise the objection on the trial, is not required to deny in his answer the right to such acccounting. Nutting *v.* Atwood (Super. Ct.), 23 N. Y. Supp. 816.

What Are Not Legal Conclusions.—The word "duly" means in a proper way, or regularly, or according to law; when used in a pleading it is sometimes a fact and sometimes a legal conclusion. Thus the allegations of a complaint, that the plaintiff duly made and filed protest, and duly appealed to the Secretary of the Treasury, and that the suit was brought in time, not denied in the answer, are to be taken as true. Robertson *v.* Perkins, 129 U. S. 233.

An allegation that a mortgage was duly recorded will be taken as true where it is not denied. Livesey *v.* Brown, 35 Neb. 111.

Where the answer denies that a notice was served as required by law, the fact of notice is admitted; the lawfulness thereof is alone in issue. Soeding *v.* Bartlett, 35 Mo. 90.

4. Churchill *v.* Bennett, 8 How. Pr. (N. Y. Supreme Ct.) 309.

suit, which denies the unlawful entry of defendant, admits posession.[1] As the matter to be decided in an ejectment suit is not that of title, but whether the defendant unlawfully withholds possession from the plaintiff, the denial of an allegation of ownership is not equivalent to a denial that the defendant unlawfully withholds possession. Where an allegation of unlawful withholding is in the complaint, it must be denied.[2]

Ownership is a fact distinct from the method of its acquisition; and allegations of ownership must not be confounded with those showing the manner in which it was acquired: a denial of the latter allegation is not a denial of the former.[3]

10. Notes, Bills, and Other Instruments.—In actions on notes and bills and other written instruments allegations of execution and indorsement are material, and are admitted unless denied.[4]

Where the complaint avers generally that the plaintiff faithfully complied with the terms of the contract, and the answer does not deny this allegation, evidence that there was a breach of the terms of the contract is not admissible.[5]

The allegation of an instrument as having a certain legal effect will be conclusive unless denied.[6]

1. Tomlinson *v.* Lynch, 32 Mo. 160.

Where the complaint in an ejectment suit describes the land, and the denial contains a different description, the plaintiff is entitled to a judgment on the pleadings, for, the boundaries set out in the pleadings being unlike, all the allegations could be true. Hadden *v.* Mannin (Ky., 1893), 21 S. W. Rep. 38.

2. Tyson *v.* Shepherd, 90 N. Car. 314. *Compare* Gilchrist *v.* Middleton, 107 N. Car. 664; Lupo *v.* True, 16 S. Car. 579; Lee *v.* Figg. 37 Cal. 328; Howard *v.* Singleton (Ky., 1893), 22 S. W. Rep. 337; Cotzhausen *v.* Kaehler, 42 Wis. 332; Burke *v.* McDonald, 2 Idaho 646.

The denial of the withholding possession must refer to the time mentioned in the complaint. Where the answer merely alleged that the defendant "is not in possession" of the land, it was held that the allegation of the complaint must be taken as confessed. Schenk *v.* Evoy, 24 Cal. 105.

Where, in an action to recover possession of land, the defendant answers admitting the possession, but denying the plaintiff's title, he cannot, without an amendment of the pleadings, afterward disclaim title and possession, and put the plaintiff to proof of the adverse possession. Graybeal *v.* Powers, 83 N. Car. 561.

3. Wilson *v.* Murphy, 45 Mo. 409, where the answer was construed by the court, not to deny title to the note, but only to deny the manner of acquiring it. *Compare* Brown *v.* Ryckman, 12 How. Pr. (N. Y. C. Pl.) 313; Felch *v.* Beaudry, 40 Cal. 439; De Loge *v.* Hall, 31 Mo. 473; Emory *v.* Phillips, 22 Mo. 499.

4. Flood *v.* Reynolds, 13 How. Pr. (N. Y. Supreme Ct.) 112.

Where the defendant denied signing the note sued on, and also alleged "that if it [the signature] is genuine, then it was procured through fraud," *held*, an admission of the signing of the note. Dinsmore *v.* Stimbert, 12 Neb. 434.

And where the defendant pleaded that he did not execute the note sued on, but did execute one like that described in the petition, but with certain additions thereto, *held*, that the execution of the note was admitted. Kinman *v.* Cannefax, 34 Mo. 147. See also Ramsay *v.* Barnes (C. Pl.), 12 N. Y. Supp. 726; San Francisco *v.* Staude. 92 Cal. 560.

5. Cassacia *v.* Phœnix Ins. Co., 28 Cal. 629, where the fact that gunpowder was kept in violation of the terms of an insurance policy was held immaterial, as the defendant had not denied the allegation of the complaint that the plaintiff had faithfully complied with all the terms of the policy.

6. Coffin *v.* Grand Rapids Hydraulic

In some states provision is made by statute to the effect that when a written instrument is referred to in a pleading, or the suit is on such instrument, the signature thereto shall be deemed genuine and admitted unless specifically denied under oath.[1]

11. Libel and Slander.—Allegations in a complaint, relative to the intent and motives of a libellous publication, are not to be deemed material, so as to render it necessary for the defendant to admit or controvert them in his answer.[2]

12. Sales.—In an action to recover the price of goods sold, the answer must deny the allegation of sale; merely denying the indebtedness admits the sale and delivery.[3]

13. Release and Payment.—A plea of release and payment of a claim admits its validity.[4]

Co. (Super. Ct.), 18 N. Y. Supp. 782, where it was held that where an obligation is declared on as a promissory note, and the answer does not dispute the allegation in that regard, defendant cannot raise the objection that the note is a conditional agreement for the payment of money.

1. *Iowa* Code, § 2730; Wagner Sts. Mo. p. 1046, § 45. Under this statute the signature to an assignment of a judgment is admitted unless specifically denied. Edmonds *v.* Montgomery, 1 Iowa 143. This statutory provision is applicable in an action against a guarantor of a note, Partridge *v.* Patterson, 6 Iowa 514; and in the case of city warrants, Clark *v.* Des Moines, 19 Iowa 199; and in county warrants, Clark *v.* Polk County, 19 Iowa 248.

But where notes purporting to have been executed by an agent are sued on, the ordinary denial of their execution, without verification, is sufficient. Pope *v.* Risley, 23 Mo. 185.

See also the following cases in construction of these statutes: Parker *v.* Simpson, 1 Mo. 539; Bates *v.* Hinton, 4 Mo. 78; Klein *v.* Keys, 17 Mo. 326; Anderson *v.* Hance, 49 Mo. 159; Carpenter *v.* Lathrop, 51 Mo. 487; State *v.* Chamberlin, 54 Mo. 338; Corby *v.* Weddle, 57 Mo. 452; Hammerslough *v.* Chatham, 84 Mo. 13; McQuade *v.* St. Louis, 9 Mo. App. 586; Patrick *v.* Boonville Gas Light Co., 17 Mo. App. 462; Smith *v.* Rembaugh, 21 Mo. App. 390; Rothschild *v.* Frensdorf, 21 Mo. App. 318; McGill *v.* Wallace, 22 Mo. App. 675; Curry *v.* Sioux City Dist. Tp., 62 Iowa 102; Miller *v.* House, 67 Iowa 737; Ashworth *v.* Grubbs, 47 Iowa 353; Walker *v.* Sleight, 30 Iowa 310; Robinson *v.* Lair, 31 Iowa, 9; Thompson *v.* Abbott, 11 Iowa 193; Carle *v.* Cornell, 11 Iowa 374; Loomis *v.* Metcalf, 30 Iowa 382; Hall *v.* Ætna Mfg. Co., 30 Iowa 215; Douglass *v.* Matheny, 35 Iowa 112; Sheldon *v.* Middleton, 10 Iowa 17; Lyon *v.* Bunn, 6 Iowa 49; Seachrist *v* Griffith, 6 Iowa 390; Terhune *v.* Henry, 13 Iowa 99; Fannon *v.* Robinson, 10 Iowa 272; Lake *v.* Cruikshank, 31 Iowa 395; Hay *v.* Frazier, 49 Iowa 454; Sankey *v.* Trump, 35 Iowa 267; Brayley *v.* Hedges, 52 Iowa 623; Sully *v.* Goldsmith, 49 Iowa 690; Farmers', etc., Bank *v.* Young, 36 Iowa 44; Brewer *v.* Crow, 4 Greene (Iowa) 520; Templin *v.* Rothweiler, 56 Iowa 259.

And see section X of this article; also U. S. *v.* Alexander, 2 Idaho 354; Heath *v.* Lent, 1 Cal. 410.

2. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54.

And in an action for slander for speaking words actionable *per se*, an allegation in the complaint, that before the speaking of the alleged slanderous words the plaintiff had sustained a good name and reputation among his neighbors, is superfluous, and need not be denied. Pink *v.* Catanich, 51 Cal. 420.

3. Lee *v.* Casey, 39 Mo. 383.

In an action for the price of a quantity of goods sold, the answer alleged that the sale was by sample, and that a specified quantity was not according to the sample, and denied all the allegations of the complaint not admitted. *Held*, that the quantity sold was not admitted. Youngs *v.* Kent, 46 N. Y. 672.

4. Blumenthal *v.* Mugge, 43 Mo. 427.

Where, in an action for the recovery of damages, the defendant pleads accord and satisfaction, and the repli-

14. Pleading a Different Contract or Tort.—Where a contract or tort is set out in the complaint, an answer setting up another contract or tort, without denial of the allegations of the complaint, is an admission of the contract or tort set up in the complaint.[1]

15. Mandamus.—The pleadings in mandamus proceedings have the same effect and are to be construed as those in civil actions. A material allegation in the petition, not denied, is admitted.[2]

16. Divorce Proceedings.—In divorce proceedings it is the policy of the state to compel the plaintiff to prove the allegations of the complaint, whether denied or not; hence, in these cases, the rule that a material allegation not denied is admitted does not obtain.[3]

17. Allegations of Status and Capacity.—Allegations of status and capacity, such as that the plaintiffs are partners, or a corporation, are material ones, which are admitted unless denied.[4]

V. NEGATIVES PREGNANT.—1. Generally.—A negative pregnant is that form of a denial which implies an affirmative. The objection to this form of a denial is that it is ambiguous.[5] A negative pregnant can only arise by the interposing of a specific denial. A general denial puts in issue every allegation in the pleading to which it is a denial. It can never be construed as a negative pregnant.[6] The general rule is that if the denial is a negative

cation denies that "in consideration of the payment of seventy-five dollars, or any other sum, and the surgeon's fee" mentioned in the answer, the plaintiff "accepted the same in full satisfaction and discharge of the damages," etc., *held*, that while this is an admission of the payments, it is a denial of acceptance in discharge of the damages claimed. O'Riley *v.* Wilson, 4 Oregon 97.

1. East River Electric Light Co. *v.* Clark (C. Pl.), 18 N. Y. Supp. 463; Schnaderbeck *v.* Worth, 8 Abb. Pr. (N. Y. Supreme Ct.) 37. See *post*, VI. ARGUMENTATIVE DENIALS.

2. State *v.* Hawes, 43 Ohio St. 16, where the petition alleged that a certain bill of exceptions tendered to a judge to sign was a true bill, and the alternative writ commanded him to sign the same or show cause why he did not, and by his answer he did not deny this allegation, and it was held that this was an admission that the bill was true.

3. Bennett *v.* Bennett, 28 Cal. 600.

4. Teller *v.* Hartman, 16 Colo. 447; Elliott *v.* Espenhain, 54 Wis. 231; Haberkorn *v.* Hill (Supreme Ct.), 2 N. Y. Supp. 243. *Compare* Brandt *v.* Shepard, 39 Minn. 454; Rock Island Lumber, etc., Co. *v.* Fairmount Town Co., 51 Kan. 394.

See also *post*, section X. WHAT MAY BE PROVED UNDER A GENERAL DENIAL.

5. Bliss Code Pl. § 332. "It is under this head of *ambiguity* that the doctrine of negatives pregnant appears most properly to range itself. A negative pregnant is such a form of negative expression as may imply or carry within it an affirmative. This is considered as a fault in pleading; and the reason why it is so considered is that the meaning of such a form of expression is ambiguous." Stephen Pl. (Tyler's ed.) 335.

6. German-American Bank *v.* White, 38 Minn. 471.

But the following cases hold that a general denial of the value stated in the complaint is insufficient, and is a negative pregnant. Steele *v.* Thayer, 36 Minn. 174; Coleman *v.* Pearce, 26 Minn. 123; Moulton *v.* Thompson, 26 Minn. 120; Pottgieser *v.* Dorn, 16 Minn. 204; Hecklin *v.* Ess, 16 Minn. 51; Durfee *v.* Pavitt, 14 Minn. 424; Dean *v.* Leonard, 9 Minn. 190; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

A general denial in an answer of the

pregnant it amounts to no denial at all, and the allegations of the complaint are treated as admitted.[1]

2. Conjunctive Denials.—If several material facts are stated conjunctively in a complaint, an answer which undertakes to deny these averments as a whole, as conjunctively stated, is evasive, and is an admission of the averments thus attempted to be denied.[2]

allegations in a complaint, "that before the maturity of said note the said A. M., for value received, sold, transferred, indorsed, and delivered it to plaintiff," puts in issue only the time, not the fact, of transfer. Frasier *v.* Williams, 15 Minn. 288. *Compare* McClung *v.* Bergfeld, 4 Minn. 148; Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507; Morton *v.* Jackson, 2 Minn. 219.

A general denial is the same in effect as a specific denial of each of the allegations in the whole or in the part of the pleading so denied, and is a negative pregnant only where a mere specific denial would be. Stone *v.* Quaal, 36 Minn. 46.

1. Kay *v.* Whittaker, 44 N. Y. 565; Young *v.* Catlett, 6 Duer (N. Y.) 439; Baker *v.* Bailey, 16 Barb. (N. Y.) 54; Moser *v.* Jenkins, 5 Oregon 447; Scovill *v.* Barney, 4 Oregon 288; Mulcahy *v.* Buckley, 100 Cal. 484; Blankman *v.* Vallejo, 15 Cal. 638; Kuhland *v.* Sedgwick, 17 Cal. 123; Caulfield *v.* Sanders, 17 Cal. 569; Woodworth *v.* Knowlton, 22 Cal. 164; Landers *v.* Bolton, 26 Cal. 393; Bradbury *v.* Cronise, 46 Cal. 287; Larney *v.* Mooney, 50 Cal. 610; Harden *v.* Atchison, etc., R. Co., 4 Neb. 521. And see the cases under other paragraphs of this section.

Good unless Objected to.— But some authorities hold that the objection that a denial is a negative pregnant is a formal one, and that unless the objection is made before trial it will be waived, and the allegation regarded as controverted. Elton *v.* Markham, 20 Barb. (N. Y.) 347; Lawrence *v.* Williams, 1 Duer (N. Y.) 585; Parker *v.* Tillinghast (City Ct.), 1 N. Y. St. Rep. 296; Otis *v.* Ross, 8 How. Pr. (N. Y. Supreme Ct.) 193; Pfandler Process Fermentation Co. *v.* McPherson (Supreme Ct.), 20 N. Y. St. Rep. 473; Doolittle *v.* Greene, 32 Iowa 123.

The remedy is by motion to make the denial more definite and certain. Wall *v.* Buffalo Water Works Co., 18 N. Y. 120.

Missouri.—The doctrine of a negative pregnant is not recognized in *Missouri*. Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454, 74 Mo. 77. See also Wynn *v.* Cory, 43 Mo. 304; First Nat. Bank *v.* Hogan, 47 Mo. 472; Ells *v.* Pacific R. Co., 55 Mo. 278.

2. Hopkins *v.* Everett, 6 How. Pr. (N. Y. Supreme Ct.) 159; Young *v.* Catlett, 6 Duer (N. Y.) 437; Metropolitan Bank *v.* Lord, 1 Abb. Pr. (N. Y. Super. Ct.) 185; Pullen *v.* Wright, 34 Minn. 315; Fish *v.* Redington, 31 Cal. 186; Burke *v.* Table Mountain Water Co., 12 Cal. 407; Busenius *v.* Coffee, 14 Cal. 91; Smith *v.* Doe, 15 Cal. 101; Blankman *v.* Vallejo, 15 Cal. 639; Castro *v.* Wetmore, 16 Cal. 379; Kuhland *v.* Sedgwick, 17 Cal. 123; Caulfield *v.* Sanders, 17 Cal. 569; Higgins *v.* Wortell, 18 Cal. 331; Wells *v.* McPike, 21 Cal. 216; Woodworth *v.* Knowlton, 22 Cal. 164; Ghirardelli *v.* McDermott, 22 Cal. 539; Towdy *v.* Ellis, 22 Cal. 651; Nelson *v.* Murray, 23 Cal. 338; Lay *v.* Neville, 25 Cal. 546; Morrill *v.* Morrill, 26 Cal. 289; Stoddard *v.* Treadwell, 26 Cal. 303; Landers *v.* Bolton, 26 Cal. 393; Moore *v.* Del Valle, 28 Cal. 170; Randolph *v.* Harris, 28 Cal 562, 87 Am. Dec. 139; Richardson *v.* Smith, 29 Cal. 530; Camden *v.* Mullen, 29 Cal. 565; Fitch *v.* Bunch, 30 Cal. 209; Blood *v.* Light, 31 Cal. 115; Leffingwell *v.* Griffing, 31 Cal. 232; Burke *v.* Carruthers, 31 Cal. 468; Reed *v.* Calderwood, 32 Cal. 109; Kinsey *v.* Wallace, 36 Cal. 462; Doll *v.* Good, 38 Cal. 287; De Godey *v.* Godey, 39 Cal. 157; Feely *v.* Shirley, 43 Cal. 369; Huston *v.* Tuein, etc., Turnpike Co., 45 Cal. 550; Bradbury *v.* Cronise, 46 Cal. 287; Leroux *v.* Murdock, 51 Cal. 541; Masters *v.* Lash, 61 Cal. 622; Young *v.* Miller, 63 Cal. 302.

Court May Instruct for Plaintiff.— Where there is only a conjunctive denial the court may instruct the jury to find for the plaintiff. Kuhland *v.* Sedgwick, 17 Cal. 123.

Alternative Denial.—A denial in the alternative form is bad. Otis *v.* Ross, 8 How. Pr. (N. Y. Supreme Ct.) 193, where the denial was that the defendant made this representation *or* that.

3. Literal Denials.—An answer which confines itself to denying *in ipsis verbis* the allegations of the complaint, and does not attempt to deny their substance or spirit, is bad as being evasive and tendering immaterial issues.[1]

Particular Amount.—The denial that the particular amount claimed is due, or that the exact sum was received, is a negative pregnant.[2]

Wrongfully and Maliciously.—If the complaint alleges that an act was wrongfully and maliciously done, a denial in the answer that it was wrongfully and maliciously done does not put in issue the doing of the act, but only its wrongful character.[3]

See Corbin *v.* George, 2 Abb. Pr. (N. Y. Supreme Ct.) 465; Salters *v.* Genin, 8 Abb. Pr. (N. Y. Super. Ct.) 253.

Separate Parargaphs.—An answer must controvert separately and specifically the charge made in each paragraph of the petition. Morgan *v.* Booth, 13 Bush (Ky.) 480.

What Constitutes a Conjunctive Denial. The mere fact that the answer makes use of the copula "and" does not necessarily make the denial a conjunctive one. Thus, an allegation in the complaint that the defendants "assumed and agreed" to pay a debt is not a statement of two distinct propositions, but the two words "assumed" and "agreed" are synonymous, and a denial that the defendants "assumed and agreed" to pay the debt is not a conjunctive denial. Jones *v.* Eddy, 90 Cal. 147. See Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; First Nat. Bank *v.* Hogan, 47 Mo. 472.

1. Rock Spring Co. *v.* Salt Lake Sanitarium Assoc., 7 Utah 158; James *v.* McPhee, 9 Colo. 486; Caulfield *v.* Sanders, 17 Cal. 569; Higgins *v.* Wartell, 18 Cal. 331; Landers *v.* Bolton, 26 Cal. 393; Seward *v.* Miller, 6 How Pr. (N. Y. Supreme Ct.) 312; Moody *v.* Belden (Supreme Ct.), 15 N. Y. Supp. 119; Miller *v.* Miller, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 30; Moser *v.* Jenkins, 5 Oregon 448; Norris *v.* Glenn, 1 Idaho 590; Robbins *v.* Lincoln, 12 Wis. 1; Burdick *v.* Briggs, 11 Wis. 126; Cuthbert *v.* Appleton, 24 Wis. 383; Miller *v.* Brunbaugh, 7 Kan. 343; Dare *v.* Pacific R. Co., 31 Mo. 480. But this last case is *overruled* by Merchants' Nat. Bank *v.* Richards, 74 Mo. 77. See Emory *v.* Phillips, 22 Mo. 499; Ells *v.* Pacific R. Co., 55 Mo. 278.

Where an answer denied the allegation of the complaint that the "bond and mortgage" contained such a condition, "as by reference to the record of said mortgage will more fully appear"—*held*, not a denial that such was the condition of the bond, and that it did not put in issue the allegation of the complaint that the whole amount secured had become due. Kay *v.* Whittaker, 44 N. Y. 565.

Likewise, in an action to recover for work and labor alleged to have been done at the request of defendant, an answer denying that the labor was performed at the request of the defendant is not a denial that the work was performed. Bradbury *v.* Cronise, 46 Cal. 287.

For further illustrations of the principle that a literal denial is evasive and tenders no issue, see Dimon *v.* Dunn, 15 N. Y. 498; Fuhn *v.* Weber, 38 Cal. 636; De Godey *v.* Godey, 39 Cal. 157; Gammon *v.* Dyke, 2 Wash. Ter. 266.

2. Conway *v.* Clinton, 1 Utah 215; Dillon *v.* Spokane County, 3 Wash. Ter. 498. A denial that property sued for is of the exact value alleged is an admission of any less value. Scovill *v.* Barney, 4 Oregon 289.

Where the complaint alleged that the defendant received a certain sum in gold coin, a denial that the amount was received in "gold coin" raises no issue. Leffingwell *v.* Griffing, 31 Cal. 232.

But where the answer averred that the value of the labor "was not over the sum of fifteen dollars or twenty dollars," it was held that this was a denial that the value of the labor was seventy-six dollars, the amount sued for, and that the answer should not be stricken out. Way *v.* Oglesby, 45 Cal. 655.

3. Kinsey *v.* Wallace, 36 Cal. 462; Feely *v.* Shirley, 43 Cal. 369; Harden *v.* Atchison, etc., R. Co., 4 Neb. 521.

A denial that the defendants "wrongfully and illegally" diverted

Time.—Where the precise time of an act alleged in a pleading is not material, a denial that the act was done at the time alleged does not raise a material issue.[1]

Slander.—An answer in slander which merely states that the defendant did not utter the precise words, at the precise time, in the particular place, and in the manner stated in the complaint, is simply stating that the complaint is not all true. Such a form of denial is a negative pregnant.[2]

In Manner and Form.—Where the answer denies the allegations of the complaint "in manner and form as therein set forth," this is a species of negative pregnant; such a form of denial refers only to the manner and form in which the plaintiff has stated his cause of action, and not to the substance of the allegations.[3]

VI. Argumentative Denials—1. Defined.—An argumentative denial arises when the pleader mistakes the matter which may be used as evidence to support a denial, and pleads it as though it were new matter. It is specially pleading matter which goes to disprove any material allegation in the complaint.[4]

certain water is an admission of the act of diversion. Harris *v.* Shontz, 1 Mont. 212; Toombs *v.* Hornbuckle, 1 Mont. 286. And a denial that defendant unlawfully entered on land is an admission of the entry. Leroux *v.* Murdock, 51 Cal. 541; Larney *v.* Mooney, 50 Cal. 610; Busenius *v.* Coffee, 14 Cal. 91. Likewise a denial that the defendant wrongfully and unlawfully took and carried away certain personal property is a confession of the taking and carrying away. Lay *v.* Neville, 25 Cal. 546; Woodworth *v.* Knowlton, 22 Cal. 164.

1. McMurphy *v.* Walker, 20 Minn. 382; Hincken *v.* Mutual Benefit L. Ins. Co., 6 Lans. (N. Y.) 21; Davison *v.* Powell, 16 How. Pr. (N. Y. Supreme Ct.) 467; Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Shearman *v.* New York Cent. Mills, 1 Abb. Pr. (N. Y. Supreme Ct.) 187; Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y. Supreme Ct.) 19.

The denial of having made an assault on the day mentioned in the complaint admits that it was committed on some other day. Baker *v.* Bailey, 16 Barb. (N. Y.) 54. And where the answer denies that the property was destroyed by fire on a certain day, this is an admission that it was destroyed at some other time. Schaetzel *v.* Germantown, etc., Ins. Co., 22 Wis. 412. The denial of a payment on a certain day is a negative pregnant with an admission of payment on some other day. Argard *v.* Parker, 81 Wis. 581.

Ownership.—The time when ownership exists is sometimes immaterial. A mere denial that the plaintiff was the owner at the time set out in his complaint is insufficient. Kuhland *v.* Sedgwick, 17 Cal. 123; Doll *v.* Good, 38 Cal. 287.

Iowa.—In *Iowa* a material issue can be raised by a literal denial of time. Where the complaint alleged that the defendant on a certain day set fire to plaintiff's hay, a denial that defendant did on that day set fire to the hay was held sufficient. Doolittle *v.* Greene, 32 Iowa 123. See Mahana *v.* Blunt, 20 Iowa 142.

2. Salinger *v.* Lusk, 7 How. Pr. (N. Y. Supreme Ct.) 430.

In an action for slander an answer is insufficient which denies the truth of two charges taken together, when the charges are made in separate paragraphs of the petition. Morgan *v.* Booth, 13 Bush (Ky.) 480.

3. Dole *v.* Burleigh, 1 Dakota 218; Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368; Seattle *v.* Buzley, 2 Wash. Ter. 26.

4. Smith *v.* Little, 67 Ind. 553.

At common law an argumentative pleading was bad. Where a plea amounted to the general issue it should have been so pleaded. Stephen Pl. (Tyler's ed.) 360. But it was permissible to explain or qualify the denial by a special traverse. Stephen Pl. (Tyler's ed.) 189.

2. What Constitutes an Argumentative Denial—Contracts.—Where the action is on a contract, an answer setting up a different one is an argumentative denial,[1] and pleading facts which show that no contract at all was made is argumentative.[2] Likewise matters which tend to show that plaintiff has not performed his contract, or that conditions precedent have not been fulfilled, are matters of evidence under a denial, and reciting them in the answer is unnecessary.[3]

Ownership.—In ejectment the setting up of title in the defendant amounts to a denial.[4] And ownership of personal property by the defendant may be proved under a general denial; therefore, where the defendant sets up property in himself, in an action for its recovery or value, this is argumentative.[5]

Torts.—In an action to recover for negligence, an answer which details the various acts of defendant which show due care is argumentative.[6] And an answer, that the tort was committed, not

1. Fleischman *v.* Stern, 90 N. Y. 110; Marston *v.* Swett, 66 N. Y. 210, 23 Am. Rep. 43; Wolf *v.* Schofield, 38 Ind. 175; Clinton County *v.* Hill, 122 Ind. 215.

A contract differing from that set up in the complaint may be specially pleaded. Becker *v.* Sweetzer, 15 Minn. 427; Taylor *v.* Richards, 9 Bosw. (N. Y.) 679; Simmons *v.* Green, 35 Ohio St. 104; Murphy *v.* Napa County, 20 Cal. 498; Gilman *v.* Bootz, 63 Cal. 120.

But if a defendant denies making the contract alleged, it is irrelevant to the case to set forth a contract he admits he did make. Puget Sound Iron Co. *v.* Worthington, 2 Wash. Ter. 472.

New York.—In *New York* it is held that the setting up a different agreement, not accompanied by a denial, is an admission of the allegations of the complaint. Fleischman *v.* Stern, 90 N. Y. 110; Marston *v.* Swett, 66 N. Y. 210, 23 Am. Rep. 43.

2. Wright *v.* Schmidt, 47 Iowa 233; Milford School Town *v.* Powner, 126 Ind. 528; Wallace *v.* Exchange Bank, 126 Ind. 265; Craig *v.* Frazier, 127 Ind. 286; Ogden *v.* Kelsey, 4 Ind. App. 299; Loeb *v.* Weis, 64 Ind. 286; Lewis *v.* Edwards, 44 Ind. 333; Day *v.* Wamsley, 33 Ind. 145; Butler *v.* Edgerton, 15 Ind. 15; Beard *v.* Tieghman (Supreme Ct.), 20 N. Y. Supp. 736; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 358, 15 Am. Rep. 682.

A defendant may deny that he signed a note, and also further allege that if his signature appears thereon it is a forgery. Ludlow *v.* Berry, 62 Wis. 78.

3. Corry *v.* Campbell, 25 Ohio St. 134; Mehurin *v.* Stone, 37 Ohio St. 49; Bannister *v.* Grassy Fork Ditching Assoc., 52 Ind. 178; Wallace *v.* Exchange Bank, 126 Ind. 265; Urton *v.* State, 37 Ind. 339.

4. Bruck *v.* Tucker, 42 Cal. 346.

The recital in the answer of the series of facts through which the defendant claims a right to the land is a mere averment of matters of evidence, and amounts to no more than a general denial. Clink *v.* Thurston, 47 Cal. 21.

An averment that the plaintiff's grantor had made a prior sale to the defendant amounts only to a denial of the plaintiff's title, and the plaintiff need not reply to it. Thompson *v.* Thompson, 52 Cal. 154.

If the complaint contains averments of the facts constituting a deraignment of title in a certain manner, and the answer contains a counter-averment that the title was derived in a different manner, this counter-averment is a denial if it alleges that the facts are not otherwise than as averred in the counter-statement. Siter *v.* Jewett, 33 Cal. 92.

5. Ferguson *v.* Rainsey, 41 Ind. 511; Sparks *v.* Heritage, 45 Ind. 66; Miller *v.* Brigham, 50 Cal. 615.

Likewise setting up title and possession in a third person is argumentative. Woodworth *v.* Knowlton, 22 Cal. 164.

6. Hoosier Stone Co. *v.* McCain, 133 Ind. 231; Adams Express Co. *v.* Darnell, 31 Ind. 21; Sargent *v.* St. Louis, etc., R. Co., 114 Mo. 348; Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518.

by the defendant, but by another, is argumentative.[1] In an action for malicious prosecution, facts showing probable cause may be given in evidence under a general denial, and an answer which alleges the existence of probable cause for the prosecution is argumentative.[2]

Matters Showing that Facts Do Not Exist.—And generally all those matters which show that a fact stated in the complaint does not exist are admissible under a denial, and if spread on the record by means of an answer will either be stricken out as argumentative, or else treated as a denial needing no reply.[3]

3. Effect.—The authorities are divided as to the effect of an argumentative denial. One line of authorities holds that an affimative defense amounting to a denial, though inconsistent with the allegations of the complaint, when not coupled or accompanied by a denial of such allegations, raises no issue; that the omission to deny is equivalent to a formal admission of the truth of the averments, and is conclusive.[4] A second line of authorities holds that an argumentative denial is a formal defect to be corrected

Contributory Negligence.—An answer alleging that the injury resulted from the carelessness of the plaintiff is an argumentative denial. Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

Where the answer alleged that the horse was killed because of the gross negligence of the plaintiff, it was held that the particular act or omission of the plaintiff in which the negligence consisted should have been averred. Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426.

1. Jackson *v.* Feather River, etc., Water Co., 14 Cal. 19; Hoffman *v.* Gordon, 15 Ohio St. 211.

2. Trogden *v.* Deckard, 45 Ind. 572; Rost *v.* Harris, 12 Abb. Pr. (N. Y. Super. Ct.), 446; Radde *v.* Ruckgaber, 3 Duer (N. Y.) 684; Simpson *v.* McArthur, 16 Abb. Pr. (N. Y. C. Pl.) 302, note; Benedict *v.* Seymour, 6 How. Pr. (N. Y. Supreme Ct.) 298.

3. Widener *v.* State, 45 Ind. 244, where the answer set up facts intended to controvert the fact that money was collected in an official capacity; Wilson *v.* Root, 43 Ind. 486; Lowry *v.* Megee, 52 Ind. 107; Watts *v.* Coxen, 52 Ind. 155; Long *v.* Hoban, 4 Cin. L. Bull. (Ohio) 986; Thompson *v.* Lynch, 29 Cal. 189, where the answer averred that no such deed was ever executed; McDonald *v.* Davidson, 30 Cal. 174. *Compare* Page *v.* Merwin, 54 Conn. 426; Colorado Cent. R. Co. *v.* Mollandin, 4 Colo. 154; Colorado Cent. R. Co. *v.* Blake, 3 Colo. 417; Way *v.* Oglesby, 45 Cal. 655; Goddard *v.* Fulton, 21 Cal. 430.

In all the cases except those in *New York* the argumentative denials seem to have performed the function of a traverse; they were held good denials needing no reply; or else, if objection were taken to them, it had to be in the trial court by motion or demurrer, and if not so taken the objection was waived. See all the cases *ante*.

4. Fleischman *v.* Stern, 90 N. Y. 110; Beard *v.* Tilghman (Supreme Ct.) 20 N. Y. Supp. 736; Tell *v.* Beyer, 38 N. Y. 161. *Compare* Newton *v.* Lee, 139 N. Y. 332. Where an answer, instead of directly denying a material allegation of the complaint, contains a version of the transaction which is in some respects inconsistent with the allegation, this will not amount to a denial so as to prevent the allegation from being taken as true. West *v.* American Exch. Bank, 44 Barb. (N. Y.) 175; Wood *v.* Whiting, 21 Barb. (N. Y.) 190; Paige *v.* Willet, 38 N. Y. 28; Miller *v.* Winchofer, N. Y. Daily Reg. March 30, 1881.

"I hold it therefore to be incontrovertible that every special defense which consists of matter which goes to disprove any material allegation in the complaint is defective, and must be stricken out on motion." Per Selden, J., in Benedict *v.* Seymour, 6 How. Pr. (N. Y. Supreme Ct.) 307.

by motion or demurrer, and that if not so corrected in the trial court the objection is waived.[1] A third line of authorities positively sanctions an argumentative denial, holding that facts set forth in an answer, which only in effect controvert the allegations of a complaint, may be properly pleaded, either by themselves or in connection with a direct denial of the main allegations thereof.[2]

VII. General Denial Coupled with Admissions—1. Generally.—The authorities are in a hopeless state of confusion as to whether it is permissible to use a general denial in connection with express admissions. The formula sometimes used, that the defendant "denies each and every allegation of the complaint not herein expressly admitted," has been condemned in a great many cases which hold that the denial, if not general, must be specific.[3] The

1. Judah *v.* Vincennes University, 23 Ind. 272; Pottlitzer *v.* Wesson (Ind. App.), 35 N. E. Rep. 1030; Day *v.* Wamsley, 33 Ind. 146; Bondurant *v.* Bladen, 19 Ind. 160; Urton *v.* State, 37 Ind. 339; Port *v.* Russell, 36 Ind. 60, 10 Am. Rep. 5; Allen *v.* Randolph, 48 Ind. 496; Ohio, etc., R. Co. *v.* Hemberger, 43 Ind. 462; Western Union Tel. Co. *v.* Meek, 49 Ind. 53; Smith *v,* Denman, 48 Ind. 65. See other cases under other paragraphs of this section.

General Denial and Argumentative Denial Both Pleaded.—When both a general denial and an argumentative one are pleaded, the trial court may strike out the argumentative one, either on demurrer or on motion. Clodfelter *v.* Lucas, 7 Ind. App. 379; Tewksbury *v.* Howard (Ind.), 37 N. E. Rep. 355; Adams Express Co. *v.* Darnell, 31 Ind. 20; Colchen *v.* Ninde, 120 Ind. 88; Radabaugh *v.* Silvers (Ind.), 35 N. E. Rep. 694; Walling *v.* Burgess, 122 Ind. 299; Toledo, etc., R. Co. *v.* Stephenson, 131 Ind. 203; Fruito *v.* Elmore (Ind. App.), 34 N. E. Rep. 829; Bash *v.* Young, 2 Ind. App. 297; Huntington County *v.* Huffman, 134 Ind. 1; Palmerton *v.* Hoop, 131 Ind. 23; Sluyter *v.* Union Cent. L. Ins. Co., 3 Ind. App. 312; Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376; Mitchell *v.* Noell, 39 Ind. 399; Bolton *v.* Miller, 6 Ind. 262; Root *v.* Hibben, 66 Ind. 247; O'Harra *v.* Stone, 48 Ind. 417; Craig *v.* Frazier, 127 Ind. 286; Wickwire *v.* Angola, 4 Ind. App. 253; Garrison *v.* Clark, 11 Ind. 369; Cam *v.* Hunt, 41 Ind. 466; Westcott *v.* Brown, 13 Ind. 83; Rhode *v.* Green, 26 Ind. 83; Waggoner *v.* Liston, 37 Ind. 357; Chicago, etc., R. Co. *v.* West, 37 Ind. 211; City F. Ins. Co. *v.* Carrugi, 41 Ga. 660; Rosenberg *v.* Claflin Co. (Ala., 1892), 10 So. Rep. 521; Penter *v.* Staight, 1 Wash. 365. *Compare* Charles *v.* Malott, 51 Ind. 350; Kernodle *v.* Caldwell, 46 Ind. 153.

Florida.—It cannot be alleged for error that the court struck out, or refused to strike out, a plea alleging only facts which might have been given in evidence under the general issue. Davis *v.* Shuler, 14 Fla. 438.

2. McDonald *v.* American Mortgage Co., 17 Oregon 626; Hill *v.* Smith, 27 Cal. 476; Frisch *v.* Caler, 21 Cal. 71; Bassett *v.* Enwright, 19 Cal. 636; Farrior *v.* Houston, 95 N. Car. 578; Woodward *v.* Sloan, 27 Ohio St. 592; McNutt *v.* Kaufman, 26 Ohio St. 127; Singer Mfg. Co. *v.* Brill, 5 Cin. L. Bull. (Ohio) 523. See other cases under other paragraphs of this section.

If the plaintiff places inconsistent allegations in the same count of his complaint, it is sufficient for the defendant to deny the allegations which he wishes to controvert, leaving the others unnoticed. Perkins *v.* Brock, 80 Cal. 320. See also Durre *v.* Brown (Ind. App., 1893), 34 N. E. Rep. 577; Vanduyn *v.* Hepner, 45 Ind. 589; Stoddard *v.* Johnson, 75 Ind. 20; Nicholson *v.* Caress, 76 Ind. 24; Mays *v.* Hedges, 79 Ind. 288; Webb *v.* Corbin, 78 Ind. 403; Clauser *v.* Jones, 100 Ind. 123; Kinney *v.* Dodge, 101 Ind. 573; Sohn *v.* Jervis, 101 Ind. 578; Leary *v.* Moran, 106 Ind. 560.

3. Miller *v.* McCloskey, 1 Civ. Pro. Rep. (N. Y. Supreme Ct.) 252; Luce *v.* Alexander, 4 Civ. Pro. Rep. (N. Y. Super. Ct.) 428; Callanan *v.* Gilman, 67

same authorities hold that, unless amended, such a form of denial is nugatory, and admits the allegations of the complaint.[1] Other authorities take a middle ground with reference to such form of an answer. They hold that if an answer containing a denial of the allegations of the complaint, except as thereinafter stated, is thereby rendered indefinite, uncertain, or complicated, the remedy is by motion to make the answer more definite, and not the exclusion of evidence upon the trial.[2] But probably the weight of authority is in favor of allowing a general denial of all allegations not otherwise admitted. When there is no ambiguity in what is stated, admitted, or qualified, and when the allegations of the complaint are so specific that there can be no mistake in ascertaining what is put in issue and no difficulty in punishing the defendant if the verification is false, this form of denial is sufficient.[3]

How. Pr. (N. Y. Super. Ct.) 464; Hoffman *v.* New York, etc., R. Co., 50 N. Y. Super. Ct. 403; Potter *v.* Frail, 67 How. Pr. (N. Y. Supreme Ct.) 445; People *v.* Northern R. Co., 53 Barb. (N. Y.) 101; People *v.* Snyder, 41 N. Y. 400; Chamberlin *v.* American Nat., etc., L. Co., 5 N. Y. Wkly. Dig. 128; Hammond *v.* Earle, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 105; McEncroe *v.* Decker, 58 How. Pr. (N. Y. Supreme Ct.) 250; Bixby *v.* Drexel, 9 Rep. (N.Y. C. Pl.) 630; Clark *v.* Dillon, 4 Civ. Pro. Rep. (N.Y. C. Pl.) 245; Leary *v.* Boggs, 3 Civ. Pro. Rep. (N. Y. Supreme Ct.) 227; Scott *v.* Royal Exch. Shipping Co., 5 N. Y. Month. L. Bull. 84; Manner *v.* Simpson, 13 Daly (N. Y.) 156; Millville Mfg. Co. *v.* Salter, 15 Abb. N. Cas. (N. Y.) 305; Thierry *v.* Crawford, 33 Hun (N. Y. Supreme Ct.) 366; Spiegel *v.* Thompson, 1 How. Pr. N. S. (N. Y. City Ct.) 129; Rosenwald *v.* Hammerstein, 12 Daly (N. Y. City Ct.) 377; People *v.* Northern R. Co., 42 N. Y. 217; Fogerty *v.* Jordan, 2 Robt. (N.Y.) 319; Bussell *v.* Bussell, N. Y. Daily Reg., Oct. 3, 1883; Clark *v.* Dillon, 97 N. Y. 370; Goodwin *v.* Hirsch, 37 N. Y. Super. Ct. 503.

"The Code seems to be so plain in this respect as not to require elucidation. A general denial is proper only when the whole complaint, or, if the complaint contains more than one cause of action, when one of the counts or causes of action, can be wholly denied. A specific denial is proper when the complaint, or one of the causes of action, cannot be wholly denied, in which case such portions of the complaint may be denied as can be, and the remainder stand admitted by the failure to deny." Per Follett, J., in Potter *v.* Frail, 67 How. Pr. (N. Y. Supreme Ct.) 446.

The point of objection raised in Clark *v.* Dillon, 97 N. Y. 370, was that such an answer throws upon the opposite party the necessity of first determining the legal question as to how far the facts stated may properly be said to qualify or explain others, before the pleader can know what facts are admitted or denied by the answer.

A defendant need not deny in his answer any allegations he does not intend to controvert; they are admitted by leaving them unnoticed. Newell *v.* Doty, 33 N. Y. 83.

1. Miller *v.* McCloskey, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 303; McEncroe *v.* Decker, 58 How. Pr. (N. Y. Supreme Ct.) 250; Clark *v.* Dillon, 97 N. Y. 370; Goodwin *v.* Hirsch, 37 N. Y. Super. Ct. 503. See also preceding cases.

And the granting or refusing a motion to amend such an answer is wholly discretionary with the trial court. Rosenwald *v.* Hammerstein, 12 Daly (N. Y.) 377.

Quære, whether a defendant can *specifically* admit a *part* of an *entire* allegation, and put other parts of it in issue by a general denial. Fogerty *v.* Jordan, 2 Robt. (N. Y.) 319.

2. Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 437; Gallatin Nat. Bank *v.* Nashville, etc., R. Co. (Supreme Ct.), 4 N. Y. St. Rep. 714; Spies *v.* Roberts, 50 N. Y. Super. Ct. 301; Hammond *v.* Earle, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 105. See Potter *v.* Frail, 67 How. Pr. (N. Y. Supreme Ct.) 445.

3. Rawlings *v.* Alexander (New York City Ct.), 28 N. Y. Supp. 748; Smith *v.*

2. Answer Must be Definite and Specific as to Admissions.—While the weight of authority is in favor of allowing a general denial to be coupled with admissions and explanations, still such a form of answer must be clear and unequivocal in its admissions. The court in construing it will resolve all doubts against it, and hold that it admits allegations unless it positively indicates a purpose to make the question it purports to put in issue one of the contested issues on the trial.[1]

The Proper Form.—Where the allegations of the answer are clear and unequivocal as to the admissions, then all the other allegations of the complaint are put in issue by a denial of "each and every allegation of the complaint not hereinabove admitted or controverted."[2]

Gratz, 59 How. Pr. (N. Y. Marine Ct.) 274; Griffin *v.* Long Island R. Co., 101 N. Y. 349; Allis *v.* Leonard, 46 N. Y. 688; Genesee Mut. Ins. Co. *v.* Moynihen, 5 How. Pr. (N. Y. Supreme Ct.) 321; Haines *v.* Herrick, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 380; Parshall *v.* Tillon, 13 How. Pr. (N. Y. Supreme Ct.) 7; People *v.* Northern R. Co., 42 N. Y. 217; Youngs *v.* Kent, 46 N. Y. 672; Calhoun *v.* Hallen, 25 Hun (N. Y.) 155; Wheeler *v.* Billings, 38 N. Y. 263; Fellows *v.* Muller, 38 N. Y. Super. Ct. 138; Owens *v.* Hudnut's Pharmacy, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 145; Ingle *v.* Jones, 43 Iowa 286; Kingsley *v.* Gilman, 12 Minn. 515; Reuscher *v.* Hudson, 1 Clev. Rep. (Ohio) 218. See cases *infra*, notes 1 and 2.

This form of answer, while not to be commended, is permissible, and serves to put in issue all the allegations in the complaint not embraced in the exception. Crane *v.* Crane, 43 Hun (N. Y.) 311.

1. Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226; Malcolm *v.* Lyon (C. Pl.), 19 N. Y. Supp. 210; St. Anthony Falls Water Power Co. *v.* King Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Leyde *v.* Martin, 16 Minn. 38.

Where both a general denial and special pleas are employed, the denials ought to be so framed as to leave no doubt in the mind of the court and the adverse party as to what is denied and what admitted. Long *v.* Long, 79 Mo. 644.

Where an answer denies each and every allegation of the petition "not hereinafter expressly admitted," and there is some doubt as to what allegations are admitted, the trial court may, on motion, require more specific denials. Hintrager *v.* Richter, 85 Iowa 222.

A general denial, in an answer, of all allegations not expressly admitted or qualified, is inapplicable to a subject as to which specific answer is made. Davenport *v.* Ladd, 38 Minn. 545.

See the following cases, where it was held that the admissions contained in the answer were sufficiently definite and certain, and that the other allegations of the complaint were in issue. Claffy *v.* O'Brien (C. Pl.), 10 N. Y. Supp. 103; Harland *v.* Howard (Supreme Ct.), 10 N. Y. Supp. 449; Walsh *v.* Mehrback, 5 Hun (N. Y.) 448; Lipscomb *v.* Lipscomb, 32 S. Car. 243; Becker *v.* Sweetzer, 15 Minn. 427.

Averment of Possession.—An averment of possession is admitted by an answer which simply argues against such possession; nor does the general statement, that "all allegations, except as before admitted, are denied," render such an ambiguous denial any the less an admission. Bredell *v.* Alexander, 8 Mo. App. 110.

2. Griffin *v.* Long Island R. Co., 101 N. Y. 354. And see the following cases, where the form was almost identical: Calhoun *v.* Hallen, 25 Hun (N. Y.) 155, Allis *v.* Leonard, 46 N. Y. 688; Fellows *v.* Muller, 38 N. Y. Super. Ct. 137; Tracey *v.* Baker, 38 Hun (N. Y.) 263; Spies *v.* Roberts, 50 N. Y. Super. Ct. 301; Crane *v.* Crane, 43 Hun (N. Y.) 309; Mingst *v.* Bleck, 38 Hun (N. Y.) 358; Gallatin Nat. Bank *v.* Nashville, etc., R. Co. (Supreme Ct.), 4 N. Y. St. Rep. 714; Ingle *v.* Jones, 43 Iowa 286.

The form, "except as hereinafter stated or admitted," was held by the U. S. Supreme Court to amount in *New York* to a sufficient general denial

VIII. Denials of Legal Conclusions—1. Generally.—A denial of a legal conclusion stated in the complaint is a nullity. When the answer denies only the legal conclusions, judgment on the pleadings may be allowed, on motion.[1]

2. Denial of Indebtedness.—The denial of any indebtedness, without a denial of any of the facts from which that indebtedness follows as a conclusion of law, raises no issue. Such a denial has no legal effect, and is bad on motion or demurrer, and judgment may be rendered for the plaintiff on the pleadings, unless the answer is amended.[2]

of all allegations of the complaint not admitted to authorize evidence to be given to show any of such allegations to be untrue. Burley *v.* German-American Bank, 111 U. S. 216, *citing* People *v.* Ryder, 12 N. Y. 433; Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Allis *v.* Leonard, 46 N.Y. 688; Wheeler *v.* Billings, 38 N. Y. 263; Hier *v.* Grant, 47 N. Y, 278; Weaver *v.* Barden, 49 N. Y. 286. See also Kingsley *v.* Gilman, 12 Minn. 518; Becker *v.* Sweetzer, 15 Minn. 427; Leyde *v.* Martin, 16 Minn. 38.

The form of a denial of "each and every allegation in the complaint not herein specifically admitted or denied" was approved in Owens *v.* Hudnut's Pharmacy (Supreme Ct.), 12 N. Y. Supp. 700.

1. Simpson *v.* Prather, 5 Oregon 87; McMurray *v.* Gifford, 5 How. Pr. (N. Y. Supreme Ct.) 14; Pierson *v.* Cooley, 1 Code Rep. (N. Y.) 91; Beers *v.* Squire, 1 Code Rep. (N. Y.) 84; Mullen *v.* Kearney, 2 Code Rep, (N. Y.) 18; Fleury *v.* Roget, 5 Sandf. (N. Y.) 646; Excelsior Bank *v.* Campbell, 4 Thomp. & C. (N. Y.) 549; Sappington *v.* Jeffries, 15 Mo. 628; Engler *v.* Bate, 19 Mo. 543; Nelson *v.* Murray, 23 Cal. 338; Wells *v.* McPike, 21 Cal. 215; Frasier *v.* Williams, 15 Minn. 288; Downer *v.* Read, 17 Minn. 493; Wright *v.* Schmidt, 47 Iowa 233; State *v.* Bryant, 55 Iowa 451.

A denial that plaintiff, a lessor seeking to have his title quieted against the lessee, "lawfully entered" or is in "lawful possession," or that defendant "has committed any breaches of covenant so as to work a forfeiture," is a mere denial of legal conclusions, and is bad on demurrer. Baldwin *v.* Rees, 8 Record (Ohio) 556.

A denial that the contract set up in the petition "is or should be in any manner binding on the company" is bad. U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 467, 32 Am. Rep. 380. *Compare* Nash *v.* St. Paul, 11 Minn. 174; Simmons *v.* Sisson, 26 N. Y. 265; Dimon *v.* Dunn, 15 N. Y. 498; Cottle *v.* Cole, 20 Iowa 481.

In an action to enforce a lien, a denial that the plaintiff has a lien is a denial of a conclusion of law. Bradbury *v.* Cronise, 46 Cal. 287.

An answer in foreclosure which admits the making of the mortgage as security for a debt, admits the cause of action; a denial of the remaining allegations is aimed at a mere legal conclusion, and puts nothing in issue. Kay *v.* Churchill, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 83.

A positive denial of usury will not prevail against admissions of facts which show usury. Manice *v.* New York Dry Dock Co., 3 Edw. Ch. (N. Y.) 143; Storer *v.* Coe, 2 Bosw. (N. Y.) 662.

A denial of value or the amount of damages is a denial of a legal conclusion. Starr *v.* Cragin, 24 Hun 177; Huston *v.* Twin, etc, Turnpike R. Co., 45 Cal. 550. See Baydston *v.* Giltner, 3 Oregon 118.

Right to Open and Close.—Where the complaint alleges facts not essential for the plaintiff to aver or prove, and the same are denied by the answer, this does not deprive a defendant who sets up an affirmative defense of the right to open and close the case. Murray *v.* New York L. Ins. Co., 85 N. Y. 236.

2. *California.*—Curtis *v.* Richards, 9 Cal. 33; Wells *v.* McPike, 21 Cal. 215; Lightner *v.* Mengel, 35 Cal. 452; Kinney *v.* Osborne, 14 Cal. 112.

Ohio.—Knox *v.* Lloyd, 18 Ohio St. 353; Larimore *v.* Wells, 29 Ohio St. 13.

New York. — Pierson *v.* Cooley, 1 Code Rep. (N. Y.) 91; Fosdick *v.* Groff, 22 How. Pr. (N. Y. Supreme Ct.) 158;

When Defendant May Deny Indebtedness.—But when in his complaint plaintiff avers indebtedness as a substantive fact, instead of alleging the facts out of which the indebtedness grew, defendant may treat the averment as an alleged fact, and so deny it in his answer.[1]

3. Fraud.—Fraud is a legal conclusion from the facts alleged in the complaint. A denial of fraud is the denial of a legal conclusion, and is bad.[2]

Edson *v.* Dillaye, 8 How. Pr. (N. Y. Supreme Ct.) 273; Emery *v.* Baltz, 94 N. Y. 408; Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34.

Kentucky.—Haggard *v.* Hay, 13 B. Mon. (Ky.) 175; Clarke *v.* Finnell, 16 B. Mon. (Ky.) 329; Francis *v.* Francis, 18 B. Mon. (Ky.) 57.

Colorado.—Gale *v.* James, 11 Colo. 540; Watson *v.* Lemen, 9 Colo. 200.

Iowa.—Stucksleger *v.* Smith, 27 Iowa 286; Callanan *v.* Williams, 71 Iowa 363; Mann *v.* Howe, 9 Iowa 546; Morton *v.* Coffin, 29 Iowa 235; Bridge *v.* Livingston, 11 Iowa 57; McIntosh *v.* Lee, 57 Iowa 356; Sheldon *v.* Middleton, 10 Iowa 17.

Arkansas.—Lawrence *v.* Meyer, 35 Ark. 104; Gwynn *v.* McCauley, 32 Ark. 97; Fain *v.* Goodwin, 35 Ark. 109; Moore *v.* Nichols, 39 Ark. 145.

Idaho.—Swanholm *v.* Reeser, 2 Idaho 1167.

Montana.—Higgins *v.* Germaine, 1 Mont. 230.

Nevada.—Skinker *v.* Clute, 9 Nev. 342.

United States.—Buller *v.* Sidell, 43 Fed. Rep. 116. See Mills *v.* Duryee, 7 Cranch (U. S.) 481.

Nil Debet.—An answer which is merely a formal plea of *nil debet*, or nothing more than that the defendant does not owe the debt, is but a conclusion of law, and is a nullity. Lawrence *v.* Meyer, 35 Ark. 104; Gwynn *v.* McCauley, 32 Ark. 97; Fain *v.* Goodwin, 35 Ark. 109; Moore *v.* Nichols, 39 Ark. 145. A plea of *nil debet* is an insufficient answer to an action on a judgment. Indianapolis, etc., R. Co. *v.* Risley, 50 Ind. 60.

Refusal to Deliver Goods.—In an action for breach of contract an averment that defendant "refused" to deliver certain goods, as required by the contract, is material, and is not denied by allegations of the answer that nothing is due plaintiff as damages, and that defendant is and always has been "ready and willing" to deliver the goods. Hand *v.* Belcher Mosaic Glass Co. (City Ct.), 9 N. Y. Supp. 738.

Ohio.—A denial of indebtedness simply, while bad, does not warrant a judgment for plaintiff on the pleadings. Lewis *v.* Smith, 2 Disney (Ohio), 434.

1. McLaughlin *v.* Wheeler, 1 S. Dak. 497; Anonymous, 2 Code Rep. (N. Y.) 67; Westlake *v.* Moore, 19 Mo. 556; Godfrey *v.* Cruise, 1 Iowa 92; Higgins *v.* Wortell, 18 Cal. 331, where the complaint alleged indebtedness, and the answer was held bad as being a negative pregnant, but the court intimated that a different form of denial of indebtedness would have been good; Heath *v.* White, 3 Utah 474. But see Dickert *v.* Weise, 2 Utah 350. "When the plaintiff will persist in averring that the defendant is indebted to the plaintiff, instead of setting forth the contract upon which the indebtedness arises, he should not complain if the defendant takes issue upon such indebtedness." Per Ingraham, J., in Morrow *v.* Cougan, 3 Abb. Pr. (N. Y. C. Pl.) 329. See also Quin *v.* Lloyd, 41 N. Y. 349.

Sales.—In an action for the price of goods sold and delivered, an answer denying the indebtedness is the proper answer when the goods were paid for on delivery, for no indebtedness grew out of the transaction. Flowers *v.* Slater, 2 W. L. M. (Ohio) 445.

Ohio.—In pleading an account by copy, as allowed under § 122 of the Ohio Code of Civil Procedure, the allegation, in the petition, of the amount due on the account is a material allegation, and must be denied in the answer. Dallas *v.* Ferneau, 25 Ohio St. 635. *Compare* Prindle *v.* Caruthers, 15 N. Y. 425, where it was held that if a copy of the instrument is attached to the pleading and the general allegation of indebtedness is made, the defendant, by a general denial of indebtedness, puts in issue every fact alleged.

2. Scott *v.* Umbarger, 41 Cal. 411.

4. Denial that an Act Was "Duly" Done.—The word "duly," when used in a complaint, is generally a conclusion of law. Denying that an act was "duly" done raises no issue.[1]

5. Denial of Capacity.—A mere denial that the plaintiff has the capacity to sue, or that he is the owner of the property sought, or that the chose in action belongs to him, is the denial of a legal conclusion.[2]

6. Answer Containing a Legal Conclusion.—Sometimes, instead of denying a legal conclusion of the complaint, the pleader states in an affirmative form a legal conclusion in the answer, intending thereby to deny the legal effect of some matter stated in the complaint. Such a form of denial is equally faulty with that which denies a legal conclusion, and it raises no issue of fact.[3]

A positive denial of fraud in the answer will not prevail against admissions therein of facts which show that the transaction was fraudulent. Robinson *v.* Stewart, 10 N. Y. 189; Litchfield *v.* Pelton, 6 Barb. (N. Y.) 187.

Aider.—Though the statement of facts in the complaint does not constitute a sufficient allegation of fraud, yet, if the defendant in his answer denies only the legal conclusion of fraud, the doctrine of aider applies to make the complaint sufficient. Bonds *v.* Smith, 106 N. Car. 553.

1. State *v.* McGarry, 21 Wis. 496. To deny that a corporation is "duly" organized does not raise an issue of fact. Oregon Cent. R. Co. *v.* Scoggin, 3 Oregon 162.

Proceedings which are void by reason of the infirmity of the statute under which they were taken are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal. People *v.* Hastings, 29 Cal. 450. See Horner *v.* Rowley, 51 Iowa 626.

But where a complaint alleged generally that a demand for rent was duly made on the premises, an answer denying that the rent was duly demanded was held sufficient. McGlynn *v.* Moore, 25 Cal. 384.

Judgments.—Denying that a judgment was "duly" rendered is bad; if the defendant wants to controvert the fact that he is bound thereby, and to set up the defense that there was no jurisdiction in the court to render the judgment sued on, he must set out the facts. Ritchie *v.* Carpenter, 2 Wash. 513; People *v.* San Francisco, 27 Cal. 655.

Waiver of Objection.—Though an answer which denies that an act was "legally and duly" done is subject to motion on account of indefiniteness, yet if the parties proceed to trial the objection is waived. Trustees *v.* Odlin, 8 Ohio St. 293.

2. In an action by husband and wife, on a note, an answer that the note is not her separate property is the statement of a mere conclusion of law. Frost *v.* Harford, 40 Cal. 165.

A defense that the plaintiff is not the lawful owner of the note, when upon its face it runs to him, is frivolous. Felch *v.* Beaudry, 40 Cal. 440; Seeley *v.* Engell, 17 Barb. (N. Y.) 530. *Compare* Hunter *v.* Martin, 57 Cal. 365; Walrod *v.* Bennett, 6 Barb. (N. Y.) 144.

3. Conkling *v.* Manhattan R. Co. (Supreme Ct.), 12 N. Y. Supp. 846; Manufacturers' Nat. Bank *v.* Russell, 6 Hun (N. Y.) 375; Christy *v.* Dana, 42 Cal. 175; Yates *v.* Burch, 87 N. Y. 409; Cropsey *v.* Perry, 23 N. Y. Wkly. Dig. 162; Louis *v.* Brown, 7 Oregon 326; Kentucky River Nav. Co. *v.* Com., 13 Bush (Ky.) 435.

An answer alleging that the note sued on "is *non est factum* as to defendant, it not being a legal promissory note against defendant in this action," and that, owing to sickness, the defendant "was in no condition to execute a legal promissory note," avers only legal conclusions, and is insufficient as a plea of *non est factum*. Templeton *v.* Sharp (Ky., 1888), 9 S. W. Rep. 507.

Where a petition alleges that a railroad company, by virtue of a certain contract regarding a portion of its right of way, abandoned the same, and that its easement thereupon ter-

7. Denial of the Facts Impliedly Denies the Conclusion of Law.—While the denial of a legal conclusion does not deny the facts from which that conclusion is deduced, the converse is not true. The denial of the facts is an implied denial of the legal conclusion, and such implied denial is sufficient without any express denial.[1]

IX. Denials of Knowledge—1. How Such Denials Construed.—All the Codes provide for a general or specific denial of each material allegation of the complaint controverted by the defendant, *or of any knowledge or information thereof sufficient to form a belief.*[2]

If the answer denies knowledge or information of material facts set out in the complaint, it will be construed like any other denial; if it denies knowledge of all the material facts, it constitutes a general denial; if of only a part of the material facts, it will be construed as a specific denial. And the rules which apply to ordinary denials are, so far as they are applicable, applied to this form of denial.[3]

minated, the denial in the answer that the company abandoned or intended to abandon its right of way, or that its easement ceased, raises no issue of fact, but merely states a conclusion of law. Pennsylvania Co. *v.* Platt, 47 Ohio St. 366.

1. Prost *v.* More, 40 Cal. 347. And see *supra*, section IV. Allegations Admitted by a Failure to Deny.

2. See N. Y. Code Civ. Pro. § 500.

New York.—But a denial of sufficient knowledge to form a belief as to allegations contained in a complaint is not authorized in the District Court of New York City. Steinam *v.* Bell (C. Pl.), 27 N. Y. Supp. 905.

3. Schulenberg *v.* Prairie Institute, 65 Mo. 295; Griffin *v.* Long Island R. Co., 101 N. Y. 348, where the answer, although admitting some of the facts, was held a general denial; Wadleigh *v.* Marathon County Bank, 58 Wis. 546; Carr *v.* Bosworth, 68 Iowa 669; Seattle Bank *v.* Meerwaldt, 8 Wash. 630; Stevenson *v.* Flournoy, 89 Ky. 570, where a denial of knowledge or information was taken on an immaterial matter. Where a defendant denies knowledge as to the cause of action, he may also allege that, if it ever existed, it has been satisfied. Dovan *v.* Dinsmore, 33 Barb. (N. Y.) 86.

Negative Pregnant.—A denial in an answer of knowledge or information sufficient to form a belief "as to each and every allegation" in the complaint not specifically denied is bad, as containing a negative pregnant. Waters *v.* Curtis, 13 Daly (N. Y.) 179. See Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630.

Denial of Plaintiff's Capacity.—Where it is provided that an "affirmative allegation," that plaintiff is not a corporation or has not capacity to sue, must be made to put such fact in issue, the denial of any knowledge or information sufficient to form a belief that plaintiff is a corporation, or has capacity to sue, creates no issue. A denial of knowledge or information does not amount to a specific allegation that the corporation does not exist, any more than does an ordinary denial. Concordia Sav., etc., Assoc. *v.* Read, 93 N. Y. 474; Cooper *v.* Wandel (Supreme Ct.), 9 N. Y. St. Rep. 9; City Bank *v.* Drake, 5 N. Y. Wkly. Dig. 477; First Nat. Bank *v.* Clarke, 22 N. Y. Wkly. Dig. 569; Bengtson *v.* Thingvalla Steamship Co., 3 Civ. Pro. Rep. (N. Y. Supreme Ct.) 204; Land, etc., Co. *v.* Williams, 35 S. Car. 367. Such an answer was held frivolous in John Dixon Crucible Co. *v.* New York City Steel Works, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 195.

Contra.—The defendant may deny knowledge and information as to whether the plaintiff is a corporation or not, as alleged in its complaint. Jackson Sharp Co. *v.* Holland, 14 Fla. 384.

Georgia.—It would seem that in *Georgia* this form of a denial shifts the

2. Form.—The courts construe this form of denial rather technically. The words of the statute must be followed, at least in substance, and the denial must embrace both "knowledge" and "information."[1] The best way to draft the answer is to follow the exact words of the statute; but a slight deviation therefrom will not vitiate.[2]

burden of proof. It is there held that a plea of *non est factum*, or of *nonpartnership*, sworn to by the defendant "to the best of his knowledge and belief," does not cast the onus upon the plaintiff, but only entitles the defendant to go to the jury and establish his defense. Martin *v.* Lamb, 77 Ga. 252.

1. James *v.* McPhee, 9 Colo. 486; Haney *v.* People, 12 Colo. 345; Hastings *v.* Gwynn, 12 Wis. 672; Cutler *v.* McCormick, 48 Iowa 406; Manny *v.* French, 23 Iowa 250; Claflin *v.* Reese, 54 Iowa 544; Durden *v.* Simmons, 84 N. Car. 555; Farmer's, etc., Bank *v.* Charlotte, 75 N. Car. 45; Hantemann *v.* Gray, 5 Civ. Pro. Rep. (N. Y. City Ct.) 224, note; Lloyd *v.* Burns, 38 N. Y. Super. Ct. 423; First Nat. Bank *v.* Clarke, 22 N. Y. Wkly. Dig. 569; Edwards *v.* Lent, 8 How. Pr. (N. Y. Supreme Ct.) 28; Heye *v.* Bolles, 33 How. Pr. (N. Y. C. Pl.) 266; People *v.* McCumber, 15 How. Pr. (N. Y. Supreme Ct.) 186; Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553. And for a lack in this respect the answer raises no issue, and the allegations of the complaint are admitted. Fagg *v.* Southern Bldg. Assoc., 113 N. Car. 364. See cases *supra*.

A denial of knowledge sufficient to form a belief is not equivalent to a denial "of any knowledge or information thereof sufficient to form a belief," and does not form an issue. First Nat. Bank *v.* Clarke, 22 N. Y. Wkly. Dig. 569; Edwards *v.* Lent, 8 How. Pr. (N. Y. Supreme Ct.) 28; Heye *v.* Bolles, 33 How. Pr. (N. Y. C. Pl.) 266; People *v.* McCumber, 15 How. Pr. (N. Y. Supreme Ct.) 186; Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553; Hantemann *v.* Gray, 5 Civ. Pro. Rep. (N. Y. City Ct.) 224, note; Lloyd *v.* Burns, 38 N. Y. Super. Ct. 423.

But the following cases would seem to hold that a denial of knowledge alone is sufficient: Genesee Mut. Ins. Co. *v.* Moynihen, 5 How. Pr. (N. Y. Supreme Ct.) 321; Snyder *v.* White, 6 How. Pr. (N. Y. Supreme Ct.) 321; Flood *v.* Reynolds, 13 How. Pr. (N. Y. Supreme Ct.) 112; Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Richter *v.* McMurray, 15 Abb. Pr. (N. Y. C. Pl.) 346; Temple *v.* Murray, 6 How. Pr. (N. Y. Supreme Ct.) 329.

2. Cumins *v.* Lawrence County, 1 S. Dak. 158; Robbins *v.* Baker, 2 Oregon 52; Sherman *v.* Osborn, 8 Oregon 67; Colburn *v.* Barrett, 21 Oregon 27; Wilson *v.* Allen, 11 Oregon 154; Ninde *v.* Oskaloosa, 55 Iowa 207; Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Richter *v.* McMurray, 15 Abb. Pr. (N. Y. C. Pl.) 346; Snyder *v.* White, 6 How. Pr. (N. Y. Supreme Ct.) 321; Johnson *v.* Haberstro (Supreme Ct.), 7 N. Y. St. Rep. 225; McGuinness *v.* New York, 13 N. Y. Wkly. Dig. 522.

Forms Held Good.—An answer averring that the defendant has "no knowledge or information sufficient to form a belief as to the truth of any of the allegations in said complaint contained" is good. Grocers' Bank *v.* O'Rorke, 6 Hun (N. Y.) 18.

Where defendants in their answer "say that they have no knowledge or information sufficient to form a belief," etc., and "aver the truth to be that they are entirely ignorant and uninformed, and have not any knowledge or information sufficient to form a belief," etc., this is sufficient in form. Meehan *v.* Harlem Sav. Bank, 5 Hun (N. Y.) 439. And see Flood *v.* Reynolds, 13 How. Pr. (N. Y. Supreme Ct.) 112, for an approved form.

Forms Held Bad.—In the following cases the form of answer was held bad as not meeting the requirements of the statute: Sayre *v.* Cushing, 7 Abb. Pr. (N. Y. C. Pl.) 371; Elton *v.* Markham, 20 Barb. (N. Y.) 343; Nichols *v.* Jones, 6 How. Pr. (N. Y. Supreme Ct.) 355; Bidwell *v.* Overton, 26 Abb. N. Cas. (N. Y. C. Pl.) 402; Collins *v.* North Side Pub. Co. (City Ct.), 20 N. Y. Supp. 892; Baylis *v.* Stimson, 110 N. Y. 621; Sheldon *v.* Sabin, 12 Daly (N. Y.) 84; Waters *v.* Curtis, 13 Daly (N. Y.) 179; Wood *v.* Staniels, 3 Code Rep. (N. Y.) 152; Lay Gas Mach. Co. *v.* Falls of

3. Denials "upon Information and Belief."—The courts have, by a construction of the provision allowing a denial of knowledge or information, reached the conclusion that a denial "upon information and belief" is also allowed by such provision. A defendant may deny, upon information and belief, allegations of the complaint when he has no personal knowledge as to the facts alleged, but has information sufficient to induce him to believe that the allegations are not true.[1]

Neuse Mfg. Co., 91 N. Car. 74; Ord *v.* Steamer Uncle Sam, 13 Cal. 370; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Watson *v.* Hawkins, 60 Mo. 550.

Denial of the Allegation not Necessary.—A defendant, after having alleged that he has no knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint, is not required to add a statement that he therefore denies the same, as the denial in the words of the Code forms a complete issue, and such an issue is not aided by such additional averment. Cumins *v.* Lawrence County, 1 S. Dak. 158; Flood *v.* Reynolds, 13 How. Pr. (N. Y. Supreme Ct.) 112.

Denial of Knowledge Coupled with Admissions.—An answer, by which "defendant denies any knowledge or information sufficient to form a belief as to every allegation in the complaint not hereinbefore admitted," will be held to put in issue the facts alleged in the complaint and not specifically admitted by the answer, where the denials are so specific as to clearly point out the allegations of the complaint to which they are intended to apply. Tracy *v.* Baker, 38 Hun (N. Y.) 263.

And see McGuinness *v.* New York, 13 N. Y. Wkly. Dig. 522, for a sufficient form of a denial of knowledge of some of the allegations of the complaint, and an admission of others.

1. Sheldon *v.* Heaton, 78 Hun (N. Y.) 50; Wood *v.* Raydure, 39 Hun (N. Y.) 144; Humble *v.* McDonough (Buffalo Super. Ct.), 25 N. Y. Supp. 965; Sackett *v.* Havens, 7 Abb. Pr. (N. Y. Supreme Ct.) 371, note; Henderson *v.* Manning, 5 Civ. Pro. Rep. (N. Y. City Ct.) 221; Macauley *v.* Bromell Printing Co., 5 Civ. Pro. Rep. (N. Y. City Ct.) 431; Bennett *v.* Leeds Mfg. Co., 110 N. Y. 151; Brotherton *v.* Downey, 21 Hun (N. Y.) 436; Musgrove *v.* New York, 51 N. Y. Super. Ct. 528; Maclay *v.* Sands, 94 U. S. 586; Jones *v.* Petaluma, 36 Cal. 230.

"It is quite clear, from these provisions, that a party has no right to interpose an unqualified denial in a verified answer unless it be founded upon personal knowledge; and that, where he has no positive knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted, but bound, at his peril, to deny upon information and belief." Per Barrett, J., in Brotherton *v.* Downey, 21 Hun (N. Y.) 436.

"Except in those special cases in which the defendant is conclusively presumed to have positive knowledge as to the existence or non-existence of a fact alleged in the complaint, we have no doubt that the defendant may interpose a denial in this form. He may have information which satisfies him how the fact is, and yet he may not have any actual, positive knowledge thereof. In such case he can deny in no other form. He cannot deny positively, because he does not know positively that such a denial would be true. He cannot deny knowledge or information sufficient to form a belief, because he has formed a belief on sufficient information. The only mode in which he can answer truly is to deny upon information and belief." Per Lyon, J., in Stacy *v.* Bennett, 59 Wis. 235.

A denial upon "information and belief" is peculiarly proper when defendant is ignorant of the facts alleged, and must verify his answer. He cannot safely deny, nor is he bound to admit. Snyder *v.* White, 6 How. Pr. (N. Y. Supreme Ct.) 321; Lidgerwood Mfg. Co. *v.* Baird, 6 Civ. Pro. Rep. (N. Y. Super. Ct.) 54; Taylor *v.* Smith (Supreme Ct.), 8 N. Y. Supp. 519; Holmes *v.* Continental Co., N. Y. Daily Reg., Nov. 11, 1884; Kitchen *v.* Wilson, 80 N. Car. 192; Leyner *v.* Fuller, 67 Iowa 188.

The answer to a petition to the Su-

4. When a Denial of Knowledge or Information Cannot be Interposed.—Although the denial of knowledge or information is an authorized form of denial, it is by no means absolute or universal. The true distinction to be observed in determining when a defendant may avail himself of the privilege accorded to him of answering in the qualified form allowed by the Code, and when he must positively admit or deny the allegations, is to inquire whether the facts alleged are presumptively within the defendant's knowledge. If they are, he cannot avail himself of this form of denial.[1]

preme Court for a writ of mandate may deny the allegations of the petition upon information and belief. People *v.* Alameda County, 45 Cal. 395. See Walker *v.* Buffandeau, 63 Cal. 312.

A denial upon information and belief may be interposed when it appears that the facts in controversy are not within the personal knowledge of the defendant, and that the information on which he bases his belief comes from agents employed to transact the business out of which the litigation arose. Maclay *v.* Sands, 94 U. S. 586.

The Proper Form.—The answer must expressly state that the defendant denies according to both his information and his belief. This must be expressed in the answer, not in the verification. Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Stent *v.* Continental Nat. Bank, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 88. And see Metraz *v.* Pearsall, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 90, and Davis *v.* Potter, 4 How. Pr. (N. Y. Supreme Ct.) 155, where the forms of answer were approved.

Contra.—A denial in an answer "upon information and belief" is not authorized by the Code, and is insufficient. Swinburne *v.* Stockwell, 58 How. Pr. (N. Y. Supreme Ct.) 312; Pratt Mfg. Co. *v.* Jordan Iron, etc., Co., 33 Hun (N. Y.) 143; Edwards *v.* Lent, 8 How. Pr. (N. Y. Supreme Ct.) 28; Bidwell *v.* Overton, 26 Abb. Pr. N. Cas. (N. Y. C. Pl.) 402; Powers *v.* Rome, etc., R. Co., 3 Hun (N. Y.) 285; Therasson *v.* McSpedon, 2 Hilt. (N. Y.) 1; Pfandler Process Fermentation Co. *v.* McPherson (Supreme Ct.), 20 N. Y. St. Rep. 473; Schroeder *v.* Wanzor, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 13; Nelson *v.* Murray, 23 Cal. 338. The above authorities hold this view because, though a party does have some information touching the allegations of the complaint, still, if there is a want of belief on his part, he is justified in denying the allegations on the ground that he has no information or knowledge sufficient to form a belief. See Sackett *v.* Havens, 7 Abb. Pr. (N. Y.) 371, note; State *v.* Hancock County, 11 Ohio St. 183; McKenzie *v.* Washington L. Ins. Co., 2 Disney (Ohio) 223. *Compare* the following cases: First Nat. Bank *v.* Clark, 22 N. Y. Wkly. Dig. 569; Sheldon *v.* Sabin (C. Pl.), 4 Civ. Pro. Rep. (N. Y.) 4; Hantemann *v.* Gray (City Ct.), 5 Civ. Pro. Rep. (N. Y.) 224, note; Henderson *v.* Manning, 5 Civ. Pro. Rep. (N. Y. City Ct.) 221; Judd *v.* Cushing, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 358; Zimmermann *v.* Hunt (Supreme Ct.), 7 N. Y. St. Rep. 778; Hoffman *v.* New York, etc., R. Co., 50 N. Y. Super. Ct. 403; Simmonds Mfg. Co. *v.* Browning, N. Y. Daily Reg., Jan. 24, 1884; Moss *v.* Barton, 12 N. Y. Wkly. Dig. 524; Myers *v.* Bank of Portsmouth (Supreme Ct.), 2 N. Y. St. Rep. 125; Richards *v.* Frechsel, 14 Abb. N. Cas. (N. Y. City Ct.) 316, note; Oppermann *v.* Barr, N. Y. Daily Reg., April 28, 1884; Roby *v.* Hallock, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 86; City Bank *v.* Drake, 5 N. Y. Wkly. Dig. 477; Kamlah *v.* Salter, 6 Abb. Pr. (N. Y. C. Pl.) 226; Neuberger *v.* Webb, 24 Hun (N. Y.) 347; Ladue *v.* Andrews, 5 N. Y. Wkly. Dig. 262; Boughen *v.* Nolan, 5 N. Y. Wkly. Dig. 100.

1. Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y. Supreme Ct.) 19; Hackett *v.* Richards, 11 N. Y. Leg. Obs. 315; Edwards *v.* Lent, 8 How. Pr. (N. Y. Supreme Ct.) 28; Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553; Kellogg *v.* Baker, 15 Abb. Pr. (N. Y. Super. Ct.) 286; Joseph Dixon Crucible Co. *v.* New York City Steel Works, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 195; Fallon *v.*

Practice where Defendant Does Not Recollect.—But there may be cases in which, although apparently within his knowledge, the defendant does not know or remember the facts alleged. If so, he must in his answer, or in the affidavit verifying it, state the lapse of time or other circumstances which he supposes warrant the qualified denial permitted by the Code.[1]

Durant, 60 How. Pr. (N. Y. Supreme Ct.) 178; Morton *v.* Jackson, 2 Minn. 219; Minor *v.* Willoughby, 3 Minn. 225; Freeman *v.* Curran, 1 Minn. 169; Elmore *v.* Hill, 46 Wis. 618. Nor can the defendant deny information when he has the means of information. Hance *v.* Remming, 1 Code Rep. N. S. (N. Y.) 204; Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553; Wesson *v.* Judd, 1 Ab. Pr. (N.Y. C. Pl.) 254; Nichols *v.* Lumpkin, 20 N. Y. Wkly. Dig. 367; Gribble *v.* Columbus Brewing Co., 100 Cal. 67. And this principle and rule of answering applies as well to a corporation as to an individual defendant. Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y. Supreme Ct.) 19. "But the statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint to enable them to answer in the proper form. * * * Any other form of denial in such cases is an evasion of the statute." Per Field, J., in San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453. See Curtis *v.* Richards, 9 Cal. 38; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621.

Rule in Equity.—The rule of requiring the defendant to answer positively as to facts which are presumptively within his knowledge is borrowed from equity practice. Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y. Supreme Ct.) 19. See Hall *v.* Wood, 1 Paige (N. Y.) 404; Sloan *v.* Little, 3 Paige (N. Y.) 103.

Effect of Denying Knowledge of a Fact Presumptively Within Defendant's Knowledge.—As to just what effect shall be given to an answer which denies knowledge of a fact which the law presumes a party to know is a matter of doubt. It has been held that such an answer is evasive and admits the allegations of the complaint. Brown *v.* Scott, 25 Cal. 190. Other authorities hold that the answer is good until struck out on motion as sham. Smalley *v.* Isaacson, 40 Minn. 450; Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Leach *v.* Boynton, 3 Abb. Pr. (N. Y. Supreme Ct.) 1.

And it has been held that, while the answer of an individual defendant may be shown by affidavits to be false, and while it may be shown that the matters are within his personal knowledge, and his answer may therefore be struck out as sham, this rule does not obtain when the defendant is a corporation. Martin *v.* Erie Preserving Co., 48 Hun (N. Y.) 81. Other authorities hold that the answer is good, and that no motion can be made to strike it out as sham, false, or frivolous. They intimate that the remedy is a criminal prosecution for the false verification. Caswell *v.* Bushnell, 14 Barb. (N.Y.) 393; Grocers' Bank *v.* O'Rorke, 6 Hun (N. Y.) 19; Hagadorn *v.* Edgewater, 59 Hun (N. Y.) 625; Farmers', etc., Bank *v.* Charlotte, 75 N. Car. 45; Erwin *v.* Lowery, 64 N. Car. 321; Swepson *v.* Harvey, 66 N. Car. 436.

Denials of Information Not Favored.—Denials of information are not favored in a pleading which a party must have leave of court to put in. O'Brien *v.* Catlin, 1 Code Rep. N. S. (N. Y.) 273.

Where a receiver is made a party defendant after the original defendant has answered, such receiver cannot deny information or knowledge of a fact admitted in the answer of the defendant. Forbes *v.* Waller, 25 N.Y. 430.

1. Richardson *v.* Wilton, 4 Sandf. (N.Y.) 708; Thorn *v.* New York Cent. Mills Co., 10 How. Pr. (N. Y. Supreme Ct.) 22; Edwards *v.* Lent, 8 How. Pr. (N. Y. Supreme Ct.) 28; Shearman *v.* New York Cent. Mills, 1 Abb. Pr. (N. Y. Supreme Ct.) 187; Wesson *v.* Judd, 1 Abb. Pr. (N. Y. C. Pl.) 254; Mott *v.* Burnett, 1 Code Rep. N. S. (N. Y.) 225; Hance *v.* Remming, 1 Code Rep. N. S. (N. Y.) 204; Brown *v.* Scott, 25 Cal. 190; Vassault *v.* Austin, 32 Cal. 597; Comerford *v.* Dupuy, 17 Cal. 308. See Jones *v.* Perot (Colo.), 34 Pac. Rep. 728.

5. What Matters are Presumptively Within Defendant's Knowledge—**Personal Acts.**—A defendant cannot deny knowledge of his own acts; nor can he deny knowledge of allegations which include personal transactions with him. In such cases a positive answer is required.[1]

Acts of Agent.—Neither a corporation nor an individual can deny knowledge of the acts of its or his agent.[2]

Sales.—Where merchandise is alleged to have been sold to defendant, he must positively deny its purchase. He cannot deny on information and belief.[3]

Contents of Records.—A party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact.[4]

1. Lewis *v.* Acker, 11 How. Pr. (N. Y Supreme Ct.) 163; Sherman *v.* Boehm, 13 Daly (N. Y.) 42. A defendant cannot deny knowledge of an allegation that he boarded and lodged with plaintiff, Byrne *v.* Benton, 3 N. Y. Month. L. Bull. 100; nor that he has not paid his taxes, Knox *v.* Galligan, 21 Wis. 470; nor whether he spat in the plaintiff's face, Richardson *v.* Wilton, 4 Sandf. (N. Y.) 708; nor whether he caused the plaintiff to be arrested on a writ, Lawrence *v.* Derby, 15 Abb. Pr. (N. Y. Super. Ct.) 346, note; nor knowledge of the quantity of goods which he admits he received, Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68. Nor can an officer of a corporation deny knowledge of the corporate existence. Brown *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51.

All the answers in the above cases were either stricken out as sham, or were held to admit the allegations.

2. Shearman *v.* New York Cent. Mills, 1 Abb. Pr. (N. Y. Supreme Ct.) 187; Loveland *v.* Garner, 74 Cal. 298; Beyre *v.* Adams, 73 Iowa 382; Nashville, C. & St. L. R. Co. *v.* Carrico (Ky.), 26 S. W. Rep. 177.

Partners.—A partner cannot be permitted to deny any knowledge or information as to a transaction alleged to have been had with his firm. Chapman *v.* Palmer, 12 How. Pr. (N. Y. Supreme Ct.) 37; Mott *v.* Burnett, 1 Code Rep. N. S. (N. Y.) 225.

Contra.—A foreign corporation may deny knowledge or information as to allegations of demand made of its agents in New York City. Warner *v.* U. S. Land, etc., Co., 53 Hun (N. Y.) 312. And a city may deny knowledge of the acts of its assessors. Smith *v.* Janesville, 26 Wis. 291. And a corporation may deny knowledge with respect to the alleged negligence of its servants in transporting goods. Boorman *v.* American Express Co., 21 Wis. 154.

3. Wing *v.* Dugan, 8 Bush (Ky.) 583; Lay Gas Mach. Co. *v.* Falls of Neuse Mfg. Co., 91 N. Car. 74; Chapman *v.* Palmer, 12 How. Pr. (N. Y. Supreme Ct.) 37. In the first two cases above, the answer was treated as a nullity, and was held to admit the allegations of the complaint; in the last case the answer was stricken out as frivolous. See Harvey *v.* Walker, 13 N. Y. Supp. 170, and Schroeder *v.* Capehart, 49 Minn. 525, where the answer was held good because not objected to.

But where an answer is verified by the attorney instead of by the defendant himself, it may deny knowledge touching a sale alleged to have been made by defendant as commission merchant. Neuberger *v.* Webb, 24 Hun (N. Y.) 347.

Contra.—In an action to recover for goods sold, defendant may deny the sale on information and belief. Richards *v.* Fuechsel, 5 Civ. Pro. Rep. (N. Y. City Ct.) 430; Wood *v.* Watson, 23 N. Y. Wkly. Dig. 85; Harvey *v.* Walker, 59 Hun (N. Y.) 114.

4. Union Lumbering Co. *v.* Chippewa County, 47 Wis. 246; Goodell *v.* Blumer, 41 Wis. 444; Mills *v.* Jefferson, 20 Wis. 50; Hathaway *v.* Baldwin, 17 Wis. 616; State *v.* McGarry, 21 Wis. 496; Milwaukee *v.* O'Sullivan, 25 Wis. 666; Brown *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51; Collart *v.* Fisk, 38 Wis. 239; Zivi *v.* Ein-

Judgments.—A party is precluded from denying on information and belief that a judgment was rendered against him.[1]

Making of Contracts and Notes.—Where a defendant admits the execution of a contract he cannot deny information of its contents.[2] And whether a defendant made or indorsed a note, and whether he transferred it, is presumed to be within his own personal knowledge. If, therefore, he would answer these allegations he must admit or deny them positively.[3] But the maker of a note

stein (City Ct.), 20 N. Y. Supp. 893; Mulcahy *v.* Buckley, 100 Cal. 484.

Deeds.—Where the complaint avers the making of a deed, sets it out in *hæc verba*, and states the volume and page of the records where it is recorded, a denial in the answer "of sufficient knowledge to form a belief" is not sufficient to raise an issue. Goodell *v.* Blumer, 41 Wis. 436. Likewise when there is an allegation of an assignment of a mortgage, and the volume and page of the record containing it are given, a denial of knowledge is sham, and should be stricken out. Wheaton *v.* Briggs, 35 Minn. 470. But the court laid stress on the fact that the answer was verified in the county in which the record was kept.

Records of County Supervisors.—The minutes of a board of county supervisors are such public records as will preclude any one from denying their alleged contents upon information and belief. State *v.* McGarry, 21 Wis. 496. *Contra*, People *v.* Curtis, 1 Idaho 754.

Filing Copies.—When a material fact is evidenced by official documents, and copies thereof are filed with the pleading, an answer that the defendant has no knowledge is insufficient, and admits the complaint. Barret *v.* Godshaw, 12 Bush (Ky.) 592.

Letters of Administration. — But a grant of letters of administration may be denied on information and belief. Wittmann *v.* Watry, 37 Wis. 238; Morrow *v.* Cougan, 3 Abb. Pr. (N. Y. C. Pl.) 328.

Facts Not Disclosed by Record. — All those facts which the record does not disclose may be denied on information and belief. A defendant may deny on information and belief the sufficiency of a recorded claim of lien. Hagman *v.* Williams, 88 Cal. 146. And the defendant may deny knowledge of an alleged fact that plaintiff paid taxes, since the records do not show by whom taxes are paid. Davis *v.* Lonk, 30 Wis. 308.

1. Such a denial should be stricken out as sham, because the party must know positively whether or not a judgment was rendered against him. Buller *v.* Sidell, 43 Fed. Rep. 116; Roblin *v.* Long, 60 How. Pr. (N. Y. Supreme Ct.) 200; Beebe *v.* Marvin, 17 Abb. Pr. (N. Y. Super. Ct.) 194. But there must be an allegation that he was served with process or that he entered his appearance. See cases *supra*.

Not a Party.—Where a judgment is pleaded, a denial of any knowledge, made by one not a party thereto, is good. Mower *v.* Stickney, 5 Minn. 407; Zivi *v.* Einstein, 21 N. Y. Supp. 583. But where a stay bondsman was sued on his bond, and employed the same attorney that the defendant had, he was held precluded from denying any information or knowledge of the judgment, as he had but to ask the attorney. Hance *v.* Rumming, 2 E. D. Smith (N. Y.) 48. *Compare* Wesson *v.* Judd, 1 Abb. Pr. (N. Y. C. Pl.) 254; Mott *v.* Burnett, 2 E. D. Smith (N. Y. C. Pl.) 50.

2. Wesson *v.* Judd, 1 Abb. Pr. (N. Y. C. Pl.) 254; Lloyd *v.* Burns, 38 N. Y. Super. Ct. 223. *Contra.*—Parties are not presumed to recollect the date or contents of written instruments not in their possession or control. Kellogg *v.* Baker, 15 Abb. Pr. (N. Y. Super. Ct.) 286.

Denial of Making Contract.—Where the complaint alleges the execution of a contract, and a copy of the alleged agreement is filed, a denial of knowledge of it is good, and cannot be stricken out as frivolous. Snyder *v.* Bedell, 10 Rep. 217. See also Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; People *v.* McCumber, 15 How. Pr. (N. Y. Supreme Ct.) 186; Caswell *v.* Bushnell, 14 Barb. (N. Y.) 393; Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y. Supreme Ct.) 19.

3. Fales *v.* Hicks, 12 How. Pr. (N. Y. Supreme Ct.) 153, and Thorn *v.* New

may deny knowledge of the indorsement or transfer of it by the payee.[1]

Ownership.—In an action on a note or bond, a denial of knowledge as to whether plaintiff is the owner should be struck out as frivolous. There must be positive allegations of title in a third person.[2]

Questions of Law.—Questions of law are not sufficiently denied by a statement that the party "has not sufficient information to form a belief."[3]

York Cent. Mills, 10 How. Pr. (N. Y. Supreme Ct.) 19, applying the rule to a corporation.

While a denial on information is bad, it cannot be stricken out as frivolous. Shearman *v.* New York Cent. Mills, 1 Abb. Pr. (N. Y. Supreme Ct.) 187.

Where the defendant is sued on a note which has not been seen by him for over twenty years, and is lost and cannot be seen, a denial of his signature on information and belief is sufficient to put in issue the execution of the note. Hall *v.* Woodward, 30 S. Car. 564. See Carroll County Sav. Bank *v.* Strother, 22 S. Car. 552.

Amount Due.—But an allegation of the amount due on a note may be denied on information and belief. Richter *v.* McMurray, 15 Abb. Pr. (N. Y. C. Pl.) 346.

Iowa.—In *Iowa* a defendant may deny knowledge of a note alleged to have been executed by him. McFarland *v.* Lester, 23 Iowa 260.

1. Caswell *v.* Bushnell, 14 Barb. (N. Y.) 393; Snyder *v.* White, 6 How. Pr. (N. Y. Supreme Ct.) 321; Sherman *v.* Bushnell, 7 How. Pr. (N. Y. Supreme Ct.) 171; Flood *v.* Reynolds, 13 How. Pr. (N. Y. Supreme Ct.) 112; Duncan *v.* Lawrence, 6 Abb. Pr. (N. Y. Super. Ct.) 304; Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y. Supreme Ct.) 19; Dickerson *v.* Kimbal, 1 Code Rep. N. Y. 49.

Protest. — The maker may deny knowlege of the presentment and nonpayment. Dickerson *v.* Kimbal, 1 Code Rep. (N. Y.) 49. But where the protest is on file with the petition, the maker cannot allege want of knowledge. Huffaker *v.* Nat. Bank, 12 Bush (Ky.) 287. See Gridler *v.* Farmers', etc., Bank, 12 Bush (Ky.), 333.

2. Fleury *v.* Roget, 5 Sandf. (N. Y. 646; Fleury *v.* Roger, 9 How. Pr. (N.Y Super. Ct.) 215; Fleury *v.* Brown, 9 How. Pr. (N. Y. Super. Ct.) 217; Flammer *v.* Kline, 9 How. Pr. (N. Y. Super. Ct.) 216; Tompkins *v.* Acer, 10 How. Pr. (N. Y. Supreme Ct.) 309; De Santes *v.* Searle, 11 How. Pr. (N. Y. C. Pl.) 477; Bronson *v.* Rock Island, etc., R. Co., 40 How. Pr. (N. Y. Supreme Ct.) 48; Asiel *v.* Kansas, etc., R. Co., 3 N. Y. L. Bull. 28; Kamlah *v.* Salter, 6 Abb. Pr. (N. Y. C. Pl.) 226; Deloatch *v.* Vinson, 108 N. Car. 147.

But it has been held that a denial of ownership upon information and belief is sufficient where no motion is made to strike it out. Harvey *v.* Mc Leran, 66 Cal. 34.

Contra.—A denial, on information and belief, that the thing sued for belongs to plaintiff is sufficient. Townsend *v.* Platt, 3 Abb. Pr. (N. Y. C. Pl.) 325; Temple *v.* Murray, 6 How. Pr. (N. Y. Supreme Ct.) 329; Genesee Mut. Ins. Co. *v.* Moyniben, 5 How. Pr. (N. Y. Supreme Ct.) 321; Snyder *v.* White, 6 How. Pr. (N. Y. Supreme Ct.) 321; Cunningham *v.* Skinner, 65 Cal. 385. See Hyde *v.* Kitchen (Supreme Ct.), 21 N. Y. Supp. 238.

Attorney's Authority to Sue.—A defendant cannot deny on information and belief that the attorney has authority to represent the plaintiff. It is only upon a suitable suggestion of facts that the attorney will be required to show some authority. "Information and belief," however honestly entertained, are not sufficient to overcome the presumption arising from professional obligations, resting upon an attorney, that he will not abuse his privileges by representing a party without authority. Robinson *v.* Robinson, 32 Mo. App. 88; Keith *v.* Wilson, 6 Mo. 435, 35 Am. Dec. 443; Valle *v.* Picton, 16 Mo. App. 178; San Francisco *v.* Stande, 92 Cal. 560.

3. Kentucky River Nav. Co. *v.* Com. 13 Bush (Ky.) 436. A plea by the defendant that he "has no information sufficient to form a belief" as to

X. WHAT MAY BE PROVED UNDER A GENERAL DENIAL—1. Nature of a General Denial.—As a rule a general denial under the Code is a mere traverse, in bar, of the facts pleaded in the complaint.[1]

The General Issue.—Under the Code there is no plea which meets the idea of the general issue under the old system.[2]

whether certain ordinances were ever published "as required by law" is but a statement of his want of information as to the law, and is not good. Greer *v.* Covington, 83 Ky. 410. *Compare* Emery *v.* Baltz, 94 N. Y. 408.

1. Dutcher *v.* Dutcher, 39 Wis. 651.

Allegations of Complaint Determine its Scope.—The scope of a general denial is wholly determined by the allegations of the complaint. Only the facts *alleged* in the complaint are denied by a general denial. Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Caldwell *v.* Bruggerman, 4 Minn. 270; Nash *v.* St. Paul, 11 Minn. 174; Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Causey *v.* Cooper, 41 Ga. 409; Coles *v.* Saulsby, 21 Cal. 47; Adams Express Co. *v.* Darnell, 31 Ind. 20; Lafayette, etc., R. Co. *v.* Ehman, 30 Ind. 83; Watkins *v.* Jones, 28 Ind. 12; Bate *v.* Sheets, 50 Ind. 329; Morgan *v.* Wattles, 69 Ind. 260; Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293.

The Test.—Under a general denial the simple inquiry is, has the plaintiff proved what he has alleged in his petition? School Dist. *v.* Shoemaker, 5 Neb. 36; Jones *v.* Seward County, 10 Neb. 154.

Equivalent to Specific Denials.—A general denial is the same in effect as a specific denial of each of the allegations in the whole complaint. Stone *v.* Quaal, 36 Minn. 46.

Admissions.—A general denial will not put the plaintiff upon proof of facts elsewhere admitted in such answer. Farrell *v.* Hennessy, 21 Wis. 139; McWilliams *v.* Bannister, 40 Wis. 489.

Striking Out.—Every special defense which consists of matter which goes to disprove any material allegation in the complaint is defective, and must be stricken out on motion. Benedict *v.* Seymour, 6 How. Pr. (N. Y. Supreme Ct.) 298.

2. Van Ingen *v.* Newton, 1 Disney (Ohio) 458; Scott *v.* Morse, 54 Iowa 732; Hargan *v.* Burch, 8 Iowa 310; Bowen *v.* Hale, 4 Iowa 430; Dyson *v.* Ream, 9 Iowa 51; Walters *v.* Washington Ins. Co., 1 Iowa 404a, 63 Am. Dec. 451; Hutchinson *v.* Sangster, 4 Greene (Iowa) 340; Wood *v.* Ostram, 29 Ind. 186; Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344.

Under a general denial a defendant may not introduce evidence of all the facts which might have been proved under the general issue at common law, but he is confined to contesting the facts alleged in the petition; but he may introduce as evidence whatever goes to controvert the facts alleged in the petition. Oleson *v.* Hendrickson, 12 Iowa 222; Scott *v.* Morse, 54 Iowa 732.

"But the Code, by requiring that an answer, in addition to a general or specific denial of the allegations in the complaint, when such a denial is made, shall state any new matter constituting a defense, when such a defense is meant to be relied on, has effectually abolished the general issue, as formerly understood. * * * The only effect of a general or specific denial in an answer of the material allegations of the complaint now is to cast the burden of proof upon the plaintiff; but where the necessary proof is given, if the answer contains nothing more than such a denial, the plaintiff is at once, and as a matter of course, entitled to a verdict or judgment." Per Oakley, Ch. J., in Texier *v.* Gouin, 5 Duer (N. Y.) 392.

"Although the Code of Procedure has abrogated the common-law system of pleading, with all its technical rules, yet, in one respect, the new system which it has introduced bears a close analogy to that for which it has been substituted. The general denial allowed by the Code corresponds very nearly with the general issue in actions of assumpsit and of debt on simple contract, at common law. The decisions upon the subject, therefore, in the English courts, although not obligatory as precedents since the changes introduced by the Code, will nevertheless be found to throw much light upon the question," etc. Per Selden, J., in McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696.

Contra.—A general denial under the

To What Evidence Defendant is Limited.—Under a general denial of the allegations in the complaint, the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish in order to sustain his action.[1]

2. Payment.—Where the complaint alleges the indebtedness

Code is equivalent to the plea of the general issue at common law. Perkins *v.* Ermel, 2 Kan. 325. In *Missouri* there is a plea of "general issue" in preceedings before justices of the peace. Reed *v.* Snodgrass, 55 Mo. 180; Farmers', etc., Bank *v.* Williamson, 61 Mo. 259. And in *Alabama* a general denial of each and every allegation in the complaint is neither more nor less than the general issue. Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350. But see Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422; Equitable Accident Ins. Co. *v.* Osborn, 90 Ala. 201.

1. *New York.*—Andrews *v.* Bond, 16 Barb. (N. Y.) 633; Saunders *v.* Townsend, 26 Hun (N. Y.) 308; Little *v.* Denn, 34 N. Y. 452; Woolly *v.* Newcombe, 87 N. Y. 605; Griffin *v.* Long Island R. Co., 101 N. Y. 348; Schaus *v.* Manhattan Gas Light Co., 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 371; Wheeler *v.* Billings, 38 N. Y. 263; Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Sawyer *v.* Warner, 15 Barb. (N. Y.) 282; Schwarz *v.* Oppold, 74 N. Y. 307; Boomer *v.* Koon, 6 Hun (N. Y.) 645; Miller *v.* North America's Ins. Co. 1 Abb. N. Cas. (N. Y. Supreme Ct.) 470; Moody *v.* Belden (Supreme Ct.), 15 N. Y. Supp. 119; Weaver *v.* Barden, 49 N. Y. 286; Clifford *v.* Dam, 81 N. Y. 56; O'Brien *v.* McCann, 58 N. Y. 373.

Nebraska.—Jones *v.* Fruin, 26 Neb. 76; Jones *v.* Seward County, 10 Neb. 154; School Dist. *v.* Shoemaker, 5 Neb. 36; Burlington, etc., R. Co. *v.* Lancaster County, 7 Neb. 33; South Omaha *v.* Cunningham, 31 Neb. 316; Donovan *v.* Fowler, 17 Neb. 247; Hassett *v.* Curtis, 20 Neb. 164; Richardson *v.* Steele, 9 Neb. 483; Creighton *v.* Newton, 5 Neb. 100; Winkler *v.* Roeder, 23 Neb. 709, 8 Am. St. Rep. 155; Broadwater *v.* Jacoby, 19 Neb. 77; Burlington, etc., R. Co. *v.* Young Bear, 17 Neb. 668; Hedman *v.* Anderson, 8 Neb. 180; Aultman *v.* Stichler, 21 Neb. 76; Cool *v.* Roche, 15 Neb. 24.

Missouri.—Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Nichols *v.* Winfrey, 79 Mo. 544.

Texas.—Mims *v.* Mitchell, 1 Tex. 443; McKaughan *v.* Harrison, 25 Tex. (Supp.) 461; Fowler *v.* Davenport, 21 Tex. 626; Guess *v.* Lubbock, 5 Tex. 535; Towner *v.* Sayre, 4 Tex. 28; Hurt *v.* Blackburn, 20 Tex. 601; Robinson *v.* Brinson, 20 Tex. 438.

Minnesota. — Bond *v.* Corbett, 2 Minn. 248; Caldwell *v.* Bruggerman, 4 Minn. 190; Filley *v.* Register, 4 Minn. 296; Plummer *v.* Mold, 14 Minn. 532.

California.—Hawkins *v.* Borland, 14 Cal. 413; Whitmore *v.* Reynolds, 46 Cal. 380; Brown *v.* Kentfield, 50 Cal. 129.

Indiana.—Ferguson *v.* Ramsey, 41 Ind. 511.

Kansas.—McGrew *v.* Armstrong, 5 Kan. 284.

Iowa.—Johnson *v.* Pennell, 67 Iowa 669.

Georgia. — See also Woolfolk *v.* Beach, 61 Ga. 67; Dickson *v.* Saloshin, 54 Ga. 117; Johnson *v.* Shurley, 58 Ga. 417; Steadman *v.* Simmons, 39 Ga. 592.

That Cause of Action Never Existed.—Under the general denial defendant may prove any fact which goes to show that plaintiff never had any cause of action. Hoffman *v.* Parry, 23 Mo. App. 20; Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 444, 4 Am. Rep. 337; Greenway *v.* James, 34 Mo. 328; Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178; Koehler *v.* Adler, 91 N. Y. 657; Evans *v.* Williams, 60 Barb. (N. Y.) 346; Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Andrews *v.* Bond, 16 Barb. (N. Y.) 633; Weaver *v.* Barden, 49 N. Y. 286. And likewise that the cause of action had not accrued when suit was brought. Mack *v.* Burt, 5 Hun (N. Y.) 28; Goddard *v.* Fulton, 21 Cal. 430; Burke *v.* Turney, 54 Cal. 486.

Ownership of Cause of Action.—Under a general denial the defendant may prove that the plaintiff does not own the cause of action sued on. Bond *v.* Long, 87 Mo. 266; Field *v.* Knapp, 108 N. Y. 87; Allis *v.* Leonard, 46 N. Y. 688; Wetmore *v.* City, 44 Cal. 294. But see Brett *v.* First Universalist Soc., 63 Barb. (N. Y.) 610.

generally, without showing how that indebtedness was created, payment may be proved under a general denial.[1]

3. Actions on Contracts.—In an action upon a contract, under an answer of general denial, the plaintiff is limited to the contract alleged in the complaint; under a general denial the defendant may show that the contract between him and the plaintiff was a differ-

1. Marley *v.* Smith, 4 Kan. 155; Parker *v.* Hays, 7 Kan. 412; Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 431; Van Giesen *v.* Van Giesen, 10 N. Y. 316. See also *post*, NEW MATTER XIII. 8, *f*.

Suing for Balance.—Where the plaintiff sues for a balance, and alleges generally that a sum is due, he invites an examination into the amount of the indebtedness, and under a general denial defendant may prove payment. Quin *v.* Lloyd, 41 N. Y. 350. And see the above case, where the complaint was construed as suing only for a balance, and not as stating the original transaction. Where a balance is sued for it is an admission of payment of all except the balance. White *v.* Smith, 46 N. Y. 418.

Allegation of Nonpayment Must be a Material One.—To entitle the defendant to prove payment under a general denial, the allegation of nonpayment in the complaint must be a material one, necessary to constitute the cause of action, Knapp *v.* Roche, 94 N. Y. 329; because a plaintiff cannot in his complaint anticipate the defense of payment by an allegation that no payments have been made, Benicia Agricultural Works *v.* Creighton, 21 Oregon 495. See Wheeler, etc., Mfg. Co. *v.* Tinsley, 75 Mo. 458; Van Gieson *v.* Van Gieson, 12 Barb. (N. Y.) 520; Wimpy *v.* Gaskill, 76 Ga. 41.

Payment as New Matter.—The general rule is that, when the original transaction or contract is set out, and not merely the indebtedness, then the defense of payment is new matter, and must be pleaded. McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Wilcox *v.* Joslin (Supreme Ct.), 10 N. Y. Supp. 342; Clark *v.* Mullen, 16 Neb. 481; Magenan *v.* Bell, 14 Neb. 8; Van Buskirk *v.* Chandler, 18 Neb. 584; Tootle *v.* Maben, 21 Neb. 620; Lamb *v.* Thompson, 31 Neb. 448; Clark *v.* Spencer, 14 Kan. 407, 19 Am. Rep. 96; Stevens *v.* Thompson, 5 Kan. 305; Hawes *v.* Woolcock, 30 Wis. 213; Martin *v.* Pugh, 23 Wis. 184.

And see *post*, XIII. NEW MATTER.

California.— In *California* payment is never new matter; it may always be proved under a general denial. McLarren *v.* Spalding, 2 Cal. 510; Brooks *v.* Chilton, 6 Cal. 641; Frisch *v.* Caler, 21 Cal. 71; Goddard *v.* Fulton, 21 Cal. 430; Fairchild *v.* Amsbaugh, 22 Cal. 572; Davanay *v.* Eggenhoff, 43 Cal. 395; Wetmore *v.* San Francisco, 44 Cal. 294; Farmers', etc., Bank *v.* Christensen, 51 Cal. 571. But see Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Hook *v.* White, 36 Cal. 299.

The *California* Supreme Court reaches the conclusion that payment is not new matter because the averment that a debt has not been paid, followed by a plea of payment, makes up an issue on the point. Frisch *v.* Caler, 21 Cal. 71. And in most actions, notably those on notes, the complaint must allege nonpayment. Davanay *v.* Eggenhoff, 43 Cal. 398; Brown *v.* Orr, 29 Cal. 120. But see Hook *v.* White, 36 Cal. 299, where a specific denial of an allegation of nonpayment was held sham.

It is optional, though, with the defendant to plead payment as new matter. Caulfield *v.* Sanders, 17 Cal. 569; McDonald *v.* Davidson, 30 Cal. 174.

But where the payment is made after suit brought it is new matter, and must be pleaded. Glascock *v.* Ashman, 52 Cal. 493.

It seems that not only may the defendant prove payment under a general denial, but that the onus of proving nonpayment devolves on the plaintiff. Farmers', etc., Bank *v.* Christensen, 51 Cal. 571.

Iowa.—In *Iowa* a plea of payment is not affirmative matter, and will not be taken as true if not replied to. Powesheik *v.* Mickel, 10 Iowa 76; Stacy *v.* Stichton, 9 Iowa 399; Garretson *v.* Bitzer, 57 Iowa 469; Sinnamon *v.* Melbourn, 4 Greene (Iowa) 309. And the burden of proof is upon the plaintiff to establish the fact of indebtedness. Garretson *v.* Bitzer, 57 Iowa 469.

ent one from that set out in the complaint, or that no contract at all was made.[1]

Want of Consideration.—In an action on contract the complaint must show a consideration; and under a general denial the defendant may prove the want of it.[2]

Invalidity.—If the plaintiff's evidence shows the contract sued upon to be invalid or illegal, defendant may avail himself of the objection under a general denial.[3]

Failure of Plaintiff to Perform.—The defendant, under a general denial, may show that the plaintiff has failed to perform, in whole or in part, the contract set out in the complaint.[4]

1. Paris *v.* Strong, 51 Ind. 339; Chicago, etc., R. Co. *v.* West, 37 Ind. 215; Blizzard *v.* Applegate, 61 Ind. 368; Wheeler *v.* Billings, 38 N. Y. 263; Schermerhorn *v.* Van Allen, 18 Barb. (N. Y.) 29; Goodale *v.* Central Nat. Bank, 16 N. Y. Wkly. Dig. 364; Dietrich *v.* Dreutel (Supreme Ct.), 6 N. Y. St. Rep. 528; Healy *v.* Clark (C. Pl.), 12 N. Y. St. Rep. 685; Marsh *v.* Dodge, 66 N. Y. 533; Goddard *v.* Fulton, 21 Cal. 430; Wilkerson *v.* Farnham, 82 Mo. 672.

It is competent to show that the contract was conditional, and that the condition was not fulfilled, or has terminated the contract. Stewart *v.* Goodrich, 9 Mo. App. 125; Danenbaum *v.* Person (City Ct.), 25 N. Y. St. Rep. 849.

So a custom or usage known to both parties may be proved, by way of showing that the contract made was not that alleged. Miller *v.* North America's Ins. Co., 1 Abb. N. Cas (N. Y. Supreme Ct.) 470. See also Manning *v.* Winter, 7 Hun (N. Y.) 482; Peck *v.* Winne, 51 N. Y. 641; Booth *v.* Powers, 56 N. Y. 22; Schreyer *v.* New York, 39 N. Y. Super. Ct. 1.

That a note was made for accommodation and has become *functus officio*, is admissible under a general denial. Goddard *v.* Fulton, 21 Cal. 430.

And a general denial puts the plaintiff upon proof of the joint liability, if he would obtain a joint judgment. Stafford *v.* Nutt, 51 Ind. 535.

2. Evans *v.* Williams, 60 Barb. (N. Y.) 346; Dubois *v.* Hermance, 56 N. Y. 673, 1 Thomp. & C. (N. Y.) 293; Eldridge *v.* Mather, 2 N. Y. 157; Weaver *v.* Barden, 49 N. Y. 286; Butler *v.* Edgerton, 15 Jnd, 15; Bondurant *v.* Bladen, 19 Ind. 160; Bush *v.* Brown, 49 Ind. 573, 19 Am. Rep. 695.

The rule only obtains where it is necessary to aver, or it is averred, in the complaint, what the consideration was. In an action on a contract the want of consideration would be new matter where it was not necessary to set out the consideration in the complaint. Nixon *v.* Beard, 111 Ind. 137.

Failure of Consideration.—Failure of consideration may be proved under a general denial. Brooks *v.* Chilton, 6 Cal. 641.

3. Cary *v.* Western Union Tel. Co., 20 Abb. N. Cas. (N. Y. Supreme Ct.) 333; Tyler *v.* Larimore, 19 Mo. App. 445.

The capacity of the parties is put in issue by a general denial. Cavender *v.* Waddingham, 2 Mo. App. 551; Painter *v.* Weatherford, 1 Greene (Iowa) 97.

Proof that the contract is *ultra vires*, or that an officer of the corporation had no authority to execute it, is admissible under a general denial. Smith *v.* Hall, 5 Bosw. (N. Y.) 319; Hall *v.* Auburn Turnpike Co., 27 Cal. 256, 87 Am. Dec. 75.

But evidence to show that the contract sued on was a wagering contract is inadmissible under a general denial. Cummiskey *v.* Williams, 20 Mo. App. 606.

In Stafford Paving Co. *v.* Monheimer, 41 N. Y. Super. Ct. 184, it was doubted whether the invalidity of a contract could be shown under a general denial.

See also *post*, XIII. NEW MATTER.

4. Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570; Weinberg *v.* Blum, 13 Daly (N. Y.) 399; Chatfield *v.* Simonson, 92 N. Y. 209; Springer *v.* Dwyer, 50 N. Y. 19; Emery *v.* Pease, 20 N. Y. 62; Williams *v.* Slote, 70 N. Y. 601; Manning *v.* Winter, 7 Hun (N. Y.) 482; Krom *v.* Levy, 1 Hun (N. Y.) 171; Close *v.* Clark (C. Pl.), 30 N. Y. St. Rep. 671; Reed *v.* Hayt, 51 N. Y.

Sales.—In an action to recover the price of goods alleged to have been sold and delivered to defendant, the defendant may show under a general denial that he never incurred indebtedness for the price.[1]

Notes and Bills.—Under a general denial of the execution of a note the proof is strictly limited to showing that defendant did not execute it; proof of collateral agreements nullifying its effect is inadmissible.[2]

4. Judgments.—Where, in an action upon a judgment, the defendant, by a general denial, puts in issue the existence of a regular, valid, and legal judgment, any evidence tending to show that the judgment is illegal or void is competent.[3]

Super. Ct. 121; Moritz *v.* Larsen, 70 Wis. 569; Fabric Fire & Hose Co. *v.* Bilt Mfg. Co., 39 Fed. Rep. 98; Caldwell *v.* Bruggerman, 4 Minn. 270.

Where the complaint is on a *quantum meruit*, evidence that the work was unskilfully done, or worth less than the amount claimed, is admissible under a general denial. Raymond *v.* Richardson, 4 E. D. Smith (N. Y.) 171. See Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Gates *v.* Preston, 41 N. Y. 113; Trimble *v.* Stillwell, 4 E. D. Smith (N. Y.) 512; Laraway *v.* Perkins, 10 N. Y. 371. But see *post*, XIII. NEW MATTER.

Under a denial that certain services were of the value specified, evidence cannot be given tending to show that the services were not rendered. Van Dyke *v.* Maguire, 57 N. Y. 430.

1. **Only Part Delivered.**—That only part of the goods have been delivered is admissible under a general denial. Manning *v.* Winter, 7 Hun (N. Y.) 482. See Bormer *v.* Koon, 6 Hun (N. Y.) 645; Carr *v.* Jackson, *cited* in 7 Hun (N. Y.) 484.

Agency.—The defendant may show that he purchased as agent for another to whom credit was given. Merritt *v.* Briggs. 57 N. Y. 651. Also that the person who sold, sold them as his own, and not as agent for plaintiff. Hawkins *v.* Borland, 14 Cal. 413. And also that the alleged agent had no authority to purchase for defendant. Hier *v.* Grant, 47 N. Y. 278; Day *v.* Wamsley, 33 Ind. 145.

Value.—Under a general denial the defendant may show that the goods sold were not of the value alleged in the complaint. Correio *v.* Lynch, 65 Cal. 274.

2. Dunning *v.* Rumbaugh, 36 Iowa 566.

Fraud.—Under a plea denying the execution of a note, defendant may prove that his signature was procured by fraud. Corby *v.* Weddle, 57 Mo. 452. See Frisbee *v.* Langworthy, 11 Wis. 375; Jenkins *v.* Long, 19 Ind. 28, 81 Am. Dec. 374; Farmer *v.* Calvert, 44 Ind. 209; Glazer *v.* Clift, 10 Cal. 303.

Delivery.—Under a general denial the defendant may show that the note sued on was not delivered. Fisher *v.* Hamilton, 48 Ind. 239.

Alteration.—Evidence showing that a note hes been altered after execution is admissible under a general denial. Bormer *v.* Koon, 6 Hun (N. Y.) 645; Schwarz *v.* Oppold, 74 N. Y. 307; National Bank *v.* Nickell, 34 Mo. App. 295; Walton Plow Co. *v.* Campbell, 35 Neb. 173.

An alteration in the date of a bill of exchange payable at a specified period after date is a material alteration; and where the bill is declared on with its altered date, the defense is available to the acceptor under a traverse of the acceptance. Hirschman *v.* Budd, L. R. 8 Exch. 171.

3. Kinsey *v.* Ford, 38 Barb. (N. Y.) 195.

The jurisdiction of the court rendering the judgment sued on is put in issue under the general denial, but the merits of the judgment are not. Crone *v.* Dawson, 19 Mo. App. 214.

A certified copy of the judgment record, showing that the judgment has been vacated, is admissible. Kinsey *v.* Ford, 38 Barb. (N. Y.) 195.

Nul Tiel Record.—The general denial answers to the plea of *nul tiel record* at common law. Where a general denial is pleaded, a further answer of *nul tiel record* is surplusage. Westcott *v.* Brown, 13 Ind. 83.

Former Recovery.—If, on the case made by the complaint, the defendant is not called upon or has no opportunity to plead a former judgment as an estoppel, it may be received in evidence under a general denial.[1]

5. Torts.—Trespass De Bonis Asportatis.—Under a general denial in an action for taking or injuring plaintiff's goods, defendant can show that the goods taken or injured did not belong to plaintiff.[2]

Trover and Conversion.—In an action for the conversion of property a general denial puts in issue both the conversion and the plaintiff's title or right of possession.[3]

1. Clink *v.* Thurston, 47 Cal. 21; Jackson *v.* Lodge, 36 Cal. 28; Flandreau *v.* Downey, 23 Cal. 358; Young *v.* Rumnell, 2 Hill (N. Y.) 481, 38 Am. Dec. 594; Norris *v.* Amos, 15 Ind. 365; Gans *v.* St. Paul F., etc., Ins. Co., 43 Wis. 108.

A judgment roll in a former suit, which does not constitute a bar, may be used in evidence without being pleaded. Kelsey *v.* Sargent (Supreme Ct.), 3 N. Y. St. Rep. 477; Krekeler *v.* Ritter, 62 N. Y. 372. See Schlussel *v.* Willett, 34 Barb. (N. Y.) 615.

Arbitration and Award.—An arbitration and award upon the claim sued on may be proved under a general denial. Jones *v.* McGee, 7 N. Y. Wkly. Dig. 97.

Res Judicata as New Matter.—The general rule is that the defense of former recovery is new matter, which must be pleaded. Louisville, etc., R. Co. *v.* Cauley, 119 Ind. 142. See *post*, XIII. NEW MATTER.

Contra.—Former recovery is not new matter. Derby *v.* Hartman, 3 Daly (N. Y.) 458.

2. Brown *v.* Elliott, 4 Daly (N. Y.) 329.

In trespass *de bonis asportatis*, under a denial of ownership evidence is admissible to show that the sale under which the plaintiff claims title was made to defraud creditors, and is void. Greenway *v.* James, 34 Mo. 326.

Likewise evidence is admissible that the taking was with plaintiff's consent. Wallace *v.* Robb, 37 Iowa 192.

Iowa.—A defendant cannot, under an answer setting out only a denial, excuse a trespass by proving the right of possession or title in some third person. Facts relied upon as a defense must be pleaded. Patterson *v.* Clark, 20 Iowa 429. See also Dyson *v.* Ream, 9 Iowa 51; Hargan *v.* Burch, 8 Iowa 310; Hutchinson *v.* Sangster, 4 Greene (Iowa) 340.

3. Robinson *v.* Frost, 14 Barb. (N. Y.) 536; Schoenrock *v.* Farley, 49 N. Y. Super. Ct. 302; Ely *v.* Ehle, 3 N. Y. 506; Jacobs *v.* Remsen, 12 Abb. Pr. (N. Y. Supreme Ct.) 390; Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293; McKillip *v.* Burhaus, 12 N. Y. Wkly. Dig. 185; Driscoll *v.* Dunwoody, 7 Mont. 394.

A conversion is an assault on an actual possession or on the right to possess. The "property" of which the plaintiff is deprived by the act of conversion—the subject-matter of the right which is violated—must be something which he has the immediate right to possess; only on this condition can the technical action of trover be maintained. Pollock Torts, 289.

Therefore the defendant, under a general denial, may show title or a right of possession in himself. Mc Clelland *v.* Nichols, 24 Minn. 176; Staubach *v.* Rexford, 2 Mont. 565; Gaskell *v.* Patton, 58 Iowa 163; Edgerly *v.* Bush, 16 Hun (N. Y.) 80; Brevoort *v.* Brevoort, 40 N. Y. Super. Ct. 211; Schoenrock *v.* Farley, 49 N. Y. Super. Ct. 302. And he may show that, by the laws of a foreign country governing the case, the the title was in himself. Edgerly *v.* Bush, 16 Hun (N. Y.) 80. Likewise, under a general denial, the defendant may show title or the right of possession in a third party. Davis *v.* Hoppock, 6 Duer (N. Y.) 254; Robinson *v.* Peru Plow, etc., Co., 1 Oklahoma 140.

The Conversion.—The defendant, under a general denial, may introduce evidence of any facts which disprove his conversion, Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669; Willard *v.* Giles, 24 Wis. 319; Terry *v.* Mun-

Replevin.—In replevin, the plaintiff's cause of action depending essentially upon his right to the immediate possession of the property in controversy, a general denial puts in issue not only such right of possession, but every collateral fact necessary to the establishing of the same; a general denial also puts in issue the fact of defendant's wrongful detainer.[1]

ger, 49 Hun (N. Y.) 560; as, in the case of a common carrier, that he delivered to a third person, who, by the course of business between the parties, was apparently authorized to receive, Ontario Bank *v.* New Jersey Steamboat Co., 59 N. Y. 510.

Fraud and Rescission.—Where it appears that plaintiff claims title through a sale by defendant, the defendant, under a general denial, may show fraud to avoid the sale, and his rescission of it. Johnson *v.* Oswald, 38 Minn. 550.

Conversion of a Note.—In an action for the conversion of a promissory note, under a general denial, evidence on the part of the defendant that the note was wrongfully and materially altered by the payee after execution and delivery is competent; likewise, under a general denial, evidence of the neglect or refusal of the maker of a note to pay it according to its terms is proper, in an action for its conversion, upon the question of value. Booth *v.* Powers, 56 N. Y. 22. See Quin *v.* Lloyd, 41 N. Y. 349.

1. Aultman *v.* Stichler, 21 Neb. 72; Richardson *v.* Steele, 9 Neb. 483; School Dist. *v.* Schumacher, 5 Neb. 36; Creighton *v.* Newton, 5 Neb. 100; Hedman *v.* Anderson, 8 Neb. 180; Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Stern Auction, etc., Co. *v.* Mason, 16 Mo. App. 473; Bosse *v.* Thomas, 3 Mo. App. 472; St. Louis Drug Co. *v.* Dart, 7 Mo. App. 590; Young *v.* Glascock, 79 Mo. 574; Holmberg *v.* Dean, 21 Kan. 73; Bailey *v.* Bayne, 20 Kan. 657; Yandle *v.* Crane, 13 Kan. 344; Brown *v.* Holmes, 13 Kan. 482; Heeron *v.* Beckwith, 1 Wis. 27; Child *v.* Child, 13 Wis. 18.

The defendant may prove a right of possession in himself. Sparks *v.* Heritage, 45 Ind. 66; Schoenrock *v.* Farley, 49 N.Y. Super. Ct. 302. See Miller *v.* Brigham, 50 Cal. 615.

Likewise, under a general denial, the defendant may show a right of possession in a third person. Chamberlin *v.* Winn, 1 Wash. 501; Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Young *v.* Glascock, 79 Mo. 574; Woodworth *v.* Knowlton, 22 Cal. 164; Wetmore *v.* San Francisco, 44 Cal. 294; Kennedy *v.* Shaw, 38 Ind. 474; Farmer *v.* Calvert, 44 Ind. 209; Thompson *v.* Sweetser, 43 Ind. 312; Davis *v.* Warfield, 38 Ind. 461; Sparks *v.* Heritage, 45 Ind. 66; Lane *v.* Sparks, 75 Ind. 278; Branch *v.* Wiseman, 51 Ind. 1; Wiler *v.* Manley, 51 Ind. 169.

The statement that the defendant may show a right of possession in a third person needs some explanation. Trespass and other violations of possessory rights can be committed not only against the person who is lawfully in possession, but against any person who has legal possession, whether rightful in its origin or not, so long as the intruder cannot justify his act under a better title. A mere stranger cannot be heard to say that one whose possession he has violated was not entitled to possess. Unless and until a superior title or justification is shown, existing legal possession is not only presumptive but conclusive evidence of the right to possess. Therefore an outstanding claim of a third party, the *jus tertii*, as it is called, cannot be set up to excuse either trespass or conversion. Pollock on Torts, 300.

At common law, and also under the Revised Statutes of *New York*, there were two actions of replevin, one in the *cepit* and one in the *detinet*. In replevin in the *cepit* the general issue put in issue only the taking. Under the plea of *non cepit* the defendant could not show title in himself or in a stranger. As it was necessary in such an action for the plaintiff only to show that he was in possession of the property and that the defendant wrongfully took it from his possession, the plea of *non cepit* only put in issue the wrongful taking. Without more, property in a third person could be no defense to such an action. Therefore, in order to defend an action of replevin in the *cepit*, the defendant was bound to prove property either in him-

Malicious Prosecution.—In an action for malicious prosecution, evidence to rebut the allegation of malice is admissible under a general denial.[1]

Fraud.—Where the ground on which recovery is sought is fraud,

self or in a third person, with which he was in some way connected and under which he could justify. But in an action of replevin in the *detinet*, the general issue put in issue as well the plaintiff's property in the goods as the detention thereof by the defendant. And it is in this latter sense, where the action is founded, not on a wrongful taking and detention, but only on a wrongful detention, that under a general denial the defendant may show a title in a stranger, without connecting himself with it. Griffin *v.* Long Island R. Co., 101 N. Y. 348; Siedenbach *v.* Riley, 111 N. Y. 560.

Replevin by Mortgagees. — Under a general denial, in an action of replevin by a mortgagee, the defendant may prove that the alleged mortgage is a forgery. Gaudy *v.* Pool, 14 Neb. 98.

Likewise the mortgagor may show that the mortgage is void for usury. Adamson *v.* Wiggins, 45 Minn. 448.

In an action of replevin by a mortgagee for the possession of mortgaged property, the defendant in possession may, for the purpose of defeating the plaintiff's right of recovery, prove, under the general denial, a sale of the property by her to the plaintiff subsequent to the execution and delivery of the mortgage, and his refusal to take the goods and pay her the contract price. Deford *v.* Hutchison, 45 Kan. 318.

The defendant, under a general denial, may show that the plaintiff is a mortgagee of the property, instead of absolute owner. O'Neil *v.* Murry, 6 Dakota 108.

Fraud. — In an action of replevin, fraud in the acquisition of the plaintiff's title may be proved by the defendant under the general denial. Stern Auction, etc., Co. *v.* Mason, 16 Mo. App. 473; Sopris *v.* Truax, 1 Colo. 89; Bailey *v.* Swain, 45 Ohio St. 657; Jansen *v.* Effey, 10 Iowa 227; Branch *v.* Wiseman, 51 Ind. 1; Staubach *v.* Rexford, 2 Mont. 566; Grum *v.* Barney, 55 Cal. 254; Humphreys *v.* Harkey, 55 Cal. 283; Stephens *v.* Hallstead, 58 Cal. 193. *Contra*, Frisbee *v.* Langworthy, 11 Wis. 376.

Demand.—The absence and necessity of demand before action may be insisted upon by defendant under a general denial. Burckhalter *v.* Mitchell, 27 S. Car. 240.

Estoppel.—Matter of estoppel may be availed of under a general denial. Towne *v.* Sparks, 23 Neb. 143.

Lien.—The defendant, under a general denial, may show that he has a lien. Lindsay *v.* Wyatt, 1 Idaho 738.

Waiver.—Likewise a waiver of right to the property may be shown. Oester *v.* Sitlington, 15 Mo. 247.

Kansas.—In *Kansas*, in replevin, all that is necessary in order to enable the defendant to prove any defense which he may have is to deny all the allegations of the plaintiff's petition. Bailey *v.* Bayne, 20 Kan. 657.

Nebraska. — In *Nebraska*, under the statute, upon a plea of general denial, in actions of replevin, the defendant may have affirmative relief in damages. Creighton *v.* Newton, 5 Neb. 100. See Merrill *v.* Wedgwood, 27 Neb. 283.

1. Benedict *v.* Seymour, 6 How. Pr (N. Y. Supreme Ct.) 298; Ammerman *v.* Crosby, 26 Ind. 454; Wilkinson *v.* Arnold, 11 Ind. 45.

Probable Cause.—A general denial puts in issue the want of probable cause. Rost *v.* Harris, 12 Abb. Pr. (N. Y. Super. Ct.) 446; Radde *v.* Ruckgaber, 3 Duer (N. Y.) 684; Simpson *v.* McArthur, 16 Abb. Pr. (N. Y. C. Pl.) 302, note.

Guilt.—The defendant, under a general denial, may show the guilt of the plaintiff. Bruley *v.* Rose, 57 Iowa 651.

Advice of Counsel.—The defendant may show, under a general denial, that he acted in good faith on the advice of counsel. Sparling *v.* Conway, 75 Mo. 510; Levy *v.* Brannan, 39 Cal. 485. *Compare* Hunter *v.* Mathis, 40 Ind. 356; Trogden *v.* Deckard, 45 Ind. 572; Scheer *v.* Keown, 34 Wis. 349.

Grand Juror.—In an action against a grand juror for malicious prosecution, the defendant may, under an answer of general denial, avail himself of the protection afforded him by the law. Hunter *v.* Mathis, 40 Ind. 356.

and the facts constituting the fraud are alleged in the complaint, a general denial puts the plaintiff to proof of it, and entitles the defendant to prove all such facts as disprove the fraud.[1]

Negligence.—In an action for damages for negligence the defendant, under a general denial, may prove that he was not negligent, and to that end may show whatever acts of prudence and caution he employed.[2]

1. Van Alstyne *v.* Norton, 1 Hun (N. Y.) 537.

In an action for damages for fraudulently concealing a defect in a thing sold, the fact that defendant had communicated the defect to plaintitiff is admissible under a general denial. Howell *v.* Biddlecom, 62 Barb. (N. Y.) 131.

And where a complaint alleged a fraudulent hypothecation of plaintiff's securities to defendants, the defendants, under a general denial, may show that they are *bona-fide* holders for value. Hennequin *v.* Butterfield, 43 N. Y. Super. Ct. 411.

Attacking Title.—Where defendant's title is attacked on the ground of fraud, he may, under a general denial, introduce any proof showing that his title is not fraudulent. Ray *v.* Teabout, 65 Iowa 157. Summers *v.* Hoover, 42 Ind. 153; as that the conveyance alleged to have been made in fraud of creditors was the conveyance of a homestead which a debtor may convey. Hibben *v.* Soyer, 33 Wis. 319.

2. Kendig *v.* Overhulser, 58 Iowa 195; Stevens *v.* Lafayette, etc., Gravel Road Co., 99 Ind. 392; Jonesboro, etc., Turnpike Co. *v.* Baldwin, 57 Ind. 86; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Jones *v.* Sheboygan Co., 42 Wis. 306.

In an action against a carrier for negligence in losing a package, evidence is admissible, under a general denial, that the package was stolen without the fault of the carrier. Adams Express Co. *v.* Darnell, 31 Ind. 20.

Negligence of Third Person.—Under a general denial the fact that the injury was caused by the negligence of others may be shown. Schular *v.* Hudson River R. Co., 38 Barb. (N. Y.) 653; Schaus *v.* Manhattan Gas Light Co., 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 371. See also New Haven, etc., R. Co. *v.* Quintard, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 128; Gilbert *v.* Sage, 5 Lans. (N. Y.) 287; Howell *v.* Biddlecom, 62 Barb. (N. Y.) 131; St. John *v.* Skinner, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 371, note.

In an action against a railroad company for the loss of goods, under a general denial evidence is admissible that the road was not in the control of the defendants, but was in the hands of a receiver. Kansas Pac. R. Co. *v.* Searle, 11 Colo. 1. See Merchants' Loan Co. *v.* Clair, 36 Hun (N. Y.) 367; Corser *v.* Russell, 20 Abb. N. Cas. (N. Y.) 316; Andrews *v.* Miles, 15 N. Y. Wkly. Dig. 290.

Negligence as a Defense.—In an action for work and labor upon a *quantum meruit*, under a general denial negligence may be shown. Raymond *v.* Richardson, 4 E. D. Smith (N. Y.) 171; Bridges *v.* Paige, 13 Cal. 640. See Schermerhorn *v.* Van Allen, 18 Barb. (N. Y.) 29; Merritt *v.* Briggs, 57 N. Y. 651.

Ownership.—Under a general denial, in an action for damage to plaintiff's goods through defendant's negligence, defendant may show that the goods injured did not belong to plaintiff. Brown *v.* Elliott, 4 Daly (N. Y.) 329.

Contributory Negligence.—Some authorities hold that contributory negligence need not be specially pleaded, but is available under the general issue. See Farner *v.* Simmons Hardware Co., 10 Mo. App. 596; Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102; Jonesboro, etc., Turnpike Co. *v.* Baldwin, 57 Ind. 86; Jones *v.* Sheboygan, 42 Wis. 306; McQuade *v.* Chicago, etc., R. Co., 68 Wis. 616; MacDonell *v.* Buffum, 31 How. Pr. (N. Y. Supreme Ct.) 154; New Haven, etc., Co. *v.* Quintard, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 128. But the probable weight of authority is that contributory negligence is new matter, and must be specially pleaded. See, for a full treatment of this subject, article CONTRIBUTORY NEGLIGENCE.

6. Ejectment and Other Matters Pertaining to Real Estate.—In an action for recovery of real property it is sufficient in the defendant to deny generally the title alleged in the petition; and under such a denial he may prove any fact tending to show that plaintiff has not the title, or the right of possession.[1]

1. Wicks *v.* Smith, 18 Kan. 508; Over *v.* Shannon, 75 Ind. 352; Tracy *v.* Kelley, 52 Ind. 535; Emily *v.* Harding, 53 Ind. 102; Steeple *v.* Downing, 60 Ind. 478; Webster *v.* Bebinger, 70 Ind. 9; Vanduyn *v.* Hepner, 45 Ind. 589; Lain *v.* Shepardson, 23 Wis. 224; Mather *v.* Hutchinson, 25 Wis. 27; Raynor *v.* Timerson, 46 Barb. (N. Y.) 518; Punderson *v.* Love, 3 Tex. 60; Rivers *v.* Foote, 11 Tex. 662; Dalby *v.* Booth, 16 Tex. 563; Mann *v.* Falcon, 25 Tex. 271; Willson *v.* Cleaveland, 30 Cal. 192; Semple *v.* Cook, 50 Cal. 26; Jackson *v.* Lodge, 36 Cal. 29; Northern Pac. R. Co. *v.* McCormick, 55 Fed. Rep. 601.

Compare the following cases, which hold that any facts which show the invalidity of the title set up by plaintiff in an action to recover personal property are admissible under a general denial: Grum *v.* Barney, 55 Cal. 254; Humphreys *v.* Harkey, 55 Cal. 283; Stephens *v.* Hallstead, 58 Cal. 193.

Paramount Title in Defendant.—A defendant may, in such an action, for the purpose of defeating the plaintiff's title, show, under a general denial, a paramount title in himself, provided such title carries with it the right of possession, whether such title is legal or equitable, and whether the plaintiff's title is legal or equitable. Clayton *v.* School District, 20 Kan. 256; Hall *v.* Dodge, 18 Kan. 277; Wicks *v.* Smith, 18 Kan. 508; Armstrong *v.* Brownfield, 32 Kan. 116; Bancroft *v.* Chambers, 10 Kan. 364; Mastin *v.* Gray, 19 Kan. 467, 27 Am. Rep. 149; Mitchell *v.* Insley, 33 Kan. 658; Bruck *v.* Tucker, 42 Cal. 346; Marshall *v.* Shafter, 32 Cal. 177; Sneed *v.* Osborn, 25 Cal. 630; Roberts *v.* Columbet, 63 Cal. 22; Daniels *v.* Henderson, 49 Cal. 242, an action to recover rents and profits; Stone *v.* Bumpus, 40 Cal. 429, an action to abate a nuisance.

Title in Third Person.—The plaintiff in an action of ejectment must always recover on the strength of his own title, not on the weakness of the defendant's. Therefore the defendant, under a general denial, in order to show that plaintiff is not entitled to the possession, may show title out of the plaintiff, and in a third person, at the time of the commencement of the action. Raynor *v.* Timerson, 46 Barb. (N. Y.) 518.

But the right to set up title in a third person is limited. Ejectment is a mere possessory action; if the plaintiff succeeds, all that is necessarily proved is that he has a right to be put in possession. If the plaintiff had an actual possession, without title, this will warrant a recovery against a defendant who has no title, but only a subsequent possession. Where no title appears on either side, a prior possession will prevail over a subsequent one. Title in a third person, then, can be shown under a general denial only when such a title carries with it the right to possession. If the defendant, as a mere trespasser, has violated the plaintiff's actual possession, it is no defense that a third person has title.—Bird *v.* Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Bledsoe *v.* Simms, 53 Mo. 308; Crockett *v.* Morrison, 11 Mo. 3. See Smith *v.* Lorillard, 10 Johns. (N. Y.) 338; Dicey on Parties, 486.

Under a general denial a party may prove title in his wife. Bledsoe *v.* Simms, 53 Mo. 305.

Abandonment.—The fact that the plaintiff, or those under whom he claims, had abandoned the land may be shown under a general denial. Bird *v.* Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Kimball *v.* Gearhart, 12 Cal. 50; Bell *v.* Brown, 22 Cal. 672; Willson *v.* Cleaveland, 30 Cal. 192; Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214; Morenhaut *v.* Wilson, 52 Cal. 263.

Ouster.—In an action of ejectment by one tenant in common against another, the ouster is admitted by a general denial. La Riviere *v.* La Riviere, 77 Mo. 512.

Mining Rules.—Mining rules and customs in proof of ownership may be given in evidence under a general denial. Colman *v.* Clements, 23 Cal. 245.

Estoppel.—It is doubtful whether, in

Forcible Entry and Detainer.—In an action of forcible entry and detainer, all matters of legal excuse, justification, or avoidance can be given in evidence by the defendant under a general denial.[1]

Action to Quiet Title.—In a proceeding under the statute to quiet title, where the answer is a general denial, the issue of the plaintiff's possession is the only issue under the pleadings.[2]

Trespass Quare Clausum Fregit.—In trespass *quare clausum fregit* it is incumbent on the plaintiff to show that he was in the actual possession of the premises at the time of the alleged trespass, and the defendant may prove, under a general denial, any fact which shows that plaintiff was not in possession.[3]

Action on Warranty.—In an action for a breach of the covenant of warranty, the defendant, under a general denial, may show that there was no paramount title.[4]

The Statute of Limitations.—Ordinarily the statute of limitations is new matter to be pleaded. But in cases of ejectment some authorities hold that, where the statute operates, it vests the absolute title to the property, and that there is no more necessity of pleading it than though defendant held the plaintiff's title.[5]

ejectment, estoppel can be proved under a general denial. Creque *v.* Sears, 17 Hun (N. Y.) 123.

Fraud.—Under a general denial the defendant may show that a deed in plaintiff's chain of title was procured by fraud. Staley *v.* Housel, 35 Neb. 160; Franklin *v.* Kelley, 2 Neb. 80.

May Attack Plaintiff's Title in Any Manner.—The defendant, when he pleads the general denial, may attack plaintiff's title in any manner; he may show that the proceedings by which it was acquired are invalid and void. Benton *v.* Hatch, 43 Hun (N. Y.) 142, a sheriff's deed, *held* to be invalid; Kipp *v.* Bullard, 30 Minn. 84, and Mobley *v.* Griffin, 104 N. Car. 112, both cases where the execution sale was invalid because it conveyed a homestead; Roberts *v.* Chan Tin Pen, 23 Cal. 260, where the tax deed under which plaintiff claimed was allowed to be shown invalid; Miles *v.* Lingerman, 24 Ind. 385, the case of an infant's deed; Fraser *v.* Charleston, 11 S. Car. 486, the defense of title diverted by equitable assignment; Hickman *v.* Link, 97 Mo. 483, allowing the defendant to engraft a trust on a deed.

Oregon.—In an action of ejectment, where the defendant merely traverses the allegations in the complaint, and does not set up title in himself or another, the defendant will be confined in his evidence to such facts only as tend to show the weakness of the plaintiff's title. Phillippi *v.* Thompson, 8 Oregon 428.

1. Watson *v.* Whitney, 23 Cal. 376.

2. Murphy *v.* De France, 23 Mo. App. 337.

3. Uttendorffer *v.* Saegers, 50 Cal. 496, where the defendant was allowed to prove that a tenant of the plaintiff was in the actual possession. See Earl *v.* Bowen, 3 N. Y. Wkly. Dig. 461, where the defendant offered in evidence, under a general denial, a judgment in a former action of trespass, for the purpose of proving that he was formerly in possession of the *locus in quo*.

Texas.—In Texas, in an action *quare clausum fregit*, the general issue is not a denial of the plaintiff's possession. Carter *v.* Wallace, 2 Tex. 206.

4. Rhode *v.* Green, 26 Ind. 83. See Walker *v.* Fleming, 37 Kan. 171.

The ownership of realty as a probative fact may be given in evidence under the general issue when ownership of personalty is the fact in issue. Grewell *v.* Walden, 23 Cal. 165.

5. Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Bledsoe *v.* Simms, 53 Mo. 305; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Fulkerson *v.* Mitchell, 82 Mo. 13; Hill *v.* Bailey, 76 Mo. 454; Davis *v.* Peveler, 65 Mo. 189; Goff *v.* Roberts, 72 Mo. 570; Fairbanks *v.* Long, 91 Mo. 628; Stocker *v.* Green, 94 Mo. 280; Holmes *v.* Kring, 93 Mo. 452; Vail *v.* Halton, 14 Ind.

The Statute of Frauds.—Likewise some authorities hold that those contracts touching land which the Statute of Frauds requires to be in writing are void if not so, and that the statute may be relied on under a general denial.[1]

7. Mitigating Circumstances.—Mitigating circumstances and partial defenses are new matter to be specially pleaded; but under a general denial the question of actual damages is raised, and it has been held that all mitigating circumstances which might at common law have been given in evidence under the general issue may still be given under a general denial.[2]

XI. The General Denial as a Plea in Abatement.—The general denial does not perform the functions of a plea in abatement. Under the Code system of pleading the general denial is in one respect equivalent to the general issue at common law; it does not put in issue the plaintiff's title to sue.[3] The incapacity of

344. See Punderson *v.* Love, 3 Tex. 60; Rivers *v.* Foote, 11 Tex. 662; Dalby *v.* Booth, 16 Tex. 563; Mann *v.* Falcon, 25 Tex. 271; Maxwell *v.* Campbell, 45 Ind. 360; Watkins *v.* Jones, 28 Ind. 12; Evansville *v.* Evans, 37 Ind. 229; Wicks *v.* Smith, 18 Kan. 508; Powers *v.* Armstrong, 36 Ohio St. 357; Vore *v.* Woodford, 29 Ohio St. 245. And see article Limitations, Statute of, and this article, *post*, XIII. 6.

1. Wiswell *v.* Tefft, 5 Kan. 263; Allen *v.* Richards, 83 Mo. 55; Springer *v.* Kleinsorge, 83 Mo. 152; Schergens *v.* Wetzell, 12 Mo. App. 596; Hook *v.* Turner, 22 Mo. 333; Bernhardt *v.* Walk, 29 Mo. App. 206; Smith *v.* Theobold, 86 Ky. 141. But see Graff *v.* Foster, 67 Mo. 512; Donaldson *v.* Newman, 9 Mo. App. 235; Gordon *v.* Madden, 82 Mo. 193. And see article Frauds, Statute of, and this article, *post*, XIII. 7.

2. Wandell *v.* Edwards, 25 Hun (N. Y.) 498; Beardsley *v.* Bridgman, 17 Iowa 290; Smith *v.* Lisher, 23 Ind. 500. See Ronan *v.* Williams, 41 Iowa 680; Davenport Gas Light, etc., Co. *v.* Davenport, 15 Iowa 6; Peck *v.* Parchen, 52 Iowa 46; Martin *v.* Swearingen, 17 Iowa 346; Desmond *v.* Brown, 33 Iowa 13; McClintock *v.* Crick, 4 Iowa 453; Marker *v.* Dunn, 68 Iowa 720.

In an action for conversion partial satisfaction by one tort feasor may be given in evidence under the general denial. Muser *v.* Lewis, 14 Abb. N. Cas. (N. Y. Super. Ct.) 333.

In an action to recover damages for the alienation of the affections of plaintiff's wife, evidence to show that he and his wife did not live happily together, and that the wife had no affection for plaintiff, and that he lost nothing by deprivation of her society, is admissible under a general denial. Edwards *v.* Nichols, 21 N. Y. Wkly. Dig. 238.

And under a general denial, in an action for breach of promise, evidence that the plaintiff drank to excess is admissible in mitigation of damages. Button *v.* McCauley, 5 Abb. Pr. N. S. (N. Y. Ct. of App.) 29.

Libel and Slander.—Under the general denial, in an action for libel, the defendant may prove the truth of the charge, not as a defense, but in mitigation not only of punitive, but also of compensatory damages. Halstead *v.* Schempp, 6 Cinc. L. Bull. (Ohio) 271.

And in slander the general bad character of plaintiff may be shown under a general denial. Anonymous, 8 How. Pr. (N. Y. Supreme Ct.) 434. *Contra*, Anonymous, 6 How. Pr. (N. Y. Supreme Ct.) 160.

In *Indiana*, matters in mitigation, in actions for libel and slander, should be specially pleaded, but in all other actions they are admissible under a general denial. Smith *v.* Lisher, 23 Ind. 500.

3. White *v.* Moses, 11 Cal. 70; Cheatham *v.* Riddle, 12 Tex. 112; Clifton *v.* Lilley, 12 Tex. 130; Trammell *v.* Swan, 25 Tex. 473; Downs *v.* McCombs, 16 Ind. 211; Harrison *v.* Martinsville, etc., Co., 16 Ind. 505, 79 Am. Dec. 447; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Jones *v.* Cincinnati Type Foundry

the plaintiff to sue will be waived if a mere general denial is used. The point must be taken affirmatively in the answer.[1]

Existence of a Corporation.—No corporation, either foreign or domestic, is required to prove its corporate existence when the general denial alone is used. Such a form of denial does not raise the issue.[2]

Co., 14 Ind. 89; Sandford *v.* McCreedy, 28 Wis. 103; Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

But where the plaintiff sued as "executrix and residuary legatee," and the answer alleged that defendant had no knowledge or information sufficient to form a belief as to that averment, it was held that the plaintiff, under this form of denial, must prove her capacity. Wittmann *v.* Watry, 37 Wis. 238.

Missouri.—In *Missouri* a general denial puts in issue the incorporation of the plaintiff, where the incorporation is not by public act, and the suit is not upon a contract made with the plaintiff under the name by which it sues. Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344. See Farmers', etc., Bank *v.* Williamson, 61 Mo. 259.

And an allegation in the petition that the plaintiff is administrator is put in issue by a general denial. Gilmore *v.* Morris, 13 Mo. App. 114. See State *v.* Price, 21 Mo. 434.

1. Dillaye *v.* Parks, 31 Barb. (N. Y.) 132; Castree *v.* Gavelle, 4 E. D. Smith (N. Y.) 425.

The defense that plaintiff is a married woman and has not legal capacity to sue cannot be proved under a general denial. Dillaye *v.* Parks, 31 Barb. (N. Y.) 132.

The appointment of a *guardian ad litem* for an infant plaintiff is not put in issue by a general denial. Schenck *v.* Hagar, 24 Minn. 339. See Fetz *v.* Clark, 7 Minn. 217; Fogle *v.* Schaeffer, 23 Minn. 304.

That there is a defect of parties plaintiff cannot be proved under a general denial. Abbe *v.* Clark, 31 Barb. (N. Y.) 238.

Compare the following cases: U. S. *v.* Shoup, 2 Idaho 459; Erskine *v.* Wilson, 20 Tex. 77; Gregg *v.* Johnson, 37 Tex. 558; Compton *v.* Western Stage Co., 25 Tex. Supp. 67.

2. Williams Reaper Co. *v.* Smith, 33 Wis. 530; Central Bank *v.* Knowlton, 12 Wis. 624, 78 Am. Dec. 769; Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109; Farmers' Trust Co. *v.* Fisher, 17 Wis. 114; National L. Ins. Co. *v.* Robinson, 8 Neb. 452; Zunkle *v.* Cunningham, 10 Neb. 162; Dietrich *v.* Lincoln, etc., R. Co., 13 Neb. 43; Herron *v.* Cole, 25 Neb. 692; Bank of Havana *v.* Wickham, 7 Abb. Pr. (N. Y. Supreme Ct.) 134; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 312; Palmetto Lumber Co. *v.* Risley, 25 S. Car. 309; American Button-Hole, etc., Co. *v.* Hill, 27 S. Car. 164; St. Anthony Falls Water Power Co. *v.* King Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Woodson *v.* Milwaukee, 21 Minn. 60; Indianapolis Furnace, etc., Co. *v.* Herkimer, 46 Ind. 142; Cicero Hygiene Draining Co. *v.* Craighead, 28 Ind. 274; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Dunning *v.* New Albany, etc., R. Co., 2 Ind. 437; Railsbach *v.* Liberty, etc., Turnpike Co., 2 Ind. 656; Hubbard *v.* Chappel, 14 Ind. 601; Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137. See article CORPORATIONS.

Denial of Knowledge.—Nor does a general denial of knowledge or information put the corporate existence in issue. Liberian Exodus Joint Stock Steamship Co. *v.* Rodgers, 21 S. Car. 27.

Contract with View to Organize.—Where the contract sued on is one made with an existing corporation, the general denial is an admission of the corporate existence; but where the contract is made with a view to the organization of a corporate body, the plaintiff, after a general denial, must prove its incorporation. Chance *v.* Indianapolis, etc., Gravel Road Co., 32 Ind. 472; Wert *v.* Crawfordsville, etc., Turnpike Co., 19 Ind. 242; Williams *v.* Franklin Tp. Academical Assoc., 26 Ind. 310.

Incorporation of Defendant.—The converse of the rule that a plaintiff corporation need not prove its existence when a general denial is interposed is equally true. Thus, where an action is brought against a defendant by a name implying a corporation, and in

Partnership.—An allegation of the existence of a partnership is admitted by a general denial.[1]

XII. THE GENERAL DENIAL LIMITED IN SCOPE BY STATUTE.—Some of the States have by statutory provision limited the scope of the general denial in certain cases. *Texas* has a statute to the effect that when an action is founded on any instrument or note in writing its execution must be denied by affidavit.[2] In *Iowa* the genuineness of a signature to a written instrument must be denied in writing under oath.[3] In *Indiana* the general denial does not, unless sworn to, put in issue the execution of a written instrument.[4] *Missouri* provides by statute that the execution of a

that name such defendant forms an issue by general denial and goes to trial, it is not necessary for the plaintiff to introduce any evidence of the existence of the corporation. Adams Express Co. *v.* Hill, 43 Ind. 157.

New York.—The statute which absolves the plaintiff from proving its corporate existence unless *nul tiel corporation* is pleaded applies only to corporations created by a statute of the state. Under a general denial a foreign corporation must prove its corporate character. Waterville Mfg. Co. *v.* Bryan, 14 Barb. (N. Y.) 182.

Likewise a general denial will compel a joint stock association to prove its existence. Saltsman *v.* Shults, 14 Hun (N. Y.) 256.

1. Fisk *v.* Tank, 12 Wis. 306, 78 Am. Dec. 737; Whitman *v.* Wood, 6 Wis. 676; Martin *v.* American Express Co., 19 Wis. 336; Lee *v.* Hamilton, 12 Tex. 413; Congdon. *v.* Monroe, 51 Tex. 109; Drew *v.* Harrison, 12 Tex. 279; Persons *v.* Frost, 25 Tex. Supp. 129; Lewis *v.* Lowery, 31 Tex. 663; Cushing *v.* Smith, 43 Tex. 261.

2. Art. 2262 Sayles Tex. Civil Sts. vol. i. 704. A general denial does not put the plaintiff upon proof of the execution of the note sued on. Bedwell *v.* Thompson, 25 Tex. Supp. 245; Able *v.* Chandler, 12 Tex. 88, 62 Am. Dec. 518; Kinnard *v* Herlock, 20 Tex. 48; Lewin *v.* Houston, 8 Tex. 94. But the plaintiff must produce the note. Davis *v.* Marshall, 25 Tex. 372; Bedwell *v.* Thompson, 25 Tex. Supp. 245; Matossy *v.* Frosh, 9 Tex. 610; Bond *v.* Mallow, 17 Tex. 636. But if the note is alleged to be lost a general denial puts in issue its execution. Erskine *v.* Wilson, 20 Tex. 77.

A general denial in a suit to establish a rejected claim against an estate puts the plaintiff on proof of such account. Kendall *v.* Riley, 45 Tex. 20.

3. Hall *v.* Ætna Mfg. Co., 30 Iowa 215. But the statute providing that the signature to a written instrument shall be deemed genuine unless denied under oath relates only to the *genuineness* of the signature, and the defendant in an action on a note may, under a plea of *non est factum*, not under oath, show that he never signed the instrument sued on. Lake *v.* Cruikshank, 31 Iowa 375.

And the denial of the "execution" of the note sued on is not sufficient to cast upon the plaintiff the burden of proving the genuineness of the signature, but will permit the defendant to prove that the signature is not genuine. Sully *v.* Goldsmith, 49 Iowa 690.

The act of 1853 did not require an answer to an action on a note, denying any indebtedness, and the execution of the note, to be verified. Lyon *v.* Bunn, 6 Iowa 49. See also Seachrist *v.* Griffiths, 6 Iowa 390; Partridge *v.* Patterson, 6 Iowa 514; Sheldon *v.* Middleton, 10 Iowa 17; Tannon *v.* Robinson, 10 Iowa 272; Hall *v.* Ætna Mfg. Co., 30 Iowa 215; Carle *v.* Cornell, 11 Iowa 374; Twogood *v.* Coopers, 9 Iowa 415; Taylor *v.* Runyan, 9 Iowa 522; Wolff *v.* Hagensick, 10 Iowa 590; Markey *v.* Mettler, 1 Iowa 528; Shepard *v.* Ford, 10 Iowa 502; Gilbert *v.* Mosier, 11 Iowa 498; Mitchell *v.* Moore, 24 Iowa 394.

4. Evans *v.* Southern Turnpike Co., 18 Ind. 101. And the general denial must be verified if it puts in issue the genuineness of an indorsement. Stebbins *v.* Goldthwait, 31 Ind. 159.

Compare the following *California* cases, which hold that a general denial to an unverified complaint on a note puts indorsement in issue: Grogan *v.* Ruckle, 1 Cal. 159; Youngs *v.* Bell, 4 Cal. 201; Hastings *v.* Dollarhide, 18 Cal. 391; Mahe *v.* Reynolds, 38 Cal. 560. But it is otherwise if the

written instrument must be specifically denied under oath.[1]

Conditions Precedent.—Some states have statutes which allow the plaintiff to aver, generally, that he has performed all the conditions precedent on his part to be performed; but this does not allow the defendant to controvert such allegation by a general denial.[2]

XIII. New Matter.—1. General Nature—Definition.—"New matter" means matter extrinsic to the matter set up in the complaint as the basis of the cause of action.[3]

Must be Pleaded.—It is a settled rule of Code pleading that new matter by way of confession and avoidance must be specially pleaded.[4]

action is against an indorser on his indorsement. Mahe *v.* Reynolds, 38 Cal. 560.

But a general denial, not sworn to, will compel the plaintiff to produce the note. Hicks *v.* Reigle, 32 Ind. 360.

The statute prescribing that the execution of a writing shall be denied on oath applies only where the writing offered in evidence purports to have been executed by an actual party to the instrument. Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740. And in an action against an administrator or executor on a note of the decedent an unverified general denial puts in issue the execution of the instrument. Cawood *v.* Lee, 32 Ind. 44; Mahon *v.* Sawyer, 18 Ind. 73; Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740.

1. The objection that a bond sued on has no seal will not be considered unless the execution is denied under oath; a general denial does not raise the issue. State *v.* Chamberlin, 54 Mo. 338.

2. Preston *v.* Roberts, 12 Bush (Ky.) 571. *Compare* Tisdale *v.* Mitchell, 12 Tex. 68.

3. Manning *v.* Winter, 7 Hun (N. Y.) 482. New matter is where the contract is admitted, and the matter set up *avoids* the contract—not where the matter set up *denies* the contract. Gilbert *v.* Cram, 12 How. Pr. (N. Y. Supreme Ct.) 455; Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y. 573; Wabrod *v.* Bennett, 6 Barb. (N. Y.) 144; Radde *v.* Ruckgaber, 3 Duer (N. Y.) 684; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Brazill *v.* Isham, 12 N. Y. 9; Carter *v.* Koezley, 14 Abb. Pr. (N. Y. Super. Ct.) 147.

A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. Churchill *v.* Baumann, 95 Cal. 542; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Greenway *v.* James, 34 Mo. 326; Evans *v.* Williams, 60 Barb. (N. Y.) 347.

New matter is the averment of facts different from those alleged in the complaint, and not embraced within the judicial inquiry into their truth. Lupo *v.* True, 16 S. Car. 586; Hudson *v.* Wabash Western R. Co., 101 Mo. 13; Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 444, 4 Am. Rep. 337; Bridges *v.* Paige, 13 Cal. 641.

New matter is that which under the rules of evidence the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Glazer *v.* Clift, 10 Cal. 304; McCarty *v.* Roberts, 8 Ind. 150.

Whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some fact not inconsistent with such allegations, are new matter. Mauldin *v.* Ball, 5 Mont. 96.

Answer by Infant.—The same rules which determine what new matter is in the case of adults obtain in the case of an answer by an infant. It is the duty of a guardian *ad litem* to ascertain the facts pertining to the controversy intrusted to him, and, if they constitute new matter, to plead them. Roe *v.* Angevine, 7 Hun (N. Y.) 679. *Compare* Sawyer *v.* Gates (Supreme Ct.), 14 N. Y. St. Rep. 236.

4. *California.*—Ladd *v.* Stevenson, 1 Cal. 18; Kendall *v.* Vallego, 1 Cal. 371; Gaskill *v.* Moore, 4 Cal. 233; Piercy *v.* Sabin, 10 Cal. 22, 70 Am.

2. Manner of Pleading—Introductory.—The right to rely on the defense pleaded must be affirmatively shown by the answer,[1] and

Dec. 692; Coles *v.* Soulsby, 21 Cal. 47; Goddard *v.* Fulton, 21 Cal. 430; McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115; McDonald *v.* Davidson, 30 Cal. 173; Moss *v.* Shear, 30 Cal. 469; Ayres *v.* Bensley, 32 Cal. 620.

Nebraska.—Quick *v.* Sachasse, 31 Neb. 312.

Wisconsin.—Gay *v.* Fretwell, 9 Wis. 186.

North Carolina.—Johnson *v.* Bell, 74 N. Car. 355.

Texas.—Smith *v.* Sherwood, 2 Tex. 460; Keeble *v.* Black, 4 Tex. 69; Love *v.* McIntyre, 3 Tex. 10; Ulims *v.* Mitchell, 1 Tex. 443.

New York.—McKyring *v.* Bull, 16 N. Y., 297, 69 Am. Dec. 696; Venice *v.* Breed, 65 Barb. (N. Y.) 598; Catlin *v.* Gunter, 1 Duer (N. Y.) 253; Allen *v.* Mercantile Mut. Ins. Co., 46 Barb. (N. Y.) 642; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229; Jacobs *v.* Remsen, 36 N. Y. 668; Carter *v.* Koezley, 14 Abb. Pr. (N. Y. Super. Ct.) 147; Tilson *v.* Clark, 45 Barb. (N. Y.) 178; Savage *v.* Corn Exch., etc., Nav. Ins. Co., 4 Bosw. (N. Y.) 1; Fry *v.* Bennett, 28 N. Y. 324; Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293; Rapalee *v.* Stewart, 27 N. Y. 310; Dingeldein *v.* Third Ave. R. Co., 9 Bosw. (N. Y.) 79; Pier *v.* Finch, 29 Barb. (N. Y.) 170; Mechanics Bank *v.* Foster, 44 Barb. (N. Y.) 87; Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429; 88 Am. Dec. 396.

Evidence of Defense Not Set Up.—A defendant will not be allowed to give evidence of a defense not set up in his answer. Diefendorff *v.* Gage, 7 Barb. (N. Y.) 18; Button *v.* McCauley, 38 Barb. (N. Y.) 413; Baker *v.* Bailey, 16 Barb. (N. Y.) 54; Wright *v.* Delafield, 25 N. Y. 266; Fay *v.* Grimsteed, 10 Barb. (N. Y.) 321; Kelsey *v.* Western, 2 N. Y. 501; Sandford *v.* Travers, 7 Bosw. (N. Y.) 498; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468; Field *v.* New York, 6 N. Y. 179; Bucknam *v.* Brett, 13 Abb. Pr. (N. Y. Supreme Ct.) 119.

And an affirmative defense is of no avail if not pleaded, though the testimony discloses it. Dingeldein *v.* Third Ave. R. Co., 9 Bosw. (N. Y.) 79, where the illegality in a contract sued on was shown by the evidence. See also Paige *v.* Willet, 38 N. Y. 28; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 14 N. Y. 85; Richards *v.* Allen, 3 E. D. Smith (N. Y.) 399.

Allegation on Information and Belief.—Affirmative matter in an answer may be alleged "upon information and belief" with the same effect as in a complaint. Risdon *v.* Davenport (S. Dak., 1894), 57 N. W. Rep. 482. Thus, in an answer, an allegation of payment upon information and belief is sufficient. First Nat. Bank *v.* Roberts, 2 N. Dak. 195.

The Insertion of Superfluous Allegations in the Complaint does not make such allegations merely traversable by defendant. If they are of new matter their anticipation by plaintiff does not relieve defendant from pleading them. Hyde *v.* Hazel, 43 Mo. App. 671.

New Matter as Complete Defense.—When the new matter set up in the answer amounts to a complete defense, it is not necessary to traverse any of the allegations of the petition. Kortzendorfer *v.* St. Louis, 52 Mo. 204.

South Carolina.—The Code in this state does not recognize special pleas. Smith *v.* Chamberlain, 38 S. Car. 530.

1. Gillett *v.* Hill, 32 Iowa 220.

An Answer to One Count of a complaint should specify to which count it is intended to apply. Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y. Supreme Ct.) 68.

Stating Distinct Grounds of Defense.—An answer which fails to state separately the distinct grounds of defense will be rejected if excepted to in apt time. Keathley *v.* Branch, 88 N. Car. 379.

Putting Court in Possession of Facts.—A pleader who would resist the collection of notes given in the purchase of lands must by his allegations put the court in possession of all the facts necessary to enable it to do complete equity. Cooper *v.* Singleton, 19 Tex. 260, 70 Am. Dec. 333.

Setting Out Proofs.—But a defendant, having stated a defense, is not bound so to define it, or rather enlarge it, as to set out the proofs by which it is to be established. Pacific Mail S. S. Co. *v.* Irwin, 67 Barb. (N. Y.) 277.

Setting Up Supposed Claim for Plaintiff.—The defendant cannot set up a supposed or presumed ground of claim for plaintiff and then plead to it himself, and thus put the plaintiff to the

care must be taken to insert in the answer allegations sufficient to support every element and constituent part of the defense.[1]

Giving Color.—An answer seeking to avoid the complaint by new matter should confess, directly or by implication, that but for the matter of avoidance contained in it the action could be maintained.[2]

necessity of pleading to it also. Kilbourne *v.* Lockman, 8 Iowa 380. Thus, where an answer purports to admit a certain fact, as stated in the petition, and the petition does not state any such fact, *held*, that the answer will not be construed as alleging affirmatively that such fact exists, so as to require the plaintiff to reply thereto. Hoisington *v.* Armstrong, 22 Kan. 110.

Yet where the complaint avers a fact, qualified by a particular intention, the answer may admit the fact and deny the intention. Kingsley *v.* Gilman, 12 Min. 515.

1. An answer of tender, omitting to allege that the money has been paid into court, does not state facts sufficient to constitute a defense, and plaintiff may avail himself of the objection upon trial. Becker *v.* Boon, 61 N. Y. 317.

Where a consideration is necessary to support a release, in pleading the release as a defense the consideration for it must also be pleaded. Peters *v.* Clements, 52 Tex. 140.

In pleading a pending attachment or garnishment as a defense, the defendant should show whether the whole or any portion of the debt has been attached or garnished. Clark *v.* Marbourg, 33 Kan. 471.

Although by statute the performance of conditions precedent in a contract may be stated generally, if the defendant relies on a failure to perform them, this is new matter, and the answer must specify the particulars in which such conditions have not been performed. Preston *v.* Roberts, 12 Bush (Ky.) 571.

In further illustration of the rule stated in the text, see Baskin *v.* Godbe, 1 Utah 28; Hager *v.* Blake, 16 Neb. 12; O'Donohue *v.* Hendrix, 13 Neb. 257; Burlington, etc., R. Co. *v.* Kearney County, 17 Neb. 515; State *v.* Manning, 55 Mo. 142; Krause *v.* Thomas, 53 Minn. 209; Huyler *v.* Dahoney, 48 Tex. 234; Welborn *v.* Norwood, 1 Tex. Civ. App. 614; Hyde *v.* Kitchin, 21 N. Y. Supp. 238, 66 Hun (N. Y.) 633.

Allegation of Legal Notice.—The allegation, "after due notice, as required by law," is a sufficient allegation of a legal notice. State *v.* Nolan, 99 Mo. 570.

Where it is necessary to give a notice in writing the surety may avail himself of a written notice to the holder to sue the maker, under an averment in the answer that he had requested plaintiff to sue the maker, without an allegation that the notice was in writing. Coats *v.* Swindle, 55 Mo. 31.

Not Real Party in Interest.—A mere allegation that the plaintiff is not the real party in interest is not sufficient. The facts must be set out which will enable the court to say that the plaintiff is not the real party in interest. Lamson *v.* Falls, 6 Ind. 309; Raymond *v.* Pritchard, 24 Ind. 318; Heretti *v.* Smith, 33 Ind. 514.

But in an action upon a judgment, an allegation in the answer that plaintiff is not, but that another person, naming him, is the owner of such judgment, presents a good defense, though the particulars of the assignment are not stated. Holcombe *v.* Tracy, 2 Minn. 241.

2. McMurray *v.* Gifford, 5 How. Pr. (N. Y. Supreme Ct.) 15; Tobias *v.* Rogers, 3 Code Rep. (N. Y.) 156; State *v.* Williams, 48 Mo. 210; Howes *v.* Carver, 7 Iowa 491; Hutchinson *v.* Sangster, 4 Greene (Iowa) 340; Martin *v.* Swearengen, 17 Iowa 346; Anson *v.* Dwight, 18 Iowa 241; Morgan *v.* Hawkeye Ins. Co., 37 Iowa 359.

Pleading conditionally, or in the alternative, is not allowable. Bauer *v.* Wagner, 39 Mo. 385.

But the confession may be by implication as well as directly. See Morgan *v.* Hawkeye Ins. Co., 37 Iowa 359, where the answer was held to sufficiently confess by implication a cause of action; also Abbott *v.* Sartori, 57 Iowa 656, where the answer was held not to contain sufficient confession to warrant proof of matter in avoidance.

But in an Action for Slander the defendant may allege mitigating circum-

Payment.—The rule as to the degree of certainty required in the plea of payment is the same as that in other pleas; facts which constitute the evidence of payment need not be stated.[1]

Fraud.—A general plea of fraud is subject to demurrer. The specific statements and acts relied upon as constituting the fraud must be set out.[2]

stances without confessing the speaking of the words. Desmond *v.* Brown, 33 Iowa 13. See McClintock *v.* Crick, 4 Iowa 453; Marker *v.* Dunn, 68 Iowa 720.

1. Wells *v.* Fairbank, 5 Tex. 582; Cartwright *v.* Jones, 13 Tex. 1. An allegation of payment, without showing that the payment was made on account of the claim sued upon, is insufficient. Each *v.* Hardy, 22 Minn. 65. A plea of payment in general terms is good if not excepted to. Holliman *v.* Rogers, 6 Tex. 91. See First Nat. Bank *v.* Bews, 2 Idaho 1175; Phillips *v.* Jarvis, 19 Wis. 204, where the pleas of payment were held good. And see Manufacturers' Nat. Bank *v.* Russell, 6 Hun (N. Y.) 375, and State *v.* Central Pac. R. Co., 9 Nev. 79, where the pleas of payment were held defective.

A plea of payment to the assignor of a chose in action must allege that the payment was made before notice of the assignment. Indianapolis, etc., R. Co. *v.* Hyde, 122 Ind. 188. *Compare* Shauver *v.* Philips (Ind. App., 1893), 32 N. E. Rep. 1131; Holzhauer *v.* Heine, 37 Mo. 443.

Specifying Time.—A plea of payment need not specifically state the several times when partial payments were made; a general plea of payment is sufficient. Hendrix *v.* Gore, 8 Oregon 407.

Contra.—The plea should be specific as to time. Hahn *v.* Broussard, 3 Tex. Civ. App. 481; Gray *v.* McFarland, 29 Tex. 163; O'Neal *v.* Phillips, 83 Ga. 556.

Stating Amount.—A payment may be pleaded without naming the amount paid. Bobb *v.* Bancroft, 13 Kan. 123; Joy *v.* Cooley, 19 Mo. 645. *Contra*, Hahn *v.* Broussard, 3 Tex. Civ. App. 481.

What May Be Pleaded as Payment.—Any valid agreement between the parties which would operate to discharge the debt may be pleaded as a payment. McLaughlin *v.* Webster, 141 N. Y. 76; Wheeler *v.* Faurot, 37 Ohio St. 27; Hart *v.* Crawford, 41 Ind. 197; Wolcott *v.* Ensign, 55 Ind. 70. *Contra*, Able *v.* Lee, 6 Tex. 427. See Lowry *v.* Shane, 34 Ind. 495; Farmers', etc., Bank *v.* Sherman, 33 N. Y. 69; Hoddy *v.* Osborn, 9 Iowa 517; Pemberton *v.* Simmons, 100 N. Car. 317.

But under a plea of payment evidence going to excuse *non*payment is inadmissible. Voak *v.* National Investment Co., 51 Minn. 450.

2. *Minnesota.*—Cummings *v.* Thompson, 18 Minn. 246; Brown *v.* Manning, 3 Minn. 13, 74 Am. Dec. 736; Kelley *v.* Wallace, 14 Minn. 173.

Indiana.—Joest *v.* Williams, 42 Ind. 565, 13 Am. Rep. 377; Ham *v.* Greve, 34 Ind. 18; Curry *v.* Keyser, 30 Ind. 214; Keller *v.* Johnson, 11 Ind. 337, 71 Am. Dec. 355; Fankbouer *v.* Fankbouer, 20 Ind. 62; Jenkins *v.* Long, 19 Ind. 28, 81 Am. Dec. 374.

Iowa.—Ockendon *v.* Barnes, 43 Iowa 615; Mills *v.* Collins, 67 Iowa 164; Hale *v.* Walker, 31 Iowa 344, 7 Am. Rep. 137.

Missouri.—Hoester *v.* Samuelmann, 101 Mo. 619; Casey *v.* Smales, 4 Mo. 77; Moore *v.* Thompson, 6 Mo. 353; Jolliffe *v.* Collins, 21 Mo. 338; Hill *v.* Miller, 36 Mo. 182; Smalley *v.* Hale, 37 Mo. 102; Wood *v.* Evans, 43 Mo. App. 230; Jones *v.* St. Louis, etc., R. Co. 79 Mo. 92; Martin *v.* Lutkewitte, 50 Mo. 58; Peers *v.* Davis, 29 Mo. 184; Hodges *v.* Torrey, 28 Mo. 103; Duffy *v.* Byrne, 7 Mo. App. 418.

New York.—McMurray *v.* Gifford, 5 How. Pr. (N. Y. Supreme Ct.) 14.

California.—Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 355; Capuro *v.* Builders' Ins. Co., 39 Cal. 123; Gushee *v.* Leavitt, 5 Cal. 160.

See Hale *v.* Walker, 31 Iowa 344, 7 Am. Rep. 137, and Foy *v.* Haughton, 83 N. Car. 467, where the pleas of fraud were held insufficient. See also Van Wy *v.* Clark, 59 Ind. 259, where the defense of fraud was held sufficiently stated.

In a defense upon the ground of fraudulent representations it is not sufficient to aver that the representa-

Want of Consideration.—The answer of a want of consideration may consist of the general statement that there was no consideration, without any further or more particular statement.[1]

Justification.—A plea of justification must state particularly the the matters relied on.[2]

tions were false; the pleader must show wherein they were false. Specht *v.* Allen, 12 Oregon 117.

But to Avoid the Estoppel of a Judgment it is sufficient to allege that it was obtained by fraud, without stating the facts that constitute the fraud. Edgell *v.* Sigerson, 20 Mo. 494.

In Pleading a Fraudulent Issue of Bonds it is not sufficient to do so in general terms. Specific facts constituting the presumption of fraud must be alleged. Cummings *v.* Lawrence County, 1 S. Dak. 158.

Fraudulent Conveyance.—An allegation that a conveyance was made with intent to delay and defraud the grantor's creditors is sufficient as an allegation of fraud. Probert *v.* McDonald, 2 S. Dak. 495.

1. Hunter *v.* McLaughlin, 43 Ind. 45; Bush *v.* Brown, 49 Ind. 573, 19 Am. Rep. 695; Webster *v.* Parker, 7 Ind. 185; Ohio Thresher, etc., Co. *v.* Hensel (Ind. App., 1894), 36 N. E. Rep. 716; Williams *v.* Mellon, 56 Mo. 262. See Barr *v.* Baker, 9 Mo. 850; Doan *v.* Mass. 20 Mo. 297; Smith *v.* Hutchinson, 61 Mo. 83; Lindell *v.* Rokes, 60 Mo. 249, 21 Am. Rep. 395; Merrick *v.* Phillips, 58 Mo. 436; Bennett *v.* Torlina, 56 Mo. 309; Myers *v.* Van Wagoner, 56 Mo. 115; Sumner *v.* Summers, 54 Mo. 340; Porter *v.* Jones, 52 Mo. 399; Hamilton *v.* Marks, 63 Mo. 167; Williams *v.* Jensen, 75 Mo. 681.

The statement that there was a total failure of consideration is a statement of a conclusion of law. German Bank *v.* Mulhall, 8 Mo. App. 558.

It has been held that a plea of want of consideration in general terms is subject to a motion for a more specific statement. Simpson Centenary College *v.* Bryan, 50 Iowa 293. But if no motion is made the objection is waived. Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225.

In an action on a note given for the price of land an answer averring failure of consideration in consequence of a defect in the title must set out in what the defect consists. Staley *v.* Ivory, 65 Mo. 74; Copeland *v.* Loan, 10 Mo. 266; Morrow *v.* Bright, 30 Mo. 298; Clifton *v.* Brundage, 25 Tex. 331. And a copy of the deed must be filed with the answer. Mahoney *v.* Robbins, 49 Ind. 147.

Counterclaim.—A plea of want of consideration is a technical defense, not a counterclaim. Jolliffe *v.* Collins, 21 Mo. 339. But if the answer alleges facts sufficient to constitute either the defense of want of consideration or that of a recoupment of damages, it is not necessary for defendant to state which he will rely upon; and if he so states, he will not be precluded from insisting upon any defense which the facts alleged will justify. Springer *v.* Dwyer, 50 N. Y. 20.

2. Barley *v.* Cannon, 17 Mo. 595. It must identify the trespass justified with that complained of. Isley *v.* Huber, 45 Ind. 421.

In pleading an order of a township board for the opening of a road as a justification to an action for trespass, it is necessary to plead specially the facts which authorized the board to make the order, or to state generally that the order was duly made. Robinson *v.* Jones, 71 Mo. 582.

The answer to a petition to recover damages for the loss of goods cast overboard by the carrier must show all the facts necessary to justification of the jettison. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

Arrest and Imprisonment.—A plea justifying the arrest of the plaintiff, on the ground that a crime had been committed, and that there was reasonable ground to suspect and accuse the plaintiff, must distinctly state the reasons for so suspecting him. Boynton *v.* Tidwell, 19 Tex. 118. And the answer must identify the arrest justified with that complained of. Gallimore *v.* Ammerman, 39 Ind. 323.

Slander.—An answer merely stating that the words spoken are true is not sufficient as a justification; it should state the facts constituting the crime or offense imputed so that an issue of either law or fact may be found. Atteberry *v.* Powell, 29 Mo. 429, 77 Am.

Usury.—An answer setting up usury must aver clearly every particular necessary to establish the usury charged, and must distinctly negative every supposable fact which, if true, would render the transaction innocent or lawful.[1]

Illegality of Contract.—Where the illegality of a contract sued on is relied on as a defense, the answer must specify wherein it is illegal, and all the facts going to render it void must be pleaded.[2]

Duress.—An answer setting up duress and coercion must aver the facts constituting it.[3]

Accord and Satisfaction.—A plea of accord and satisfaction must state that the matter relied upon as an accord was accepted as a satisfaction by the creditor.[4]

Estoppel in Pais.—An *estoppel in pais* should be pleaded with particularity.[5]

Dec. 579. And see George *v.* Lemon, 19 Tex, 150; Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440

After verdict in an action of slander it is too late to object to the insufficiency of the justification set forth in the answer. Evans *v.* Franklin, 26 Mo. 252. See article LIBEL AND SLANDER.

1. Gaston *v.* McLeran, 3 Oregon 389; Clayes *v.* Hooker, 4 Hun (N. Y.) 231; Rountree *v.* Brinson, 98 N. Car. 107; Moore *v.* Woodward, 83 N. Car. 531; Oldham *v.* Bank, 85 N. Car. 241. The Code has not altered the rule that the defense of usury must be distinctly set up in the plea or answer, and that the terms of the usurious agreement and the *quantum* of the usurious interest or premium must be distinctly and correctly set up. Manning *v.* Tyler, 21 N. Y. 567; Anglo-American Land, etc., Co. *v.* Brohman, 33 Neb. 409; Keim *v.* Avery, 7 Neb. 54.

But see Gebhart *v.* Sorrels, 9 Ohio St. 462, where the plea of usury was held good, although it failed to negative exceptions in the usury statute.

As Counterclaim.—When usury is set up without it being stated whether it is set up as a defense or as a counterclaim, it will be deemed to be set up as a strict defense, and that only. Burrall *v.* De Groot, 5 Duer (N. Y.) 379.

2. In a suit to recover on a note the answer set up that the note was based on a "gambling transaction." *Held*, that, in the absence of specific averments stating what the real character of the transaction was, an exception to that portion of the answer was properly sustained. McCamant *v.* Batsell, 59 Tex. 363.

The defense that a note was given for a wager upon an election must state that the election was one authorized by law, and what particular election it was. Sybert *v.* Jones, 19 Mo. 86.

An answer alleging that money was advanced for an illegal purpose must also state that it was so used. Howell *v.* Stewart, 54 Mo. 400.

And where the illegality of a contract is relied on as a defense, the answer must state that the plaintiff had knowledge of the illegality and participated in it. Wallace *v.* Lark, 12 S. Car. 578.

Superfluous Allegation.—If the facts which show that the contract was unlawful are set out, there is no necessity to aver the mere conclusion of law, that the consideration was illegal. Moffatt *v.* Bulson, 96 Cal. 106.

3. Richardson *v.* Hittle, 31 Ind. 119; Connecticut L. Ins. Co. *v.* McCormick, 45 Cal. 580.

It must be distinctly stated by whom the duress was made. An allegation of duress by one will not sustain proof of duress by another. Lord *v.* Lindsay, 18 Hun (N. Y.) 484.

4. Wilkerson *v.* Bruce, 37 Mo. App. 156; Shaw *v.* Burton, 5 Mo. 478. But a failure in this respect cannot be taken advantage of after verdict. Wilkerson *v.* Bruce, 37 Mo. App. 156.

An allegation that the notes have been "satisfied and discharged" does not constitute a plea of accord and satisfaction. Hogan *v.* Burns (Cal., 1893), 33 Pac. Rep. 631. See article ACCORD AND SATISFACTION, and *post*, XIII, 8, *s*.

5. McKeen *v.* Naughton, 88 Cal. 462; Buck *v.* Milford, 90 Ind. 291; Stewart *v.* Beck, 90 Ind. 458; Robbins

Res Judicata.—The party relying upon a former adjudication as a defense must aver in his answer in what court the judgment was rendered, and must plead facts showing that the recovery was upon the same subject-matter and between the same parties, or their privies, as the suit in which the defense of *res judicata* is made, and must aver that the judgment is in full force.[1]

Statute of Limitations.—The statute of limitations is properly pleaded only by alleging the facts which would make the statute applicable.[2]

Equitable Defenses.—The defendant may set up an equitable defense in an action at law, but if he relies on an equitable right of action as a defense, he must plead the same as fully as if he were bringing an action in equity.[3]

Contributory Negligence.—A plea of contributory negligence should set out the facts constituting the negligence.[4]

v. Magee, 76 Ind. 381; Lash *v.* Rendell, 72 Ind. 475. As to what sufficiently pleads an *estoppel in pais*, see Barnhart *v.* Fulkerth, 90 Cal. 157; also Texas Banking, etc., Co. *v.* Hutchins, 53 Tex. 61, 37 Am. Dec. 750, where the plea was held defective for want of certainty.

It should commence, "that the plaintiff ought not to be admitted to allege." Page *v.* Smith, 13 Oregon 413.

1. Spargar *v.* Romine, 38 Neb. 736; Thomas *v.* Thomas, 33 Neb. 373; Montrose *v.* Wanamaker, 134 N. Y. 590; Nave *v.* Adams, 107 Mo. 419; Field *v.* Sims, 96 Ala. 540; McCreary *v.* Jones, 96 Ala. 592. See Brandt *v.* Albers, 6 Neb. 504, and Smith *v.* Downey (Ind. App., 1893), 35 N. E. Rep. 568, where the plea was held insufficient.

A plea of former recovery in ejectment, as to a part of the demanded premises, should describe the land which was in contest in the former action. Anderson *v.* Fisk, 36 Cal. 626.

2. Walker *v.* Laney, 27 S. Car. 150; Maple *v.* Cincinnati R. Co., 40 Ohio St. 313; Turner *v.* Shuffler, 108 N. Car. 643; Hartson *v.* Hardin, 40 Cal. 264; McCollister *v.* Willey, 52 Ind. 382; Templeton *v.* Sharp (Ky., 1888), 9 S. W. Rep. 507; Stiles *v.* Smith, 55 Mo. 364; McKinzie *v.* Hill, 51 Mo. 303, 11 Am. Rep. 450; Wiggins *v.* Lovering, 9 Mo. 262.

A plea of the general statute of limitations is not sufficient when a special one is relied on. Howell *v.* Rogers, 47 Cal. 291. See Harper *v.* Eubank, 32 Mo. App. 258; Hunter *v.* Hunter, 50 Mo. 445.

In pleading the statute care must be taken not to plead legal conclusions merely. Scroggin *v.* National Lumber Co. (Neb., 1894), 59 N. W. Rep. 548; Pope *v.* Andrews, 90 N. Car. 401. See article LEGAL CONCLUSIONS.

For treatment of the subject of pleading the statute of limitations, see article LIMITATIONS, STATUTE OF; also *post*, XIII, 8, *l*.

Legal Conclusions.—For treatment of the subject of pleading legal conclusions, see article LEGAL CONCLUSIONS.

3. Carpentier *v.* Oakland, 30 Cal. 439; Chipman *v.* Hastings, 50 Cal. 310; Kentfield *v.* Hayes, 57 Cal. 409; Miller *v.* Fulton, 47 Cal. 146; Meador *v.* Parsons, 19 Cal. 295; Weber *v.* Marshall, 19 Cal. 447; Lestrade *v.* Barth, 19 Cal. 660; Downer *v.* Smith, 24 Cal. 115; Blum *v.* Robertson, 24 Cal. 129; Kahn *v.* Old Tel. Min. Co., 2 Utah 175; Garrett *v.* Love, 89 N. Car. 205; Anderson *v.* Logan, 105 N. Car. 266; Rose *v.* Treadway, 4 Nev. 455, 97 Am. Dec. 546; Maguire *v.* Vice, 20 Mo. 428; Jones *v.* Brinker, 20 Mo. 87; Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694; Ells *v.* Pacific R. Co., 51 Mo. 200.

The defendant becomes an actor with respect to the matter alleged by him. Estrada *v.* Murphy, 19 Cal. 249; Dewey *v.* Hoag, 15 Barb. (N. Y.) 365.

For treatment of the subject of pleading equitable defenses, see article EQUITABLE DEFENSES.

4. Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318; Higgins

Statute of Frauds.—In pleading the defense of the Statute of Frauds it is not sufficient to allege that the matter is barred by the statute; the facts relied upon as a defense must be set out.[1]

8. What Constitutes New Matter—*a.* INTRODUCTORY.—The requirement contained in the Codes, that an answer must contain a statement of any new matter constituting a defense, is imperative.[2]

b. EQUITABLE DEFENSES.—The Codes having abolished the distinction between actions at law and suits in equity, and between the forms of all such actions, as theretofore existing, an equitable defense to a civil action is now as available as a legal defense. The question now is, ought the plaintiff to recover, and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or of legal cognizance. But matter constituting an equitable defense is new matter, and must be pleaded.[3]

v. Missouri Pac. R. Co., 43 Mo. App. 547.

For treatment of the subject of pleading contributory negligence, see article CONTRIBUTORY NEGLIGENCE.

1. Dinkel *v.* Gundelfinger, 35 Mo. 172; Bean *v.* Valle, 2 Mo. 126.

For treatment of the subject of pleading the Statute of Frauds, see article FRAUDS, STATUTE OF.

2. *New York.*—Button *v.* McCauley, 38 Barb. (N. Y.) 413; Hendricks *v.* Decker, 35 Barb. (N. Y.) 298; Brett *v.* First Universalist Soc., 63 Barb. (N. Y.) 610; Catlin *v.* Gunter, 1 Duer (N. Y.) 253; Eldridge *v.* Mather, 2 N. Y. 157; Weaver *v.* Barden, 49 N. Y. 286.

Indiana.—Frybarger *v.* Cockefair, 17 Ind. 404; Bingham *v.* Kimball, 17 Ind. 396; Johnson *v.* Cuddington, 35 Ind. 43; Brown *v.* College Corner, etc., Gravel Road Co., 56 Ind. 110; Brown *v.* Freed, 43 Ind. 253; Livesey *v.* Livesey, 30 Ind. 398; Casade *v.* Holdridge, 50 Ind. 529.

Wisconsin.—Scheer *v.* Keown, 34 Wis. 353; Frisbee *v.* Langworthy, 11 Wis. 376; Orton *v.* Noonan, 25 Wis. 672; McLane *v.* Bovee, 35 Wis. 27; Lombard *v.* Cowham, 34 Wis. 486; Dutcher *v.* Dutcher, 39 Wis. 651.

Minnesota.—Warner *v.* Myrick, 16 Minn. 91.

Iowa.—Dyson *v.* Ream, 9 Iowa 51; Patterson *v.* Clark, 20 Iowa 429.

California.—Glazer *v.* Clift, 10 Cal. 304.

Ohio.—Stewart *v.* Hoag, 12 Ohio St. 623.

Missouri.—Maybee *v.* Moore, 90 Mo. 340; Stone *v.* Hunt, 94 Mo. 475; Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147; Hudson *v.* Wabash Western R. Co., 101 Mo. 13; Keitel *v.* St. Louis, etc., R. Co., 28 Mo. App. 657; St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76.

North Carolina.—Young *v.* Greenlee, 82 N. Car. 346.

Kentucky.—Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160.

Nebraska.—South Omaha *v.* Cunningham, 31 Neb. 316.

Oregon.—Grant *v.* Baker, 12 Oregon 329.

United States.—Watkinds *v.* Southern Pac. Co., 38 Fed. Rep. 711.

3. *New York.*—Dobson *v.* Pearce, 12 N. Y. 168, 62 Am. Dec. 152; Despard *v.* Walbridge, 15 N. Y. 374; Morris *v.* Tuthill, 72 N. Y. 575; Cramer *v.* Benton, 4 Lans. (N. Y.) 291; Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; Hicks *v.* Sheppard, 4 Lans. (N. Y.) 335; Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Webster *v.* Bond, 9 Hun (N. Y.) 437; Mentz *v.* Cook, 108 N. Y. 504; Baron *v.* Korn, 51 Hun (N. Y.) 401; Seymour *v.* McKinstry, 106 N. Y. 230; Wheelock *v.* Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405; Bell *v.* Spotts, 40 N. Y. Super. Ct. 552; Canaday *v.* Stiger, 55 N. Y. 452; Hoppough *v.* Struble, 60 N. Y. 430; Foot *v.* Sprague, 12 How. Pr, (N. Y. Supreme Ct.) 355; Pratt *v.* Peckham (Supreme Ct.), 7 N. Y. St. Rep. 621; Burget *v.* Bissell, 5 How. Pr. (N. Y. Supreme Ct.) 192; Hicksville, etc., R. Co. *v.* Long Island R. Co., 48 Barb. (N. Y.) 355; Hunt *v.* Farmers' Loan, etc., Co., 8 How. Pr. (N. Y. Supreme Ct.) 416; Hinman *v.*

c. MATTER IN ABATEMENT.—Technical pleas in abatement are abolished, but those defenses which were formerly so pleaded are

Judson, 13 Barb. (N. Y.) 629; Kay *v.* Whittaker, 44 N. Y. 565; Garner *v.* Hannah, 6 Duer (N. Y.) 262; Giles *v.* Austin, 62 N. Y. 486.

Texas.—Cannon *v.* Hemphill, 7 Tex. 184; Egery *v.* Power, 5 Tex. 501; Walcott *v.* Hendrick, 6 Tex. 406; Castro *v.* Gentiley, 11 Tex. 28.

North Carolina.—Bean *v.* Western North Carolina R. Co., 107 N. Car. 731.

Ohio.—Stewart *v.* Hoag, 12 Ohio St. 623.

Missouri.—Jones *v.* Shaw, 67 Mo. 667.

Minnesota.—Gates *v.* Smith, 2 Minn. 30; McClave *v.* White, 5 Minn. 178.

Iowa.—Kelsey *v.* Kelsey, 57 Iowa 383.

California.—Terry *v.* Sickles, 13 Cal. 427; Brodrib *v.* Brodrib, 56 Cal. 563; Hopkins *v.* Beard, 6 Cal. 664; Manly *v.* Howlett, 55 Cal. 94; Hartley *v.* Brown, 46 Cal. 202; Marks *v.* Sayward, 50 Cal. 57; McCauley *v.* Fulton, 44 Cal. 356; Sneed *v.* Osborn, 25 Cal. 630; Seaton *v.* Son, 32 Cal. 481; Cross *v.* Sacramento Sav. Bank, 66 Cal. 462; Barfield *v.* Price, 40 Cal. 535; Wright *v.* Shafter, 48 Cal. 275; Ross *v.* Heintzen, 36 Cal. 318; Kenyon *v.* Quinn, 41 Cal. 326; Gates *v.* Salmon, 46 Cal. 363; Stokes *v.* Stevens, 40 Cal. 391; Pierson *v.* McCahill, 21 Cal. 123.

Action at Law.—An equitable defense may be made to an action at law. Equitable Assur. Soc. *v.* Cuyler, 75 N. Y. 511; Pitcher *v.* Hennessey, 48 N. Y. 415; Cavalli *v.* Allen, 57 N. Y. 508; Hook *v.* Craighead, 32 Mo. 405; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137; Rose *v.* Williams, 5 Kan. 483; Rogers *v.* Gwinn, 21 Iowa 58; Wa Ching *v.* Constantine, 1 Idaho 266; Salsbury *v.* Ellison, 7 Colo. 167, 49 Am. Rep. 347. Thus fraud may be set up as an equitable defense to an action upon a judgment of ejectment. See Rogers *v.* Gwinn, 21 Iowa 58.

An equitable defense may be set up to an action of ejectment. Dobson *v.* Pearce, 12 N. Y. 163, 12 Am. Dec. 152; Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; Smith *v.* Athern, 34 Cal. 512; King *v.* Meyer, 35 Cal. 646; Love *v.* Watkins, 40 Cal. 548, 6 Am. Rep. 624; Gerdes *v.* Moody, 41 Cal. 336; Marshall *v.* Caldwell, 41 Cal. 611; Bruck *v.* Tucker, 42 Cal. 346; Montgomery *v.* Spect, 55 Cal. 352; Boyd *v.* Brinckin, 55 Cal. 427; Wormouth *v.* Johnson, 58 Cal. 621; Whittier *v.* Stege, 61 Cal. 239; Hayden *v.* Stewart, 27 Mo. 286; Chouteau *v.* Gibson, 76 Mo. 38; Reece *v.* Roush, 2 Mont. 586; Johnson *v.* McArthur, 64 N. Car. 675. Thus, a mere equitable title to land, if of such a character as in equity entitles the holder to possession, is a sufficient defense to an action of ejectment. Willis *v.* Wozencraft, 22 Cal. 608; Morrison *v.* Wilson, 13 Cal. 495, 73 Am. Dec. 593; Travers *v.* Crane, 15 Cal. 12; De Rutte *v.* Muldrow, 16 Cal. 505; Cadiz *v.* Majors, 33 Cal. 289; Talbert *v.* Singleton, 42 Cal. 391; Guedici *v.* Boots, 42 Cal. 452; Murray *v.* Dake, 46 Cal. 645; Walker *v.* Breen 67 Cal. 599; Scott *v.* Sierra Lumber Co., 67 Cal. 71; Haggin *v.* Raymond, 67 Cal. 302; De Arguello *v.* Bours, 67 Cal. 447; Central Pac. R. Co. *v.* Mudd, 59 Cal. 585; Rosiery *v.* Van Dam, 16 Iowa 175; Van Orman *v.* Spafford, 16 Iowa 186; Kramer *v.* Conger, 16 Iowa 434; Shawhan *v.* Long, 26 Iowa 488, 96 Am. Dec. 164; Tibeau *v.* Tibeau, 19 Mo. 78, 59 Am. Dec. 329; Crary *v.* Goodman, 12 N. Y. 266, 64 Am. Dec. 506; Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131.

The defendant may set up as a defense the part performance of a verbal contract for the sale of the land by plaintiff to defendant. Arguello *v.* Edinger, 10 Cal. 150.

In an action of ejectment an equitable defense is not available under an answer denying that the plaintiff is the owner and that he is entitled to the possession. Anderson *v.* Logan, 105 N. Car. 266; Hinton *v.* Pritchard, 102 N. Car. 94; Bodenhamer *v.* Welch, 89 N. Car. 78.

And where a legal title is relied on by defendant he cannot use an equitable defense. Kennedy *v.* Daniels, 20 Mo. 104.

It seems that, in an action of ejectment, if the defendant relies on the fact that the land is partnership property, he must assert his rights in equity in a different action. Lowe *v.* Alexander, 15 Cal. 297.

Equitable Defenses are to be Distinguished from Counterclaims.—A cause of action in equity which wholly de-

now pleadable in the answer; there is no distinction between matter in abatement and matter in bar. All matter in abatement is new matter and must be specially pleaded.[1]

feats the demand of the plaintiff is an equitable defense. Jones *v.* Moore, 42 Mo. 419.

Thus, in case of an assignment of a thing in action, if a set-off is pleaded it cannot be pleaded as a counterclaim, but must be set up as an equitable defense. Duff *v.* Hobbs, 19 Cal. 659.

But it has been held that the right to have a mortgage reformed is a counterclaim. Follett *v.* Heath, 15 Wis. 601. But see Andrews *v.* Gillespie, 47 N. Y. 487; Hoppough *v.* Struble, 2 Thomp. & C. (N. Y.) 664; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 608, 99 Am. Dec. 30; Thayer *v.* White, 3 Cal. 228.

Waiving Equitable Defense. — Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. Lorraine *v.* Long, 6 Cal. 452; Witte *v.* Lockwood, 39 Ohio St. 146; Spaur *v.* McBee, 19 Oregon 79. *Contra*, Hackett *v.* Schad, 3 Bush (Ky.) 353; Utah, etc., R. Co. *v.* Crawford, 1 Idaho 771. See also Lupo *v.* True, 16 S. Car. 580; Smith *v.* Bryce, 17 S. Car. 539; Penny *v.* Cook, 19 Iowa 538; Thompson *v.* Hurley, 19 Iowa 331; Gaster *v.* Waggoner, 26 Ohio St. 450; Clark *v.* Clark, 65 N. Car. 655; White *v.* Allen, 3 Oregon 104.

1. *California.*—White *v.* Adams, 52 Cal. 435; Walsworth *v.* Johnson, 41 Cal. 61; Rowe *v.* Chandler, 1 Cal. 171; Tooms *v.* Randall, 3 Cal. 438; Fairbanks *v.* Woodhouse, 6 Cal. 434; Small *v.* Gwinn, 6 Cal. 447; Whitney *v.* Stark, 8 Cal. 514 68 Am. Dec. 360; California Steam Nav. Co. *v.* Wright, 8 Cal. 585; Hentsch *v.* Porter, 10 Cal. 555; People *v.* Rains, 23 Cal. 131; Gillam *v.* Sigman, 29 Cal. 638; Welsh *v.* Kirkpatrick, 30 Cal. 203; People *v.* Steamer America, 34 Cal. 676; Hastings *v.* Stark, 36 Cal. 123; Walsworth *v.* Johnson, 41 Cal. 61; Amador Canal, etc., Co. *v.* Mitchell, 59 Cal. 169; Rutenberg *v.* Main, 47 Cal. 213; Trenor *v.* Central Pac. R. Co., 50 Cal. 223; Morenhunt *v.* Wilson, 52 Cal. 263; McCreery *v.* Everding, 54 Cal. 168; Goodline *v.* King, 55 Cal. 377; District No. 110 *v.* Feck, 60 Cal. 403; Sweeney *v.* Stanford, 67 Cal. 635.

New York.—Gardner *v.* Clark, 21 N. Y. 399; Sweet *v.* Tuttle, 14 N. Y. 467; Mayhew *v.* Robinson, 10 How. Pr. (N. Y. Supreme Ct) 163; Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 25; Burnside *v.* Matthews, 54 N. Y. 78; Phœnix Bank *v.* Donnell, 40 N. Y. 411; Hammond *v.* Earle, 58 How. Pr. (N. Y. Supreme Ct.) 427; Styles *v.* Fuller, 101 N. Y. 622; White *v.* Miller, 7 Hun (N. Y.) 429; Dawley *v.* Brown, 9 Hun (N. Y.), 461; Smith *v.* Hall, 67 N. Y. 48; Wright *v.* Wright, 54 N. Y. 442; Jackson *v.* Whedon, 1 E. D. Smith (N. Y.) 141; Savage *v.* Corn Exch., etc., Nav. Ins. Co., 4 Bosw. (N. Y.) 2.

Missouri.—Goetz *v.* Ambs, 27 Mo. 28; Bernecker *v.* Miller, 44 Mo. 102; Arthur *v.* Richards, 48 Mo. 298; Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609; Giraldin *v.* Howard, 103 Mo. 41.

Nevada.—Mandlebaum *v.* Russell, 4 Nev. 551.

Oregon.—Kennard *v.* Sax, 3 Oregon 263.

Utah.—Jungk *v.* Reed, 9 Utah 49.

Iowa.—Van Metre *v.* Wolf, 27 Iowa 341.

Colorado.—Watson *v.* Lemen, 9 Colo. 200.

Montana.—Higgins *v.* Germaine, 1 Mont. 235.

North Carolina.—Charlotte Bank *v.* Britton, 66 N. Car. 365; Hawkins *v.* Hughes, 87 N. Car. 115, *cited* in 104 N. Car. 161; Silver Valley Min. Co. *v.* Baltimore Co., 99 N. Car. 444; Usry *v.* Suit, 91 N. Car. 406.

Ohio.—Weil *v.* Guerin, 42 Ohio St. 299; Sargent *v.* Steubenville, etc., R. Co., 32 Ohio St. 449; Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 565.

Wisconsin.—Dutcher *v.* Dutcher, 39 Wis. 652; Collette *v.* Weed, 68 Wis. 428; Jones *v.* Foster, 67 Wis. 296; Plath *v.* Braunsdorff, 40 Wis. 107; Smith *v.* Peckham, 39 Wis. 415; Newhall House Stock Co. *v.* Flint, etc., R. Co., 47 Wis. 516.

Indiana.—Garrison *v.* Clark, 11 Ind. 369; Norris *v.* Scott, 6 Ind. App. 18; Midland R. Co. *v.* Stevenson, 6 Ind. App. 207; McDaniel *v.* Carver, 40 Ind. 250; Elson *v.* O'Dowd, 40 Ind. 300; Landers *v.* Douglas, 46 Ind. 522; Wagner *v.* Ewing, 44 Ind. 441; John-

d. PARTIAL DEFENSES.—Those provisions of the Codes which require a statement of any new matter, constituting a defense, to be set up in the answer, should be so construed as to require the defendant, in all cases, to plead any new matter constituting either an entire or a partial defense, and to prohibit him from giving such matter in evidence upon the assessment of damages when not set up in the answer.[1]

How Partial Defenses Should Be Pleaded.—Facts relied on as a partial defense must be pleaded as such, and not by way of full defense.[2]

son *v.* Miller, 47 Ind. 377; 17 Am. Rep. 699; Wade *v.* State, 37 Ind. 181; Curtis *v.* Gooding, 99 Ind. 45; Beatty *v.* Bartholomew, 76 Ind. 91.

Nebraska.—Maurer *v.* Miday, 25 Neb. 575; National L. Ins. Co. *v.* Robinson, 8 Neb. 452; Zunkle *v.* Cunningham, 10 Neb. 162; Dietrichs *v.* Lincoln, etc., R. Co., 13 Neb. 43; Herron *v.* Cole, 25 Neb. 692; Hall *v.* Strode, 19 Neb. 658.

The judgment on matter in abatement is that the action be dismissed, instead of that the suit abate. Stone *v.* Powell, 13 B. Mon. (Ky.) 341.

As to what constitutes matter in abatement, see article ABATEMENT IN PLEADING.

1. McKyring *v.* Bull, 16 N. Y. 309, 69 Am. Dec. 696, a leading case, where the defendant was held precluded from proving payment, in whole or in part, under a general denial; Allen *v.* Haskins, 5 Duer (N. Y.) 332; Kneedler *v.* Sternburgh, 10 How. Pr. (N. Y. Supreme Ct.) 67; Loosey *v.* Orser, 4 Bosw. (N. Y.) 391 Longworthy *v.* Knapp, 4 Abb. Pr. (N. Y. Supreme Ct.) 115; Gleason *v.* Moen, 2 Duer (N. Y.) 639; Van de Sande *v.* Hall, 13 How. Pr. (N. Y. Supreme Ct.) 458; Willis *v.* Taggard, 6 How. Pr. (N. Y. Supreme Ct.) 433 Bush *v.* Prosser, 11 N Y. 347; Smith *v.* Shufelt, 3 Code Rep. (N. Y.) 175; Tracy *v.* Humphrey, 3 Code Rep. (N. Y.) 190; Grosvenor *v.* Atlantic F. Ins Co., 1 Bosw. (N. Y.) 469; Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396; Foland *v.* Johnson, 16 Abb. Pr. (N. Y. Supreme Ct.) 235; Peebles *v.* Isaminger, 18 Ohio St. 490; Higgins *v.* Germaine, 1 Mont. 235; Atchison, etc., R. Co. *v.* Washburn, 5 Neb. 117; Burlington, etc., R. Co. *v.* Lancaster County, 7 Neb. 33; Jones *v.* Seward County, 10 Neb. 161; Phœnix Ins. Co. *v.* Barnd, 16 Neb. 89; Mordhorst *v.* Nebraska Tel. Co., 28 Neb. 610; Bishop *v.* Stevens, 31 Neb. 786; Prall *v.* Peters, 32 Neb. 832.

Contra.—A partial defense is bad, and admits the allegations of the complaint. Jones *v.* Frost, 51 Ind. 69; Conger *v.* Parker, 29 Ind. 380; Lockwood *v.* Woods, 3 Ind. App. 258; Taylor *v.* Calvert (Ind., 1894), 37 N. E. Rep. 531; Smith *v.* Dick, 95 Ala. 311.

The fact that the same allegation which forms the basis of a partial defense is embodied in the complaint does not take it from its character of new matter, within the meaning of the Code of Civil Procedure where it is extraneous to the basis of the relief asked, and where, consequently, its recital does preclude its use as a basis of defense. Petrakion *v.* Arbelly, 23 Civ. Pro. Rep. (N. Y. C. Pl.) 184, 187.

Part Payment must be specially pleaded. McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Houghton *v.* Townsend, 8 How. Pr. (N. Y. Supreme Ct.) 441; Grosvenor *v.* Atlantic F. Ins. Co., 1 Bosw. (N. Y.) 469.

But a Partial Failure of Consideration need not be specially pleaded. Carpenter *v.* Meyers, 32 Mo. 213; Voss *v.* McGuire, 18 Mo. App. 477; Mercer *v.* Hall, 2 Tex. 284; Willis *v.* Bullitt, 22 Tex. 330; Brantly *v.* Thomas, 22 Tex. 270, 77 Am. Rep. 264. But see Hackett *v.* Schad, 3 Bush (Ky.) 353.

In an Action for the Conversion of a Note the fact that the statute had barred action on the note is a partial defense, as it tends to reduce damages. Thompson *v.* Halbert (Supreme Ct.), 2 N. Y. St. Rep. 116. See also Willis *v.* Taggard, 6 How. Pr. (N Y. Supreme Ct.) 433; Wehle *v.* Butler, 43 How. Pr. (N. Y. Super. Ct.) 5; Wehle *v.* Haviland, 42 How. Pr. (N. Y. C. Pl.) 399.

2. Ronan *v.* Williams, 41 Iowa 680. But it is no objection to an answer that it begins in form as a full de-

e. MITIGATING CIRCUMSTANCES.—While a partial defense must be pleaded, mere matters in mitigation of damages need not be. They are admissible under a general denial.[1]

fense, but concludes with averments making it only a partial defense. Bennett *v.* Matthews, 64 Barb. (N. Y.) 410.

But if it clearly appears on the face of the answer to be only a partial defense, there is no necessity to use the words "partial defense." Howd *v.* Cole, 74 Hun (N. Y.) 121.

The allegations must be so certain and specific as that, if admitted, the court could give judgment in the case. Thompson *v.* Munger, 15 Tex. 523, 65 Am. Dec. 176; Davison *v.* Schermerhorn, 1 Barb. (N. Y.) 480; Mattison *v.* Smith, 1 Robt. (N. Y.) 706.

1. *Ohio.*—Duval *v.* Davey, 32 Ohio St. 604; Vanderveer *v.* Sutphin, 5 Ohio St. 294; Reynolds *v.* Tucker, 6 Ohio St. 517, 67 Am. Dec. 353; White *v.* Thomas, 12 Ohio St. 312; Barholt *v.* Wright, 45 Ohio St. 181, 4 Am. St. Rep. 535.

Iowa.—Beardsley *v.* Bridgman, 17 Iowa 290.

Indiana.—Allis *v.* Nanson, 41 Ind. 154; Blickenstaff *v.* Perrin, 27 Ind. 527; O'Conner *v.* O'Conner, 27 Ind. 69; Smith *v.* Rodecap, 5 Ind. App. 78.

Kentucky.—Thurman *v.* Virgin, 18 B. Mon. (Ky.) 785; Hart *v.* Reed, 1 B. Mon. (Ky.) 170, 35 Am. Dec. 179.

Missouri.—Weaver *v.* Hendrick, 30 Mo. 502.

New York.—Kniffin *v.* McConnell, 30 N. Y. 285; Saltus *v.* Kipp, 5 Duer (N. Y.) 646; Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y. Supreme Ct.) 69; Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561; Travis *v.* Barger, 24 Barb. (N. Y.) 614; Harter *v.* Crill, 33 Barb. (N. Y.) 283; Tompkins *v.* Wadley, 3 Thomp. & C. (N. Y.) 424; Anonymous, 8 How. Pr. (N. Y. Supreme Ct.) 434; Gilbert *v.* Rounds, 14 How. Pr. (N. Y. Supreme Ct.) 46; Lane *v.* Gilbert, 9 How. Pr. (N. Y. Supreme Ct.) 150.

Option of Pleader.—But it is optional, especially in slander and libel cases, to plead mitigating circumstances. Van Ingen *v.* Newton, 1 Disney (Ohio) 458; Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y. Supreme Ct.) 403; Knott *v.* Burwell, 96 N. Car. 272; Kimball *v.* Fernandez, 41 Wis. 329; Jauch *v.* Jauch, 50 Ind. 135, 19 Am. Rep. 699; Swinney *v.* Nave, 22 Ind. 179; Smith *v.* Lisher, 23 Ind. 501.

But some authorities hold that in slander and libel cases mitigating circumstances *must* be pleaded. Anonymous, 6 How. Pr. (N. Y. Supreme Ct.) 160; Willover *v.* Hill, 72 N. Y. 37; Fero *v.* Ruscol, 4 N. Y. 162; Spooner *v.* Keeler, 51 N. Y. 527; Wachter *v.* Quenzer, 29 N. Y. 547; Thompson *v.* Taylor, 72 N. Y. 32; Hamilton *v.* Eno, 81 N. Y. 116; Stiles *v.* Comstock, 9 How. Pr. (N. Y. Supreme Ct.) 48; Buckley *v.* Knapp, 48 Mo. 158; Quinn *v.* Scott, 22 Minn. 456; Langton *v.* Hagerty, 35 Wis. 151; Wilson *v.* Noonan, 35 Wis. 322. See article LIBEL AND SLANDER.

The mitigating circumstances which must be pleaded are those which tend to disprove malice and to reduce punitive or exemplary damages. Matters which tend to show the actual damages are not mitigating circumstances, but are admissible under a general denial. Wandell *v.* Edwards, 25 Hun (N. Y.) 498. *Compare* the following cases: Foland *v.* Johnson, 16 Abb. Pr. (N. Y. Supreme Ct.) 235; Hynds *v.* Griswold, 4 How. Pr. (N. Y. Supreme Ct.) 69; Williams *v.* Hayes, 5 How. Pr. (N. Y. Supreme Ct.) 470; Bush *v.* Prosser, 11 N. Y. 347; Graham *v.* Stone, 6 How. Pr. (N. Y. Supreme Ct.) 15; Heaton *v.* Wright, 10 How. Pr. (N. Y. Supreme Ct.) 79; Loosey *v.* Orser, 4 Bosw. (N. Y.) 391; Houghton *v.* Townsend, 8 How. Pr. (N. Y. Supreme Ct.) 441; Jeffras *v.* McKillop, etc., Co., 2 Hun (N. Y.) 351; Distin *v.* Rose, 69 N. Y. 123; Coe *v.* Griggs, 76 Mo. 619; Hawkins *v.* Globe Printing Co., 10 Mo. App. 174; Buckley *v.* Knapp, 48 Mo. 152.

Facts as Complete Defense.—Facts which might be considered by way of mitigation of damages cannot be considered if pleaded as a complete defense when they do not constitute a defense. Ronan *v.* Williams, 41 Iowa 680; Foster *v.* Hazen, 12 Barb. (N. Y.) 547; Beach *v.* Barons, 13 Barb. (N. Y.) 305; Thumb *v.* Walrath, 6 How. Pr. (N. Y. Supreme Ct.) 196; Nichols *v.* Dusenbury, 2 N. Y. 283; Hager *v.* Tibbits, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 97; Brander *v.* Faulkner, 93 N. Y. 515; Bennett *v.* Matthews, 64 Barb. (N. Y.) 410.

Pleading Hypothetically.—A partial

f. PAYMENT.—The defendant cannot avail himself of the defense of payment without pleading it; and when pleaded, if there be no reply, there can be no trial, for want of an issue.[1]

defense cannot be pleaded hypothetically. Martin *v.* Swearengen, 17 Iowa 346.

A Demurrer lies for a partial defense defectively stated. Davenport Gas Light, etc., Co. *v.* Davenport, 15 Iowa 6; Peck *v.* Parchen, 52 Iowa 46.

Contract to Convey Land.—Where the plea sets up a partial failure of a contract to convey land, it should specify the part to which title has failed, and its proportional value. Stillman *v.* Canales, 39 Tex. 406.

An Answer in Ejectment disclaiming title to a portion of the premises should particularly describe the part disclaimed. Anderson *v.* Fisk, 36 Cal. 625. See also Fortson *v.* Caldwell, 17 Tex. 627; Cumings *v.* Lawrence County, 1 S. Dak. 158.

1. *Indiana.* — Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Baker *v.* Kistler, 13 Ind. 63; Johnson *v.* Tyler, 1 Ind. App. 387.

Texas.—Marley *v.* McAnelly, 17 Tex. 658; Robson *v.* Watts, 11 Tex. 764; Pettigrew *v.* Dix, 33 Tex. 277; Matossy *v.* Frosh, 9 Tex. 610.

Kansas.—Sewing Mach. Co. *v.* Redfield, 18 Kan. 555; Stevens *v.* Thompson, 5 Kan. 305; Clark *v.* Spencer, 14 Kan. 408, 19 Am. Rep. 96; Irwin *v.* Paulett, 1 Kan. 418; St. Louis, etc., R. Co. *v.* Grove, 39 Kan. 731.

Nebraska.—Clark *v.* Mullen, 16 Neb. 481; Magenan *v.* Bell, 14 Neb. 8; Van Buskirk *v.* Chandler, 18 Neb. 584; Tootle *v.* Maben, 21 Neb. 620; Lamb *v.* Thompson, 31 Neb. 448.

Wisconsin. — Knapp *v.* Runals, 37 Wis. 135; Martin *v.* Pugh, 23 Wis. 184. Hawes *v.* Woolcock, 30 Wis. 213.

Colorado. — Esbensen *v.* Hover, 3 Colo. App. 467.

Oregon. — Clark *v.* Wick (Oregon, 1894), 36 Pac. Rep. 165; Benicia Agricultural Works *v.* Creighton, 21 Oregon 495.

South Carolina.—McElwee *v.* Hutchinson, 10 S. Car. 436.

Montana.—Higgins *v.* Germaine, 1 Mont. 235.

North Carolina.—Ellison *v.* Rix, 85 N. Car. 77.

Ohio.—Fewster *v.* Goddard, 25 Ohio St. 276; Swensen *v.* Cresop, 28 Ohio St. 668; Edwards *v.* Edwards, 24 Ohio St. 403.

Missouri.—Hyde *v.* Hazel, 43 Mo. App. 668; Wilkerson *v.* Farnham, 82 Mo. 672; Smith *v.* Rembaugh, 21 Mo. App. 390; Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355; German Bank *v.* Mulhall, 8 Mo. App. 558; Minor *v.* Rogers Coal Co., 25 Mo. App. 78.

New York.—Seward *v.* Torrence, 5 Thomp. & C. (N. Y.) 323; Edson *v.* Dillaye, 8 How. Pr. (N. Y. Supreme Ct.) 273; Everett *v.* Lockwood, 8 Hun (N. Y.) 356; Dry Dock, etc., Co. *v.* North & East River R. Co. (C. Pl.), 22 N. Y. Supp. 556; Hall *v.* Olney, 65 Barb. (N. Y.) 27; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Wilcox *v.* Joslin (Supreme Ct.), 10 N. Y. Supp. 342; Potter *v.* Gates (Supreme Ct.), 29 N. Y. St. Rep. 662; Bassett *v.* Lederer, 1 Hun (N. Y.) 274; Calkins *v.* Packer, 21 Barb. (N. Y.) 275; Texier *v.* Gouin, 5 Duer (N. Y. 389.

Evidence of payment, or of application of the fund in suit to plaintiff's benefit, cannot be introduced under a general denial. Wehle *v.* Butler, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 139.

Under a plea of payment, in a suit on an account, the objection cannot be made that the goods, for the price of which the suit is brought, were wrongfully obtained, and are therefore not properly the subject-matter of an account. Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 562.

In an action upon an alleged indebtedness an allegation in the complaint of nonpayment is essential. This is not affected by the rule that payment must be pleaded as an affirmative defense, and cannot be proved under the general issue; but the rule simply modifies the general rule of pleading so that the averment of payment is not put in issue by a general denial. Lent *v.* New York, etc., R. Co., 130 N. Y. 504; Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Wheeler, etc., Mfg. Co. *v.* Worrall, 80 Ind. 297; Friddle *v.* Crane, 68 Ind. 583; Downey *v.* Whittenberger, 60 Ind. 188; Deutsch *v.* Korsmeier, 59 Ind. 373; Kent *v.* Cantrall, 44 Ind. 452; Higert *v.* Trustees, 53 Ind. 326.

A Release of a Covenantor on his warranty, by payment made by his grant-

g. RES JUDICATA.—Where a former judgment is relied on as an estoppel in another action, it must be pleaded.[1]

h. ESTOPPEL IN PAIS.—An *estoppel in pais*, to be relied on as a defense, should be pleaded.[2]

ees, is new matter. Pierce *v.* Early, 79 Iowa 199, 203.

Foreclosure Suit.—But in an action to foreclose a mortgage the partial payments need not be pleaded. Hendrix *v.* Gore, 8 Oregon 407.

1. *Nebraska.*—Gregory *v.* Kenyon, 34 Neb. 641; Allen *v.* Saunders, 6 Neb. 441; Kilpatrick *v.* Kansas City, etc., R. Co., 38 Neb. 620.

Montana.—Josephi *v.* Mady Clothing Co. (Mont., 1893), 33 Pac. Rep. 1.

Florida.—State *v.* Anderson, 26 Fla. 240.

Indiana.—First Nat. Bank *v.* Williams, 126 Ind. 423; Norris *v.* Amos, 15 Ind. 365.

Missouri.—Campbell *v.* Kansas City, 102 Mo. 326; Greenbaum *v.* Elliott, 60 Mo. 25; Kelly *v.* Hurt, 61 Mo. 463; State *v.* Brooke, 29 Mo. App. 286; Field *v.* Sanderson, 34 Mo. 542, 86 Am. Dec. 124; Edgell *v.* Sigerson, 20 Mo. 494; Glenn *v.* Priest, 48 Fed. Rep. 19; Nave *v.* Adams, 107 Mo. 414.

Oregon.—Bays *v.* Trulson (Oregon, 1893), 35 Pac. Rep. 26.

North Carolina.—Blackwell *v.* Dibbrell, 103 N. Car. 270; Harrison *v.* Hoff, 102 N. Car. 126.

Ohio.—Fanning *v.* Hibernia Ins. Co., 37 Ohio 344; Meiss *v.* Gill, 44 Ohio St. 253.

New York.—Mandeville *v.* Avery, 63 Hun (N. Y.) 624; Dalrymple *v.* Hunt, 5 Hun (N. Y.) 111; Hendricks *v.* Decker, 35 Barb. (N. Y.) 298.

California.—Cave *v.* Crafts, 53 Cal. 135; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Hostler *v.* Hays, 3 Cal. 303; Flandreau *v.* Downey, 23 Cal. 354; Davis *v.* Perley, 30 Cal. 631; Semple *v.* Wright, 32 Cal. 659; Blood *v.* Marcuse, 38 Cal. 590, 99 Am. Dec. 435; San Francisco *v.* Spring Valley Water Works Co., 39 Cal. 475. *Contra*, Larum *v.* Wilmer, 35 Iowa 244.

When there has been no opportunity to plead the judgment, it may be relied on as evidence. Wilkes *v.* Davies, 8 Wash. 112. See Terry *v.* Munger, 49 Hun (N. Y.) 560, where a record of a former recovery was admitted as a probative fact, under a general denial, in an action for conversion, for the purpose of disproving a conversion.

Where the only answer pleaded to the cause of action stated in one paragraph of the complaint is a general denial, evidence of a former recovery under a plea addressed to another paragraph is not available. Louisville, etc., R. Co. *v.* Cauley, 119 Ind. 142.

A prior recovery is not available as a defense unless pleaded in bar, though it may be alleged in the answer. Bryson *v.* St. Helen, 79 Hun (N. Y.) 167; Norton *v.* Norton (Ky., 1894), 25 S. W. Rep. 750.

The invalidity of a judgment is new matter. Hobbs *v.* Duff, 43 Cal. 485. As, for instance, that it has been vacated by order of court. Carpenter *v.* Goodwin, 4 Daly (N. Y.) 89.

Where a garnishee interposes a judgment in favor of the assignor as a defense to an action by the assignee of the chose, this is new matter. Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

When the plea of *res judicata* operates to deny the equities of the complaint, it is not new matter. Breeze *v.* Haley, 11 Colo. 351.

Waiver.—Counsel may by stipulation waive the pleading of *res judicata*. David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 58 Fed. Rep. 721; Reich *v.* Cochran, 74 Hun (N. Y.) 551.

2. *Oregon.*—Rugh *v.* Ottenheimer, 6 Oregon 232, 25 Am. Rep. 513; Remillard *v.* Prescott, 8 Oregon 38; Bruce *v.* Phœnix Ins. Co., 24 Oregon 486.

Nevada.—Hanson *v.* Chiatiovich, 13 Nev. 395.

Utah.—Poynter *v.* Chipman, 8 Utah 442.

Iowa.—Independent Dist. *v.* Merchants' Nat. Bank, 68 Iowa 343.

Colorado.—De Votie *v.* McGerr, 15 Colo. 467; Gaynor *v.* Clements, 16 Colo. 209.

Nebraska.—Burlington, etc., R. Co. *v.* Harris, 8 Neb. 140.

Indiana.—Wood *v.* Ostram, 29 Ind. 179; Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394.

Wisconsin.—Warder *v.* Baldwin, 51 Wis. 451; McKesson *v.* Sherman, 51 Wis. 305; Van Trott *v.* Wiese, 36 Wis. 439.

California. — Clarke *v.* Huber, 25

i. FRAUD.—Fraud is new matter, and when intended to be used as a defense it must be pleaded.[1]

j. ILLEGALITY OF CONTRACT.—A defendant, in order to avail himself of facts not appearing on the face of a contract to establish its invalidity, must plead them.[2]

Cal. 597; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Martin *v.* Zellerbach, 38 Cal. 311, 99 Am. Dec. 365; Etcheborne *v.* Auzerais, 45 Cal. 121.

Washington.—Walker *v.* Baxter, 6 Wash. 244.

Texas.—Rail *v.* City Nat. Bank, 3 Tex. Civ. App. 557.

Missouri. — Central Nat. Bank *v.* Doran, 109 Mo. 40; Bray *v.* Marshall, 75 Mo. 327; Noble *v.* Blount, 77 Mo. 235; Miller *v.* Anderson, 19 Mo. App. 71; Hammerslough *v.* Cheatham, 84 Mo. 13; Stones *v.* Richmond, 21 Mo. App. 17; Weise *v.* Moore, 22 Mo. App. 530.

Kansas.—Dwelling House Ins. Co. *v.* Johnson, 47 Kan. 1.

Contra.—Hostler *v.* Hays, 3 Cal. 303; Churchill *v.* Baumann, 95 Cal. 541; Stanley *v.* Green, 12 Cal. 148; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515; Guest *v.* Guest, 74 Tex. 664.

The estoppel must be pleaded even though the proceeding is an equitable one. Central Nat. Bank *v.* Doran, 109 Mo. 40.

An estoppel by election to take under a will is new matter. Noe *v.* Splivalo, 54 Cal. 207; Etcheborne *v.* Auzerais, 45 Cal. 121; McCarty *v.* Roberts, 8 Ind. 150.

Where there is no opportunity to plead the estoppel *in pais*, it is available in evidence. Tyler *v.* Hall, 106 Mo. 313; Bank *v.* Pomeroy Flour Co., 41 Ohio St. 559. See Pennsylvania Co. *v.* Platt, 47 Ohio St. 366.

1. *Colorado.*—Tucker *v.* Parks, 7 Colo. 63.

Indiana.—Rose *v.* Hurley, 39 Ind. 78; Jenkins *v.* Long, 19 Ind. 28, 81 Am. Dec. 374; Farmer *v.* Calvert, 44 Ind. 209.

Oregon.—Hoyt *v.* Clarkson, 23 Oregon 51; Fleischner *v.* Kubli, 20 Oregon 328.

Minnesota.—Daly *v.* Proetz, 20 Minn. 411.

Iowa.—Root *v.* Schaffner, 39 Iowa 375; Moore *v.* Moore, 39 Iowa 461.

Wisconsin. — Cayon *v.* Dwelling House Ins. Co., 68 Wis. 510.

Texas.—Hoffman *v.* Cleburne Bldg., etc., Assoc., 2 Tex. Civ. App. 688; Willis *v.* Hudson, 63 Tex. 678.

California.—California Steam Nav. Co. *v.* Wright, 8 Cal. 585; Terry *v.* Sickles, 13 Cal. 427; Churchill *v.* Anderson, 56 Cal. 55; McKiernan *v.* Leuzen, 56 Cal. 61; McCreary *v.* Marston, 56 Cal. 403; Brodrib *v.* Brodrib, 56 Cal. 563; Hayward *v.* Rogers, 62 Cal. 348.

New York.—Richtmeyer *v.* Remsen, 38 N. Y. 206; Lefler *v.* Field, 50 Barb. (N. Y.) 407; Dalrymple *v.* Hillenbrand, 62 N. Y. 5, 20 Am. Dec. 438; Klinger *v.* Bondy, 36 Hun (N. Y.) 601.

In an action to rescind a contract on the ground of fraud, the defense of a former judgment for the fraud is new matter. Dalrymple *v.* Hunt, 5 Hun (N. Y.) 111.

In a suit for breach of promise the fact that defendant's promise of marriage was obtained by plaintiff fraudulently must be pleaded. Leavitt *v.* Cutler, 37 Wis. 46.

If a deed is *voidable* by reason of fraud, this is new matter; otherwise, if *void*. Lombard *v.* Cowham, 34 Wis. 486.

The defense that the contract sued on was made in fraud of creditors is new matter. Carter *v.* Shotwell, 42 Mo. App. 663. See Claflin *v.* Sommers, 39 Mo. App. 419; Pond *v.* Davenport, 45 Cal. 225.

Replevin.—The rule which requires fraud to be specially pleaded does not apply to the action of replevin. Sopris *v.* Truax, 1 Colo. 89. *Contra*, Frisbee *v.* Langworthy, 11 Wis. 375.

2. *New York.*—Milbank *v.* Jones, 127 N. Y. 370, 24 Am. St. Rep. 454; Dingeldein *v.* Third Ave. R. Co., 37 N. Y. 575; Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480; May *v.* Burras, 13 Abb. N. Cas. (N. Y. City Ct.) 384; Haywood *v.* Jones, 10 Hun (N. Y.) 500; Schreyer *v.* New York, 39 N. Y. Super. Ct. 1; Vischer *v.* Bagg, 21 N. Y. Wkly. Dig. 399; Honegger *v.* Wettstein, 94 N. Y. 252; O'Toole *v.* Garvin, 3 Thomp. & C. (N. Y.) 119.

Oregon.—Buchtel *v.* Evans, 21 Ore-

k. JUSTIFICATION.—Matters in justification of an act which would otherwise be unlawful must be specially pleaded.[1]

gon 309; Jameson *v.* Coldwell, 23 Oregon 144, 31 Pac. Rep. 299.

Washington.—Lyts *v.* Keevey, 5 Wash. 606.

Ohio.—Mathews *v.* Leaman, 24 Ohio St. 615.

Minnesota.—Nash *v.* St. Paul, 11 Minn. 174; Desnoyer *v.* L'Hereaux, 1 Minn. 1; Elfelt *v.* Smith, 1 Minn. 101; Bank of Commerce *v.* Selden, 1 Minn. 340; Eaton *v.* Caldwell, 3 Minn. 134; Short *v.* McRea, 4 Minn. 78; Caldwell *v.* Bruggerman, 4 Minn. 270; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Blackman *v.* Wheaton, 13 Minn. 326; Plummer *v.* Mold, 14 Minn. 532; O'Brien *v.* St. Paul, 18 Minn. 176.

Kentucky.—Denton *v.* Logan, 3 Met. (Ky.) 434.

Indiana.—Casad *v.* Holdridge, 50 Ind. 529.

California.—Sharon *v.* Sharon, 68 Cal. 29.

That the sale counted on is void for having been made without a license, must be set up. Boswell *v.* Welshoefer, 9 Reporter 630; Gilbert *v.* Sage, 5 Lans. (N. Y.) 287.

That the contract was made in violation of a statute imposing a penalty is new matter. Harris *v.* White, 81 N. Y. 533; O'Toole *v.* Garvin, 1 Hun (N. Y.) 92.

And so is a defense that the contract is a wagering one. Commiskey *v.* Williams, 20 Mo. App. 606; Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480.

And also that it is against public policy. Musser *v.* Adler, 86 Mo. 445; Milbank *v.* Jones, 127 N. Y. 370, 24 Am. St. Rep. 454.

The defense that the plaintiff's business is unlawful is new matter. International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76.

Where a carrier is sued for the loss of intoxicating liquors, the defense that the same were held for an unlawful purpose is new matter. Bowen *v.* Hale, 4 Iowa 430.

And so is the defense that bonds were illegally issued. German Sav. Inst. *v.* Jacoby, 97 Mo. 617.

Illegality May be Shown under Denial.—The U. S. Supreme Court has held that the illegality of a contract may be shown under a general denial. The reason given for this holding is that a court is, in the due administration of justice, bound to refuse its aid to enforce an illegal contract, though its invalidity be not specially pleaded. Oscanyan *v.* Arms Co., 103 U. S. 261.

Compare Ah Doon *v.* Smith (Oregon, 1893), 34 Pac. Rep. 1093; Tupper *v.* Thompson, 26 Minn. 385; Prost *v.* More, 40 Cal. 347; Hentz *v* Miner, 58 Hun (N. Y.) 428; Day *v.* Roth, 18 N. Y. 448; Mills *v.* Mills, 40 N. Y. 546, 100 Am. Dec. 535; Russell *v.* Burton, 66 Barb. (N. Y.) 539; Cary *v.* Western Union Tel. Co. 20 Abb. N. Cas (N. Y. Supreme Ct.) 333; O'Brien *v.* McCann, 58 N. Y. 376; Clifford *v.* Dam, 81 N. Y. 52; Griffin *v.* Long Island R. Co., 101 N. Y. 348.

1. In an action to recover damages for the pollution of a stream, the defense of justification by virtue of a statute must be pleaded. Kellogg *v.* New Britain, 62 Conn. 233.

If in the commission of a tort by husband and wife the wife acted under marital coercion, this is new matter to be specially pleaded. Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Dec. 593.

A defendant in a divorce proceeding cannot prove indignities offered by the plaintiff unless they are pleaded. Miller *v.* Miller, 14 Mo. App. 418.

Assault and Battery.—In an action for assault and battery, justification must be specially pleaded. Konigsberger *v.* Harvey, 12 Oregon 286; Atkinson *v.* Harran, 68 Wis. 405; Dailey *v.* Houston, 58 Mo. 361; Thomas *v* Werremeyer, 34 Mo. App. 665.

Trespass Quare Clausum Fregit.—All matters justifying a trespass on land must be specially pleaded. Lentz *v.* Victor, 17 Cal. 272; Columbus Co. *v.* Dayton Co., 18 Cal. 615; Pico *v.* Colimas, 32 Cal. 578; Alferd *v.* Barnum, 45 Cal. 482; Johnson *v.* Cuddington, 35 Ind. 43; Carter *v.* Wallace, 2 Tex. 206; Klais *v.* Pulford, 36 Wis. 587.

Slander.—In slander the justification that the words spoken are true must be pleaded. Langton *v.* Hagerty, 35 Wis. 151; Duval *v.* Davey, 32 Ohio St. 604.

The place where the words were spoken and the circumstances of excuse or privilege are new matter. Gudger *v.* Penland, 108 N. Car. 593 23 Am. St. Rep. 73.

l. STATUTE OF LIMITATIONS.—It is a fundamental rule of Code pleading that the statute of limitations, when relied upon as a defense to an action, must be specially pleaded.[1]

False Imprisonment.—In an action for false imprisonment matter in justification must be pleaded. Gallimore *v.* Ammerman, 39 Ind. 323; Boaz *v.* Tate, 43 Ind. 61; Wilson *v.* Manhattan R. Co. (C. Pl.), 20 N. Y. Supp. 852; Hutchinson *v.* Sangster, 4 Greene (Iowa) 340.

Thus, if the defendant relies on the bad reputation of the plaintiff as one of the circumstances going to establish a defense, by showing that he had reasonable ground to suspect him of the crime charged, he should plead it. Scheer *v.* Keown, 34 Wis. 350. See B. *v.* I., 22 Wis. 372; Wilson *v.* Noonan, 35 Wis. 350; Hill *v.* Palm, 38 Mo. 13; Moore *v.* Sanborin, 42 Mo. 490.

Justification by Officers.—All matters which justify an officer in executing or in refusing to execute process must be pleaded. Thus, in pleading a justification under a judgment, the judgment must be set up in the answer. Jacobs *v.* Remsen, 12 Abb. Pr. (N. Y. Supreme Ct.) 390. See Graham *v.* Harrower, 18 How. Pr. (N. Y. Supreme Ct.) 144.

And an officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. Glazer *v.* Clift, 10 Cal. 304; Richardson *v.* Smith, 29 Cal. 530; Leszinsky *v.* White, 45 Cal. 278; Pico *v.* Kalisher, 55 Cal. 153.

In an action against a sheriff for a violation of his duty in the service of an attachment, if he relies on matters occurring after its issuance and operating as a dissolution of the same, such matters must be specially pleaded. McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115.

Matters justifying an officer in refusing to make a levy, as, for instance, that the property is exempt, must be pleaded. Kiskaddon *v.* Jones, 63 Mo. 190.

And a trial by sheriff's jury, justifying the refusal to levy an attachment, must be pleaded. Strong *v.* Patterson, 6 Cal. 156.

A waiver of exemption, as a defense to an action for unlawful levy, must be pleaded. Murphy *v.* Sherman, 25 Minn. 199.

See also State *v.* Beckner (Ind., 1891), 26 N. E. Rep. 553, where it is held that, under a general denial, in an action against a constable and his bondsmen for alleged trespass done in virtue of his office, justification may be proved.

1. *Arkansas.*—Wassell *v.* Reardon, 11 Ark. 705, 14 Am. Dec. 245; St. Louis, etc., R. Co. *v.* Brown, 49 Ark. 253; Hutchinson *v.* Hutchinson, 34 Ark. 164.

California.—Mathews *v.* Ferrea, 45 Cal. 51; De Uprey *v.* De Uprey, 23 Cal. 352, 87 Am. Dec. 81; Lick *v.* Diaz, 30 Cal. 65; People *v.* Broadway Wharf Co., 31 Cal. 35; Norris *v.* Elliott, 39 Cal. 73; Grant *v.* Burr, 54 Cal. 301; McCreery *v.* Duane, 52 Cal. 262; McCreery *v.* Sawyer, 52 Cal. 257; Smith *v.* Richmond, 19 Cal. 477; Weeks *v.* Hahn, 20 Cal. 620; Grattan *v.* Wiggins, 23 Cal. 16; Brown *v.* Martin, 25 Cal. 82; American Co. *v.* Bradford, 27 Cal. 362; Farwell *v.* Jackson, 28 Cal. 106.

Colorado.—Meyer *v.* Binkleman, 5 Colo. 262; Chivington *v.* Colorado Springs Co., 9 Colo. 597; Stevens *v.* Andrews, 10 Colo. 402.

Indiana.—Cass County *v.* Adams, 76 Ind. 505; Hanna *v.* Jeffersonville R. Co., 32 Ind. 213; Perkins *v.* Rogers, 35 Ind. 125, 9 Am. Rep. 639; Devar *v.* Rerick, 87 Ind. 337; Medsker *v.* Pogue, 1 Ind. App. 198; Shewalter *v.* Bergman, 123 Ind. 155; Matlock *v.* Todd, 25 Ind. 128; Ross *v.* State, 131 Ind. 548; Kent *v.* Parks, 67 Ind. 53; Baugh *v.* Boles, 66 Ind. 377.

Idaho.—Hyde *v.* Lamberson, 1 Idaho 539.

Iowa.—Moulton *v.* Walsh, 30 Iowa 361; Springer *v.* Clay County, 35 Iowa 241; Robinson *v.* Allen, 37 Iowa 27; State *v.* McIntire, 58 Iowa 572; Shearer *v.* Mills, 35 Iowa 499.

Kentucky.—Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Rankin *v.* Turney, 2 Bush (Ky.) 555.

Kansas.—Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437; Zane *v.* Zane, 5 Kan. 134; Parker *v.* Berry, 12 Kan. 351.

Minnesota.—Kennedy *v.* Williams, 11 Minn. 314; Eastman *v.* St. Anthony Falls, etc., Co., 12 Minn. 137; McArdle *v.* McArdle, 12 Minn. 98; Davenport *v.* Short, 17 Minn. 24; Hoyt *v.* McNeil, 13 Minn. 390; Millette *v.* Mehmke, 26 Minn. 306.

m. CONTRIBUTORY NEGLIGENCE.—Contributory negligence, to be available as a defense, must, as a general rule, be specially pleaded.[1]

n. STATUTE OF FRAUDS.—Some authorities hold that the defense of the Statute of Frauds cannot be made available in an action unless pleaded as a defense or presented by the averments of the complaint.[2] The probable weight of authority, however, is to the effect that a defendant is not required to plead the Statute of Frauds, but that he may take advantage of it by objecting to the introduction of any evidence except such as the statute prescribes.[3]

Missouri.—Orr *v.* Rode, 101 Mo. 388; Bell *v.* Clark, 30 Mo. App. 224; Harper *v.* Eubank, 32 Mo. App. 258; Schuchman *v.* Heath, 38 Mo. App. 280; Fairbanks *v.* Long, 91 Mo. 628.

North Carolina.—Long *v.* Bank, 81 N. Car. 41; Guthrie *v.* Bacon, 107 N. Car. 338.

Nebraska.—Alexander *v.* Meyers, 33 Neb. 773; Mills *v.* Rice, 3 Neb. 76; Scroggin *v.* National Lumber Co. (Neb., 1894), 59 N. W. Rep. 548.

New York.—Riley *v.* Corwin, 17 Hun (N. Y.) 597; Sands *v.* St. John, 36 Barb. (N. Y.) 628; Baldwin *v.* Martin, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 9; Dezengremel *v.* Dezengremel, 24 Hun (N. Y.) 457; Esselstyn *v.* Weeks, 12 N. Y. 636; Miller *v.* Brenham, 68 N. Y. 84; White *v.* Spencer, 14 N. Y. 247; Cotton *v.* Maurer, 3 Hun (N. Y.) 552; Bihin *v.* Bihin, 17 Abb. Pr. (N. Y. Supreme Ct.) 19; Vorhies *v.* Vorhies, 24 Barb (N. Y.) 150; Tomlinson *v.* Miller, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 364. *Compare* Falls of Neuse Mfg. Co. *v.* Brooks, 106 N. Car. 107; Moore *v.* Garner, 101 N. Car. 374; Hobbs *v.* Barefoot, 104 N. Car. 225.

In an action to surcharge and falsify and restate an account, the statute of presumptions, instead of the statute of limitations, is proper to be pleaded. Nunnery *v.* Averitt, 111 N. Car. 394.

An ackowledgment in writing of the existence of a debt to save it from the bar of the statute should be pleaded. Zoll *v.* Carnahan, 83 Mo. 35.

For a treatment of the subject of the statute of limitations, see article LIMITATIONS, STATUTE OF.

1. Gram *v.* Northern Pac. R. Co., 1 N. Dak. 253; Conlin *v.* San Francisco, etc., R. Co., 36 Cal. 404; Hudson *v.* Wabash Western R. Co., 101 Mo. 13; O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 155; Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147; Schlereth *v.* Missouri Pac. R. Co., 96 Mo. 509; Thompson *v.* North Missouri R. Co., 51 Mo. 190, 11 Am. Rep. 443; Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509; Petty *v.* Hannibal, etc., R Co., 88 Mo. 306; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457; Bell *v.* Hannibal, etc., R. Co., 86 Mo. 599; Young *v.* Kansas, 27 Mo. App. 101; Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518; Amsden *v.* Dubuque, etc., R. Co., 13 Iowa 132; Hudson *v.* Charleston, etc., R. Co., 104 N. Car. 491.

The rule that the defendant must plead as new matter contributory negligence of plaintiff is not affected by the fact that plaintiff anticipates this and alleges his own care. Hudson *v.* Wabash Western Co., 101 Mo. 13. *Contra*, Karle *v.* Kansas City, etc., R. Co., 55 Mo. 482.

For a treatment of the subject of pleading and practice in the case of contributory negligence, see CONTRIBUTORY NEGLIGENCE.

2. *New York.*—Wells *v.* Monihan, 129 N. Y. 161; Duffy *v.* O'Donovan, 46 N. Y. 223.

Colorado.—Hunt *v.* Hayt, 10 Colo. 279.

California.—Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498; Peralta *v.* Castro, 6 Cal. 358.

North Carolina.—Holler *v.* Richards, 102 N. Car. 545.

Missouri.—Gardner *v.* Armstrong, 31 Mo. 536; Maybee *v.* Moore, 90 Mo. 340; Sherwood *v.* Saxton, 63 Mo. 79; Donaldson *v.* Newman, 9 Mo. App. 235; Taylor *v.* Penquite, 35 Mo. App. 389; Rabsuhl *v.* Lack, 35 Mo. 316; Scharff *v.* Klein, 29 Mo. App. 549; Graff *v.* Foster, 67 Mo. 512; Gordon *v.* Madden, 82 Mo. 193; Allen *v.* Richard, 83 Mo. 59.

3. *South Dakota.*—Cosand *v.* Bunker, 2 S. Dak. 295.

o. WANT AND FAILURE OF CONSIDERATION.—Where the contract is such that the law presumes a consideration, the defense of a want of consideration is new matter.[1]

p. LEAVE AND LICENSE.—The defense of leave and license must be specially pleaded.[2]

North Carolina.—Morrison *v.* Baker, 81 N. Car. 77.

Missouri.—Bernhardt *v.* Walls, 29 Mo. App. 206; Wildbahn *v.* Robidoux, 11 Mo. 659; Hook *v.* Turner, 22 Mo. 335; Springer *v.* Kleinsorge, 83 Mo. 156.

Kentucky.—Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush (Ky.) 463.

New York.—Haight *v.* Child, 34 Barb. (N. Y.) 186; Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43; Am. burger *v.* Marvin, 4 E. D. Smith (N. Y.) 393; Livingston *v.* Smith, 14 How. Pr. (N. Y. Supreme Ct.) 490; Nuglish *v.* Marvin, 128 N. Y. 380.

Minnesota.—Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97.

Iowa.—Mahana *v.* Blunt, 20 Iowa 142.

Indiana.—Suman *v.* Springate, 67 Ind. 115; McMillen *v.* Terrell, 23 Ind. 163.

California.—Harris *v.* Frank, 81 Cal. 281; McDonald *v.* Mission View Homestead Assoc., 51 Cal. 210.

For the treatment of the subject of the pleading and practice relative to the Statute of Frauds, see FRAUDS, STATUTE OF.

1. University *v.* Livingston, 57 Iowa 307, 42 Am. Rep. 42; Beeson *v.* Howard, 44 Ind. 413; Frybarger *v.* Cockefair, 17 Ind. 404; Bingham *v.* Kimball, 17 Ind. 397; Happe *v.* Stout, 2 Cal. 460; Brown *v.* Ready (Ky., 1893), 20 S. W. Rep. 1036.

A Promissory Note imports a consideration; a want of consideration must be pleaded. Winters *v.* Rush, 34 Cal. 137; Patterson *v.* Gile, 1 Colo. 200; Munro *v.* King, 3 Colo. 238. See Alden *v.* Carpenter, 7 Colo. 87.

In an Action for Services performed, if defendant relies, as a defense, upon an agreement that they should be rendered gratuitously, he should specially plead that fact. Scott *v.* Morse, 54 Iowa 732.

Anticipation of Defense.—But if the plaintiff anticipates the defense of a want of consideration, by needlessly alleging that there was a consideration, he must prove the consideration, and the want of a consideration may be proven under a general denial. Bogie *v.* Nolan, 96 Mo. 95.

Failure of Consideration is new matter. Williams *v.* Mellon, 56 Mo. 262; Smith *v.* Rembaugh, 21 Mo. App. 390; Redman *v.* Hampton, 26 Mo. App. 504; Higgins *v.* Germaine, 1 Mont. 235; Smith *v.* Sherwood, 2 Tex. 460; Keeble *v.* Black, 4 Tex. 69.

Texas.—In any suit founded on a note or other instrument in writing, under the seal of the party charged therewith, the defendant may, by a special plea, impeach or inquire into the consideration thereof, in the same manner as if such writing had not been sealed; but the plea must be verified by affidavit. Stillman *v.* Canales, 39 Tex. 406; Lemmon *v.* Hanley, 28 Tex. 219; Harris *v.* Cato, 26 Tex. 338; English *v.* Helms, 4 Tex. 228; Conner *v.* Autrey, 18 Tex. 427; Short *v.* Price, 17 Tex. 397; Drew *v.* Harrison, 12 Tex. 279; Muckleroy *v.* Bethany, 23 Tex. 163; Vineyard *v.* Smith, 34 Tex. 454; Pierce *v.* Wright, 33 Tex. 631; Wimbish *v.* Holt, 26 Tex. 673; Clopton *v.* Pridgen, 8 Tex. 308; Williams *v.* Bailes, 9 Tex. 61.

2. A license to enter upon and occupy land for any purpose must be specially pleaded. Snowden *v.* Wilas, 19 Ind. 11, 81 Am. Dec. 370; Chase *v.* Long, 44 Ind. 427; Alford *v.* Barnum, 45 Cal. 482.

Under a plea of license the title of land does not come in question. Rathbone *v.* McConnell, 20 Barb. (N. Y.) 311.

In an action of replevin, if the defense is that the defendant holds possession under license of a partner of plaintiff, it must be specially pleaded. Tell *v.* Beyer, 38 N. Y. 161.

In an action to recover damages for injuries received by plaintiff in consequence of falling through a coal-hole in the sidewalk, in front of defendant's premises, the defense that there was a license to construct the hole must be specially pleaded, and it must be alleged that the terms of the license were complied with. Clifford *v.* Dam, 81 N. Y. 53. See also Haight *v.* Badgeley, 15 Barb. (N. Y.) 499; Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293.

q. CHAMPERTY.—Champerty is new matter, and must be pleaded.[1]

r. TENDER.—Tender is new matter, to be specially pleaded.[2]

s. ACCORD AND SATISFACTION.—Accord and satisfaction are new matter.[3] See ACCORD AND SATISFACTION, *ante*, p. 73.

t. RELEASE.—Release must be specially pleaded.[4]

u. RATIFICATION, SUBROGATION, AND RESCISSION.—Ratification, subrogation, and rescission are all new matter. They must be pleaded.[5]

v. AWARD.—A defendant cannot avail himself of an award as a bar to an action unless he alleges it as such in his answer.[6] See article AWARDS.

w. IMMATURITY OF THE INDEBTEDNESS.—That the debt is not yet due is new matter, to be pleaded.[7]

x. DISCHARGE IN BANKRUPTCY.—A discharge in bankruptcy is not a bar to an action unless it is pleaded.[8]

1. Moore *v.* Ringo, 82 Mo. 468; Brumback *v.* Oldham, 1 Idaho 710; Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

Contra. — Champerty need not be specially pleaded. If the fact comes to the knowledge of the court in any proper manner, it will refuse longer to entertain the proceeding. Barker *v.* Barker, 14 Wis. 131.

2. Bryan *v.* Maume, 28 Cal. 239; Hegler *v.* Eddy, 53 Cal. 597; Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178. See article TENDER.

A tender after the commencement of the action must be pleaded. Hegler *v.* Eddy, 53 Cal. 597.

3. Berdall *v.* Bissell, 6 Colo. 162; Fitch *v.* Brockmon, 2 Cal. 576; Piercy Sabin, 10 Cal. 30, 70 Am. Dec. 692; Coles *v.* Soulsby, 21 Cal. 47; Sweet *v.* Burdett, 40 Cal. 97; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Jacobs *v.* Day, 5 Misc. Rep. (N. Y.) 410.

Contra.—Gavin *v.* Annan, 2 Cal. 494; McLarren *v.* Spalding, 2 Cal. 510; Looby *v.* West Troy, 24 Hun (N. Y.) 78.

4. Grunwald *v.* Freese (Cal., 1893), 34 Pac. Rep. 73; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Coles *v.* Soulsby, 21 Cal. 50; Mulford *v.* Estudillo, 23 Cal. 95; Seehorn *v.* Big Meadows, etc., Wagon Road Co., 60 Cal. 240; Bostwick *v.* McEvoy, 62 Cal. 503; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696. *Contra*, McLarren *v.* Spalding, 2 Cal. 510.

5. **Ratification.**—Noble *v.* Blount, 77 Mo. 235; Stows *v.* Richmond, 21 Mo. App. 17; Fernean *v.* Whitford, 39 Mo. App. 311; Kersey *v.* Garton, 77 Mo. 645; Capital Bank *v.* Armstrong, 62 Mo. 59; Wade *v.* Hardy, 75 Mo. 399.

Subrogation.—Aldrich *v.* Willis, 55 Cal. 81.

Rescission.—Reynolds *v.* Reynolds, 45 Mo. App. 622; Riggins *v.* Missouri River, etc., R. Co., 73 Mo. 598; Brown *v.* Weldon, 27 Mo. App. 251.

6. Brazill *v.* Isham, 12 N. Y. 9; Piercy *v.* Sabin, 10 Cal. 30, 70 Am. Dec. 692; Bowen *v.* Lazalere, 44 Mo. 383.

In an action for work and labor, the defense that the plaintiff agreed to arbitrate as to the price to be paid must be specially pleaded. Lautenschlager *v.* Hunter, 22 Minn. 267.

7. Hargan *v.* Burch, 8 Iowa 309; Swan Lamp Co. *v.* Brush-Swan Electric Light Co., 61 N. Y. Super. Ct. 11.

In an action for goods sold and delivered, the defense that notes were given in payment, which are not yet due, is new matter. Ballinger *v.* Lantier, 15 Kan. 608.

In an action upon a note, it is a sufficient ground for excluding evidence of the fact that the time for payment of the note had been extended, that no such defense is set up in the answer. Newell *v.* Salmons, 22 Barb. (N. Y.) 647.

8. Cornell *v.* Dakin, 38 N. Y. 253; Levy *v.* Haake, 53 Cal. 269; Collins *v.* Scheeline, 52 Cal. 450; Goodhue *v.* King, 55 Cal. 377.

The court in which an action is pending cannot take judicial notice of proceedings in bankruptcy subsequently commenced, however seriously

y. USURY.—Usury must be specially pleaded.[1]

z. BONA FIDE PURCHASER.—The issue of "innocent purchaser" cannot be raised by a general denial, but must be affirmatively pleaded, and the onus of proof lies on the pleader.[2]

*z*¹. OBJECTION TO STATUTE OR ORDINANCE.—Any objection to a statute or ordinance upon which the action is founded is new matter.[3]

*z*². TITLE IN ACTION OF TRESPASS. — Possession is sufficient to enable the plaintiff to maintain the action of trespass *quare clausum fregit*. In such an action the plaintiff's title, if not put in issue, is to be taken on the trial as admitted.[4]

*z*³. LIENS.—In an action to recover property the defense that the defendant has a lien thereon is new matter.[5]

they may affect the rights of the parties to the suit. It is the duty of the court to proceed to a decree as between the parties before it, until by some proper pleading in the case it is informed of the changed relations of any of those parties to the subject-matter of the suit. Amador Canal, etc., Co. *v.* Mitchell, 59 Cal. 168.

If the discharge in bankruptcy is obtained too late to be pleaded, either originally or by amendment, the remedy, it seems, is by motion for perpetual stay of execution. Cornell *v.* Dakin, 38 N. Y. 253; Palmer *v.* Hutchins, 1 Cow. (N. Y.) 42; Baker *v.* Taylor, 1 Cow. (N. Y.) 165.

Composition Agreement.—A composition agreement with creditors is new matter to be specially pleaded when the suit is on original demand. Sweet *v.* Burdett, 40 Cal. 97; Smith *v.* Owens, 21 Cal. 11.

1. Manning *v.* Tyler, 21 N. Y. 567; Fay *v.* Grimsteld, 10 Barb. (N. Y.) 321; Morford *v.* Davis, 28 N. Y. 481. See article USURY.

2. Holdsworth *v.* Shannon, 113 Mo. 508; Weaver *v.* Barden, 49 N. Y. 286.

3. The objection that a statute was not constitutionally passed by ayes and noes, during the presence of the required numbers, must be set up by answer. Darlington *v.* Mayor, 2 Robt. (N. Y.) 274.

In condemnation proceedings the defense that there are irregularities in the proceedings of the council to open a street is new matter. Santa Ana *v.* Harlin, 99 Cal. 539.

In an action for injuries from a train on the ground that it was running at a rate of speed in excess of that fixed by ordinance, defendant cannot show that the ordinance is unreasonable and invalid unless such defense is specially pleaded. Bluedorn *v.* Missouri Pac. R. Co. (Mo., 1893), 24 S. W. Rep. 57.

4. Althause *v.* Rice, 4 E. D. Smith (N. Y.) 347; Squires *v.* Seward, 16 How. Pr. (N. Y. Supreme Ct.) 478.

In an action for diverting a stream, evidence that the title was in a third person, and that therefore plaintiff had no right in the stream, is new matter. Hill *v.* Water, etc., Com'rs, 77 Hun (N. Y.) 491. See Ferris *v.* Brown 3 Barb. (N. Y.) 105; Mason *v.* Vestal, 88 Cal. 396; Patterson *v.* Clark, 20 Iowa 429; Dyson *v.* Ream, 9 Iowa 51.

But where in an action for trespass the complaint alleges both title and possession in plaintiff, then plaintiff's title may be attacked under a denial. Niles *v.* Lindsley, 8 How. Pr. (N. Y. Super. Ct.) 131.

5. Guille *v.* Fook, 13 Oregon 577; Stowell *v.* Otis, 71 N. Y. 40.

And the particular lien must be pleaded. Under an allegation of one lien, a different one cannot be shown. Graham *v.* Harrower, 18 How. Pr. (N. Y. Supreme. Ct.) 144. See Wehle *v.* Butler, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 139.

The particulars of a claim adverse to a mortgage lien must be specially pleaded. Mitchell *v.* Steelman, 8 Cal. 369.

Rent paid by a tenant in possession, in advance of a judgment lien, is new matter. Webster *v.* Cook, 38 Cal. 423.

The right to rents as against a mechanic's lien on a leasehold interest is new matter. Gaskill *v.* Moore, 4 Cal. 233.

And so is the loss of a mechanic's

*s*⁴. MINING RULES AND CUSTOMS.—Mining rules and customs must be specially pleaded with particularity.[1]

*s*⁵. MISTAKE.—The defense of "mistake" in an instrument is new matter.[2]

*s*⁶. RELEASE OF GUARANTORS, INDORSERS, AND SURETIES.—Matters operating to discharge a guarantor, indorser, or surety are new matter, to be pleaded.[3]

*s*⁷. CONTRACT NOT PROPERLY PERFORMED.—In an action by a contractor to recover the contract price, the defense that the contractor did his work in an unworkmanlike manner is new matter, to be pleaded.[4]

*s*⁸. ALL MATTER IN AVOIDANCE.—Lastly, all matter in avoidance of the cause of action must be pleaded.[5]

lien by acquiescence in the surrender of a leasehold interest. Gaskill *v.* Moore, 4 Cal. 233.

1. Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534; Esmond *v.* Chew, 15 Cal. 137.

Forfeiture of a mining claim under local mining laws must be specially pleaded, and cannot be shown under the general issue. Morenhaut *v.* Wilson, 52 Cal. 263; Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534; Du Prat *v.* James, 61 Cal. 361. *Contra*, Bell *v.* Brown, 22 Cal. 671.

2. Com'rs, etc., *v.* Barnard, 98 Cal. 199; Warner *v.* Myrick, 16 Minn. 91.

Where the answer alleges only fraud, mistake cannot be proved. Leighton *v.* Grant, 20 Minn. 345.

That a deed absolute was intended as a mortgage is new matter. Pico *v.* Gallardo, 52 Cal. 206; Davenport *v.* Turpin, 43 Cal. 597.

In an action of replevin in which the plaintiff relies on a bill of sale, the fact that such bill of sale is a mortgage is new matter. McAnnulty *v.* Seick, 59 Iowa 586.

3 Horton *v.* Ruhling, 3 Nev. 498; Taylor *v.* Jeter, 23 Mo. 244; Missouri Bank *v.* Matson, 24 Mo. 333; Hempstead *v.* Hempstead, 27 Mo. 187; Smith *v.* Rice, 27 Mo. 505, 72 Am. Dec. 281; Ferguson *v.* Turner, 7 Mo. 497; Rucker *v.* Robinson, 38 Mo. 154, 90 Am. Dec. 412; Pitts *v.* Fugate, 41 Mo. 405; Headlee *v.* Jones, 43 Mo. 235; Rice *v.* Morton, 19 Mo. 263; Mulford *v.* Estudillo, 23 Cal. 96; People *v.* Ah Luck, 62 Cal. 503.

A levy under an execution upon sufficient personal property to discharge sureties for the judgment is new matter. Mulford *v.* Estudillo, 23 Cal. 95.

4. Kendall *v.* Vallejo, 1 Cal. 371; Blethen *v.* Blake, 44 Cal. 117; McGuire *v.* Quintana, 52 Cal. 427.

5. *California.*—Walton *v.* Minturn, 1 Cal. 362; Hathaway *v.* De Soto, 21 Cal. 192; Perine *v.* Teague, 66 Cal. 446; People *v.* Todd, 23 Cal. 181; Janin *v.* Browne, 59 Cal. 46.

Indiana.—Watkins *v.* Jones, 28 Ind. 12; Evansville *v.* Evans, 37 Ind. 230.

Iowa.—Osborne *v.* Evans (Iowa, 1894), 58 N. W. Rep. 920.

South Dakota.—Wyckoff *v.* Johnson, 2 S. Dak. 91.

Missouri.—Meyer *v.* Broadwell, 83 Mo. 571.

New York.—Dubois *v.* Hermance, 56 N. Y. 673; Riggs *v.* American Tract Soc., 84 N. Y. 330; Abbe *v.* Clarke, 31 Barb. (N. Y.) 238; Walrod *v.* Bennett, 6 Barb. (N. Y.) 144; Miner *v.* Beekman, 50 N. Y. 337; Koehler *v.* Adler, 19 Abb. L. J. (N. Y.) 300; Smith *v.* Holmes, 19 N. Y. 271; Laraway *v.* Perkins, 10 N. Y. 371; Douglas *v.* Haberstro, 25 Hun (N. Y.) 262; Wallace *v.* Blake (Super. Ct.), 30 N. Y. St. Rep 248; Codd *v.* Rathbone, 19 N. Y. 37; Brennan *v.* New York, 62 N. Y. 365; Maretzek *v.* Cauldwell, 19 Abb. Pr. (N. Y. Super. Ct.) 35; Fox *v.* Turner (Supreme Ct.), 17 N. Y. St. Rep. 666; Burnside *v.* Matthews, 54 N. Y. 78; German Sav. Bank *v* Carrington, 14 N. Y. Wkly. Dig. 475; Willover *v.* Hill, 72 N. Y. 36.

In ejectment, a deed to the defendant executed subsequently to the commencement of the action is admissible in evidence if it is specially pleaded by supplemental answer. Roper *v.* Mc Fadden, 48 Cal. 346; McLane *v.* Bovee, 35 Wis. 27.

In an action on a policy of insurance,

XIV. JOINDER OF DEFENSES.—1. Defendant May Plead as Many Defenses as He Has.—The general rule is that a defendant is bound to set up every defense, legal or equitable or both, which he may have to the action, and that he waives those not pleaded.[1]

2. Manner of Pleading Several Defenses.—Completeness.—Each defense separately stated as a separate defense must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof which it purports to answer. The former rule in this respect is not relaxed by the Code.[2]

the fact that the insured person increased the risk by violating the conditions of the policy is new matter, Cassacia *v.* Phœnix Ins. Co., 28 Cal. 629; Tischler *v.* California Farmers' Mut. F. Ins. Co., 66 Cal. 178; also that he caused the building to be burned, Capuro *v.* Builders' Ins. Co., 39 Cal. 123.

The incapacity of a corporation to purchase and hold land, when used as a defense to an action for specific performance, is new matter. Young Men's Christian Assoc. *v.* Dubach, 82 Mo. 475.

So is the defense that the corporation has ceased to exist. Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430.

Custom.—A special custom of a board of brokers is new matter. Goldsmith *v.* Sawyer, 46 Cal 209.

Exception. — Where an exception exists which constituted a defense, such exception should be pleaded. McCormick *v.* Holbrook, 22 Iowa 487, 92 Am. Dec. 400.

Laches.—Laches must be specially pleaded. De Witt *v.* Miller, 9 Tex. 239; Curlin *v.* Hendricks, 35 Tex. 225.

Duress. — Duress must be specially pleaded. Murdock *v.* Lewis, 26 App. 234.

Failure to Make Demand.—A failure to make demand, when a demand is required of plaintiff, is new matter. Weil *v.* Tyler, 38 Mo. 545; Beardslee *v.* Boyd, 37 Mo. 180; Reid *v.* Mullins, 43 Mo. 306; Lee *v.* Casey, 39 Mo. 383; Westcott *v.* De Montreuille, 30 Mo. 252; State *v.* Grupe, 36 Mo. 365.

Instrument not Stamped.—The defense that an instrument is not stamped as required by the *United States* revenue laws must be specially pleaded. Glidden *v.* Higbee, 31 Iowa 379.

1. Witte *v.* Lockwood, 39 Ohio St. 141; Mott *v.* Burnett, 2 E. D. Smith, (N. Y.) 51; Phillips *v.* Gorham, 17 N. Y. 270; Lattin *v.* McCarty, 41 N. Y. 107; Melvin *v.* Stephens, 82 N. Car. 283; Bean *v.* Western North Carolina R. Co., 107 N. Car. 731; Bell *v.* Wright, 31 Kan. 237; Kimball *v.* McIntyre, 3 Utah 77; Vail *v.* Jones, 31 Ind. 467; Youngs *v.* Bell, 4 Cal. 201; Carpentier *v.* Oakland, 30 Cal. 442.

The defendant must make all his defenses, both legal and equitable, in his answer; and, if necessary, transfer the cause to the equity docket. Reeve *v.* Jackson, 46 Ark. 272.

Both a legal and an equitable defense may be set up in an action of ejectment. Bodley *v.* Ferguson, 30 Cal. 513.

Quo Warranto.—In a *quo warranto* proceeding the defendant may set forth in his answer more than one defense. People *v.* Stratton, 28 Cal. 382.

Missouri.—Proceedings in attachment are excepted out of the rule permitting the setting up by answer as many defenses as one may have. Houghland *v.* Dent, 52 Mo. App. 237.

Texas.—The defendant to a petition at law or in equity should at once file every matter, either of law or of fact, which he deems necessary to his defense. McKensie *v.* Hamilton, Dall. (Tex.) 461; Smith *v.* Doak, 3 Tex. 215.

2. Baldwin *v.* U. S. Tel. Co., 54 Barb. (N. Y.) 506; Loosey *v.* Orser, 4 Bosw. (N. Y.) 391; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y. Super. Ct.) 372; Hammond *v.* Earle, 58 How. Pr. (N. Y. Supreme Ct.) 426; Krutz *v.* Fisher, 8 Kan. 96; Davis *v.* Robinson, 67 Iowa 355; National Bank *v.* Green, 33 Iowa 140; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Sumner *v.* Shipman, 65 N. Car. 623; Keathley *v.*

Separate Statement.—The several defenses should be separately stated,[1] and no defense can be aided by a resort to other parts of the answer to which it contains no reference in terms or by necessary implication.[2] But, for the purpose of avoiding repetiton of facts

Branch, 88 N. Car. 379; Lash *v.* Rendell, 72 Ind. 475; Frazee *v.* Frazee, 70 Ind. 411; Cornwell *v.* Finnell, 11 Ind. 527; Rogers *v.* Place, 29 Ind. 577; Bouslog *v.* Garrett, 39 Ind. 338; Alvord *v.* Essner, 45 Ind. 156; Reid *v.* Huston, 55 Ind. 173; Smith *v.* Little, 67 Ind. 549; Lemmon *v.* Hanley, 28 Tex. 219; Meyendorf *v.* Frohner, 3 Mont. 282. *Compare* Cobb *v.* Frazee, 4 How. Pr. (N. Y. Supreme Ct.) 413; Swift *v.* Kingsley 24 Barb. (N. Y.) 541; Hamer *v.* McFarlin, 4 Den. (N. Y.) 509; Ayres *v.* Covill, 18 Barb. (N. Y.) 260; Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y. Supreme Ct.) 67; Brown *v.* Ryckman, 12 How. Pr. (N. Y. C. Pl.) 313; Van Derveer *v.* Sutphin, 5 Ohio St. 294; Van Ingen *v.* Newton, 1 Disney (Ohio) 482; Seely *v.* Blair, Wright (Ohio) 683.

Each paragraph of an answer must be complete in itself, and a failure to describe the piece of land sought to be released from the lien of a mortgage would be a fatal defect in a paragraph. Knarr *v.* Conaway, 42Ind. 260.

Where the first paragraph of a complaint is based upon a special contract to furnish material and erect a house for the defendant, and the second is based upon a *quantum meruit* for material furnished and labor performed, paragraphs of the answer which plead the special contract and allege its breach, each being pleaded as a defense to the entire complaint, do not constitute a defense to the paragraph upon the *quantum meruit*, and are demurrable. Everroad *v.* Schwartzkopf, 123 Ind. 35. See Musser *v.* Crum, 48 Iowa 53.

The general rule is that the judgment is given on the whole record. Swift *v.* Kingsley, 24 Barb. (N. Y.) 541.

Cannot be Construed as a Counterclaim.—No single pleading or defense can be made to perform the double function of alleging matter in bar of an action, and at the same time of setting up a cause of action in favor of the defendant. Campbell *v.* Routt, 42 Ind. 410.

But in a suit upon a contract a certain state of facts may at the same time constitute a defense to the action, and be a proper ground of counterclaim; and if pleaded by the defendant in this double aspect, upon a single statement of facts and without formally separating the defense from the counterclaim, the defect, if it be one, is merely formal, and objection must be made by motion. Lancaster, etc., Mfg. Co. *v.* Colgate, 12 Ohio St. 345. See Mull *v.* Walker, 100 N. Car. 46.

1. Adams *v.* Trigg, 37 Mo. 141; Donahue *v.* Prosser, 10 Iowa 276; Lyman *v.* Corwin, 27 Ark. 580. But a defect in this respect is reached by motion only. Truitt *v.* Baird, 12 Kan. 420.

Where an answer is divided into paragraphs which do not state separate defenses, but which, taken together, state one defense, a paragraph of such answer is not subject to demurrer. Benedict *v.* Hunt, 32 Iowa 27.

The plaintiff may elect to reply to separate defenses, although they are not separately stated. Bass *v.* Upton, 1 Minn. 408.

See Moore *v.* Edmiston, 70 N. Car. 510, where the answer in a slander case was construed to contain the two defenses of justification and statute of limitations; also Forbes *v.* Petty, 37 Neb. 899, where the two pleas of arbitration and accord and satisfaction were blended, and held good.

Where the defenses cover the entire complaint, it is not necessary to refer to the respective causes of action to which they are respectively intended to refer. Woods *v.* Reiss, 78 Hun (N. Y.) 78.

2. Loosey *v.* Orser, 4 Bosw. (N. Y.) 391; Ritchie *v.* Garrison, 10 Abb. Pr. (N. Y. Super. Ct.) 246; Baldwin *v.* U. S. Tel. Co., 6 Abb. Pr. N. S. (N. Y. Supreme Ct.) 405; Jackson *v.* Van Slyke, 44 Barb. (N. Y.) 116, note; Spencer *v.* Babcock, 22 Barb. (N. Y.) 326; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y. Super. Ct.) 373; Benedict *v.* Seymour, 6 How. Pr. (N. Y. Supreme Ct.) 298; Markham *v.* Barnes (Supreme Ct.), 8 N. Y. St. Rep. 502.

A defense cannot be made out by

alike applicable to each of several defenses, it is allowable to aver them either in one of the distinct and separate statements of a defense, etc., or by way of introduction to all, and, thereafter, in the subsequent separate statements, to include them in each by distinct and intelligible reference.[1]

How Stated.—While, in an answer under the Code, each statement intended as a defense must be complete in itself, no formal commencement or conclusion is required to mark it as a separate defense.[2]

3. Matter in Abatement, and Matter in Bar.—The Code has abrogated the rule of the common law that matters in abatement must be pleaded and disposed of before pleading in bar to the action. Matters in abatement and in bar may be joined in one answer.[3]

connecting two or more separate defenses together. Spencer *v.* Babcock, 22 Barb. (N.Y.) 326; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229; Ritchie *v.* Garrison, 10 Abb. Pr. (N. Y. Super. Ct.) 246; Ryle *v.* Harrington, 4 Abb. Pr. (N. Y. Supreme Ct.) 421.

1. Krutz *v.* Fisher, 8 Kan. 96; Meyendorf *v.* Frohner, 3 Mont. 282; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y. Super. Ct.) 372; Landau *v.* Levy, 1 Abb. Pr. (N. Y. Super. Ct.) 376; Baldwin *v.* U. S. Tel. Co., 54 Barb. (N. Y.) 506; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229; Ayres *v.* Covill, 18 Barb. (N. Y.) 260; Sinclair *v.* Fitch, 3 E. D. Smith (N. Y.) 677.

Where the note sued on is described or mentioned in one defense, a reference in a subsequent defense to the "said note" is sufficient. Williams *v.* Richmond, 9 How. Pr. (N. Y. Supreme Ct.) 522. See Ranney *v.* Smith, 6 How. Pr. (N. Y. Supreme Ct.) 420.

2. Bridge *v.* Payson, 5 Sandf. (N. Y.) 210; Lippincott *v.* Goodwin, 8 How. Pr. (N. Y. Supreme Ct.) 242.

Where an answer was divided into paragraphs, each numbered and commencing with the words "and defendant further answering says," it was held that the defendant was precluded from showing that the paragraphs constituted one defense. Nicoll *v.* Fash, 59 Barb. (N. Y.) 275.

To commence each defense with the words "and for a further defense" is sufficient. Benedict *v.* Seymour, 6 How. Pr. (N. Y. Supreme Ct.) 298.

Where a separate defense in an answer contains allegations and denials which can by no possibility refer to any other than a particular cause of action set out in the complaint. the defense distinctly refers to that cause of action. Crasto *v.* White, 52 Hun (N. Y.) 473.

The words "and for a further answer and second defense" are a sufficient compliance with the Code provision requiring the defenses to be separately stated and numbered. No figures are necessary. Mundy *v.* Wight, 26 Kan. 173.

The Rule.—In stating defenses there is but one safe rule, and that is, to indicate distinctly, by fit and appropriate words, where the statement of defense commences and where it concludes. Lippincott *v.* Goodwin, 8 How. Pr. (N. Y. Supreme Ct.) 242; Benedict *v.* Seymour, 6 How. Pr. (N.Y. Supreme Ct.) 298. See also Boyce *v.* Brown, 7 Barb. (N. Y.) 80; Otis *v.* Ross, 8 How. Pr. (N. Y. Supreme Ct.) 193; Willet *v.* Metropolitan Ins. Co., 2 Bosw. (N. Y.) 678; Ross *v.* Duffy (Supreme Ct.), 12 N. Y. St. Rep. 584; Spencer *v.* Tooker, 12 Abb. Pr. (N. Y. Supreme Ct.) 353; Hammond *v.* Earle, 58 How. Pr. (N. Y. Supreme Ct.) 426; Myers *v.* Bank, of Portsmouth (Supreme Ct.), 2 N. Y. St. Rep. 125; Thompson *v.* Kearney (C. P.), 12 N. Y. St. Rep. 682; Swift *v.* Kingsley, 24 Barb. (N. Y.) 541; Ayres *v.* Covill, 18 Barb. (N. Y.) 260; Townsend *v.* Platt, 3 Abb. Pr. (N. Y. C. Pl.) 325; Gardner *v.* Clark, 21 N. Y. 399; Hamilton *v.* Hough, 13 How. Pr. (N.Y. Supreme Ct.) 14; Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553.

3. Dawley *v.* Brown, 9 Hun. (N. Y.) 462; Owens *v.* Loomis, 19 Hun (N. Y.) 607; Gardner *v.* Clark, 21 N. Y. 399; Mayhew *v.* Robinson, 10 How. Pr. 'N.

4. States Where Inconsistent Defenses are Allowed.—Some states allow absolutely inconsistent defenses to be set up, and no motion to strike out or elect will be entertained. In these states the trial is the only thing which will determine which defense is true and which false.[1]

Y. Supreme Ct.); 162; Sweet *v.* Tuttle, 14 N. Y. 465; Bridge *v.* Payson, 5 Sandf. (N.Y.) 210; Montague *v.* Brown, 104 N. Car. 161; Woody *v.* Jordan, 69 N. Car. 189; Hawkins *v.* Hughes, 87 N. Car. 115, *cited in* 104 N. Car. 161; Page *v.* Mitchell, 37 Minn. 368; Erb *v.* Perkins, 32 Ark. 428; Dutcher *v.* Dutcher, 39 Wis. 652; Freeman *v.* Carpenter, 17 Wis. 130; Hooker *v.* Greene, 50 Wis. 271; Brown County *v.* Van Stralen, 45 Wis. 675; Christian *v.* Williams, 111 Mo. 430; Cohn *v.* Lehman, 93 Mo. 574; Byler *v.* Jones, 79 Mo. 261; McIntire *v.* Calhoun, 27 Mo. App. 513; Little *v.* Harrington, 71 Mo. 390. Thompson *v.* Greenwood, 28 Ind. 327, *overruling* a number of earlier cases. But *compare* Moore *v.* Sargent, 112 Ind. 484; Midland R. Co. *v.* Stevenson, 6 Ind. App. 207; Stone *v.* Miller, 7 Barb. (N. Y.) 368; King *v.* Vanderbilt, 7 How. Pr. (N. Y. Supreme Ct.) 385; Van Buskirk *v.* Roberts, 14 How. Pr. (N. Y. Supreme Ct.) 61; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Gossling *v.* Broach, 1 Hilt. (N. Y.) 49.

If a defendant pleads in abatement only, and issue is joined thereon, this is a waiver of a plea in bar. Bond *v.* Wagner, 28 Ind. 462; Thompson *v.* Greenwood, 28 Ind. 327. See Wright *v.* Bundy, 11 Ind. 398.

An answer in the nature of a plea in abatement should be pleaded separately and disposed of before an answer to the merits is considered. Hopwood *v.* Patterson, 2 Oregon 50.

Pleading matter in abatement with matter in bar waives the matter in abatement. Cannon *v.* McManus, 17 Mo. 345; Bourgoin *v.* Wheaton, 30 Mo. 215; Fugate *v.* Glasscock, 7 Mo. 577; Hatry *v.* Shuman, 13 Mo. 547; Fordyce *v.* Hathorn, 57 Mo. 120; Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86; Moody *v.* Deutsch, 85 Mo. 237.

A plea in abatement to an attachment for rent alleged, among other things, that all the said rent had been fully paid. *Held*, that the abatement was waived and that the plea was a plea in bar. Houghland *v.* Dent, 52 Mo. App. 237.

See also article ABATEMENT IN PLEADING.

1. **Arkansas.**—McIlroy *v.* Buckner, 35 Ark. 555.

California.—Billings *v.* Drew, 52 Cal. 565; Buhne *v.* Corbett, 43 Cal. 264. *Contra.*—Klink *v.* Cohen, 13 Cal. 623; Hensley *v.* Tartar, 14 Cal. 509; Blum *v.* Robertson, 24 Cal. 146.

In ejectment the defendant may in one defense deny his possession, and in another defense admit it, and a motion to strike out one of these defenses will be overruled. Buhne *v.* Corbett, 43 Cal. 264.

In an action of ejectment, where the defendants in their sworn answer denied being in possession, though in another defense, separately pleaded, they admitted possession; and on the trial the plaintiff, relying on the answer to show possession, offered no evidence to show the possession of defendants, *held*, that a nonsuit for failure to show possession in defendants was correct. Buhne *v.* Corbett, 43 Cal. 264.

An amended answer contradicting the original answer is not a nullity. Livermore *v.* Webb, 56 Cal. 489.

But where an amended answer is complete in itself, and is inconsistent with the original, the two cannot stand together. Kuhland *v.* Sedgwick, 17 Cal. 123.

In the case of Bell *v.* Brown, 22 Cal. 671, it was held that if a fact which is directly averred in one part of a verified pleading is directly denied in another part, the party verifying it is guilty of perjury, and on the trial that averment which bears most strongly against the pleader will be taken as true.

But it has also been held that, if the answer contains several defenses separately stated, an admission made in one answer, for the purpose of pleading a separate defense, does not destroy the effect of a denial, in another answer, of the matter thus admitted. Siter *v.* Jewett, 33 Cal. 93. See Willson *v.* Cleaveland, 30 Cal. 192.

But even if the rule prohibits inconsistent defenses, which is doubtful,

5. What Defenses are Inconsistent—Introductory.—Two prominent elements intended in the Code system of pleading are, that falsehoods should not be put upon the record, and that the pleadings should disclose the facts relied on in support of or defense against the action.[1] Therefore the rule is general, outside of the states enumerated in the note to the preceding paragraph, that inconsistent defenses cannot be set up.[2]

still, if inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer. And if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system. Klink *v.* Cohen, 13 Cal. 623; Uridias *v.* Morrell, 25 Cal. 31.

Judgment on Pleadings.—Inconsistent defenses do not entitle plaintiff to judgment on the pleadings. Botto *v.* Vandament, 67 Cal. 332; Amador County *v.* Butterfield, 51 Cal. 526; Mudd *v.* Thompson, 34 Cal. 39; Siter *v.* Jewett, 33 Cal. 93.

Colorado.—People *v.* Lothrop, 3 Colo. 428; Duffield *v.* Denver, etc., R. Co. (Colo. App., 1894), 36 Pac. Rep. 622; Hummel *v.* Moore, 25 Fed. Rep. 380.

In an action on a judgment, *nul tiel record* and accord and satisfaction may both be set up. Tucker *v.* Edwards, 7 Colo. 209.

Indiana.—Weston *v.* Lumley, 33 Ind. 486. See Wheeler *v.* Robb, 1 Blackf. (Ind.) 330; Ricket *v.* Stanley, 6 Blackf. (Ind.) 169; Arnold *v.* Sturges, 5 Blackf. (Ind.) 256, *cited in* 33 Ind. 489.

The statute authorizes the defendant to plead as many pleas as he thinks proper, and they must be considered independent of each other. Wheeler *v.* Robb, 1 Blackf. (Ind.) 330; *approved* in Weston *v.* Lumley, 33 Ind. 489.

Iowa.—Morgan *v.* Hawkeye Ins. Co., 37 Iowa 359; Grash *v.* Sater, 6 Iowa 302; Shannon *v.* Pearson, 10 Iowa 588.

An admission in one defense made necessary by the nature of that defense is not to be construed as affecting a different defense inconsistent with such admission. Barr *v.* Hach, 46 Iowa 308; Heinricks *v.* Terrell, 65 Iowa 25; Herzman *v.* Oberfelder, 54 Iowa 83; Tabler *v.* Callanan, 49 Iowa 362; Treadway *v.* Sioux City, etc., R. Co., 40 Iowa 526; Quigley *v.* Merritt, 11 Iowa 147.

But contradictory defenses should not be pleaded in the same division. Morgan *v.* Hawkeye Ins. Co., 37 Iowa 359.

Although a party may plead inconsistent defenses, he cannot claim property under two inconsistent rights at the same time. Crawford *v.* Nolan, 70 Iowa 97.

And a defendant cannot, while denying a fact essential to plaintiff's recovery, base a claim for affirmative relief on the same fact. Baird *v.* Morford, 29 Iowa 531.

New York.—It is doubtful if inconsistent defenses may be stricken out. Woods *v.* Reiss, 78 Hun (N. Y.) 80; Societa Italiana *v.* Sulzer, 138 N. Y. 472; Goodwin *v.* Wertheimer, 99 N. Y. 149; Bruce *v.* Burr, 67 N. Y. 240; Smith *v.* Wells, 20 How. Pr. (N. Y. Supreme Ct.) 158; Stiles *v.* Comstock, 9 How. Pr. (N. Y. Supreme Ct.) 48.

A defendant may set up as many defenses as he may have, whether inconsistent or not. Societa Italiana *v.* Sulzer, 138 N. Y. 468. See other cases under other paragraphs of this section.

North Carolina.—Reed *v.* Reed, 93 N. Car. 465; Whedbee *v.* Reddick, 79 N. Car. 521; Summer *v.* Shipman, 65 N. Car. 623; Ten Broeck *v.* Orchard, 79 N. Car. 518.

South Dakota.—Stebbins *v.* Lardner, 2 S. Dak. 127; Lawrence *v.* Peck (S. Dak., 1893), 54 N. W. Rep. 808; Green *v.* Hughitt School Tp. (S. Dak., 1894), 59 N. W. Rep. 224.

Texas.—St. Louis, etc., R. Co. *v.* Whitley, 77 Tex. 126; Ft. Worth, etc., R. Co. *v.* McAnulty (Tex. Civ. App., 1894,) 26 S. W. Rep. 414; Fowler *v.* Davenport, 21 Tex. 626; Duncan *v.* Mayette, 25 Tex. 245; Express Printing Co. *v.* Copeland, 64 Tex. 354; Welden *v.* Texas Continental Meat Co., 65 Tex. 487; Hillebrant *v.* Booth, 7 Tex. 499.

But each plea must be consistent in its own averments. Hillebrant *v.* Booth, 7 Tex. 499.

Wyoming.—Lake Shore, etc., R. Co. *v.* Warren, 3 Wyoming 135.

1. Bush *v.* Prosser, 11 N. Y. 347.

2. Burnham *v.* Call, 2 Utah 433; Bell *v.* Campbell (Mo., 1894), 25 S. W.

A Question of Fact.—But the consistency in defenses required by the Code is one of fact merely. Two or more defenses are held to be inconsistent only where the proof of one necessarily disproves the other. But the facts should be so set out in the answer that both defenses may be true.[1]

What Defenses May Be Pleaded with a General Denial.—A denial and affirmative defenses may both be set up.[2] A general denial is not inconsistent with a special plea of payment.[3] And a general denial of the execution of a contract is not inconsistent with a plea of want of consideration.[4]

In an action on a note the defendant may set up a denial of the making of the note, and also that, if his signature is genuine, it was obtained by fraud.[5]

Rep. 359; Brown *v.* Bowen, 90 Mo. 190; McClanahan *v.* West, 100 Mo. 322. See cases under next paragraph.

1. Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Cohn *v.* Lehman, 93 Mo. 574; Ledbetter *v.* Ledbetter, 88 Mo. 60; State *v.* Rogers, 79 Mo. 283; McAdow *v.* Ross, 53 Mo. 199; McCormick *v.* Kaye, 41 Mo. App. 263; McIntire *v.* Calhoun, 27 Mo. App. 513.

The inconsistent defenses which are allowed to be pleaded in a verified answer are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance as contradistinguished from denials, the party impliedly or hypothetically admitting, *for the purpose of that particular defense*, a fact which he notwithstanding insists does not in truth exist. Bell *v.* Brown, 22 Cal. 671.

The Code contains no limitation upon the provision that the defendant may set forth as many grounds of defense as he may have, except the implied limitation contained in the requirement that the pleadings shall be verified by oath. Citizens' Bank *v.* Closson, 29 Ohio St. 78.

"Under our system of pleading a defendant may set up as many defenses as he may have, the only limit to this right being that they must not be inconsistent. Separate and distinct defenses are consistent when both may be true, and are held inconsistent when the proof of one necessarily disproves the other." Per Collins, J., in Steenerson *v.* Waterbury, 52 Minn. 211. And see Blodgett *v.* McMurtry (Neb., 1894), 57 N. W. Rep. 985; Pavey *v.* Pavey, 30 Ohio St. 600.

2. Woods *v.* Reiss, 78 Hun (N. Y.) 78. *Contra*, Adams *v.* Trigg, 37 Mo. 141; Kinman *v.* Cannefax, 34 Mo. 147; Coble *v.* McDaniel, 33 Mo. 363; Atteberry *v.* Powell, 29 Mo. 429, 77 Am. Dec. 579; McCord *v.* Doniphan Branch R. Co., 21 Mo. App. 92; Darrett *v.* Donnelly, 38 Mo. 492.

3. Steenerson *v.* Waterbury, 52 Minn. 211; Doran *v.* Dinsmore, 20 How. Pr. (N. Y. Supreme Ct.) 504. *Contra*, Sheppard *v.* Starrett, 35 Mo. 367.

In a suit on a note, the plea of payment is not inconsistent with a denial of the plaintiff's ownership, nor is it in any sense an admission thereof. Cavitt *v.* Thorp, 30 Mo. App. 131.

A defendant, when sued to recover the value of services rendered, may deny that the services were rendered, and also allege that, if rendered, their value was less than the amount claimed. Weaver *v.* Carnahan, 37 Ohio St. 363.

4. Barnes *v.* Scott, 29 Fla. 285; Mulliken *v.* Mulliken (Ky., 1894), 25 S. W. Rep. 598; Pavey *v.* Pavey, 30 Ohio St. 600.

In an action on a note, the defenses *non est factum*, want of consideration, and payment are not inconsistent. Patrick *v.* Boonville Gas Light Co., 17 Mo. App. 462.

5. Citizens' Bank *v.* Closson, 29 Ohio St. 78.

But in a suit on a contract a denial of the making of the contract, and an averment that the defendants were induced to make the contract by the false and fraudulent representations of the plaintiffs, are inconsistent de-

The pleas of a general denial and of a general release are not inconsistent.[1]

A general denial and the statute of limitations are not legally inconsistent with each other.[2]

In an action for assault and battery, a positive denial of the trespass is not waived by a subsequent plea of justification in the same answer.[3]

In an action for slander or libel a plea of the general issue and pleas of justification are not inconsistent.[4]

In a real action the defendant may plead that he is the owner in fee, and also that the ownership is in some person other than himself or the plaintiff.[5]

fenses. The general denial should be struck out. Marx *v.* Gross, 58 N. Y. Super. Ct. 221; McIntire *v.* Wiegand (City Ct.), 10 N. Y. Supp. 3.

1. Kellogg *v.* Baker, 15 Abb. Pr. (N. Y. Super. Ct.) 286; Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328.

2. Lawrence *v.* Peck (S. Dak., 1893), 54 N. W. Rep. 808; May *v.* Burk, 80 Mo. 675; Schuchman *v.* Heath, 38 Mo. App. 280; Ostrom *v.* Bixby, 9 How. Pr. (N. Y. Supreme Ct.) 57.

3. Rhine *v.* Montgomery, 50 Mo. 566; Hollenbeck *v.* Clow, 9 How. Pr. (N. Y. Supreme Ct.) 289; Lansingh *v.* Parker, 9 How. Pr. (N. Y. Supreme Ct.) 288. See Johnson *v.* Gibson, 23 N. Y. Wkly. Dig. 433.

Three defenses, amounting in substance to pleas of "not guilty," "*son assault demesne*," and "*molliter manus imposuit*, are consistent both at common law and under the Code. Rhine *v.* Montgomery, 50 Mo. 566.

And a general denial, justification, and the statute of limitations are not inconsistent. McCormick *v.* Kaye, 41 Mo. App. 263.

Contra.—A general denial and justification are inconsistent, and one should be struck out. Schneider *v.* Schultz, 4 Sandf. (N. Y.) 684; Roe *v.* Rogers, 8 How. Pr. (N. Y. Supreme Ct.) 356.

4. Murphy *v.* Carter, 1 Utah 17; Wood *v.* Hilbish, 23 Mo. App. 390; Hollenbeck *v.* Clow, 9 How. Pr. (N. Y. Supreme Ct.) 289; Butler *v.* Wentworth, 9 How. Pr. (N. Y. Supreme Ct.) 282; Ormsby *v.* Douglas, 5 Duer (N. Y.) 665. *Contra.*—Porter *v.* McCreedy, 1 Code Rep. N. S. (N. Y.) 88; Sayles *v.* Wooden, 6 How. Pr. (N. Y. Supreme Ct.) 84; Anibal *v.* Hunter, 6 How. Pr. (N. Y. Supreme Ct.) 255; Ormsby *v.* Douglass, 2 Abb. Pr. (N. Y. Super. Ct.) 407; Atteberry *v.* Powell, 29 Mo. 429, 77 Am. Dec. 579.

In an action for slander a general denial is not inconsistent with a defense that the plaintiff was guilty of the misconduct which the words import. Ormsby *v.* Douglas, 5 Duer (N. Y.) 665.

Mitigating Circumstances. — In an action for libel or slander mitigating circumstances may be pleaded in connection with a general denial, and with or without a plea of justification. Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67; Dolevin *v.* Wilder, 7 Robt. (N. Y.) 319. *Contra*, Meyer *v.* Schultz, 4 Sandf. (N. Y.) 664.

5. Moore *v.* Willamette Transp., etc., Co., 7 Oregon 356.

In an action of ejectment by heirs against a purchaser at an administrator's sale, where the plaintiffs rely on an informality in the sale to defeat it, the defense that the heirs have not refunded the purchase-money is not inconsistent with the plea of the statute of limitations. Schaefer *v.* Causey, 8 Mo. App. 142.

In Kyser *v.* Cannon, 29 Ohio St. 359, it was held that where in ejectment the defendant denied the plaintiff's title and right of possession, and also pleaded the statute of limitations, the second defense was surplusage. See also Rhodes *v.* Gunn, 35 Ohio St. 387.

But in an action of ejectment the defendant cannot deny the title of the grantor of the plaintiff and at the same time claim as purchaser under the same grantor; and he may be compelled to elect. Fugate *v.* Pierce, 49 Mo. 441.

In an action of ejectment an equitable defense seeking affirmative relief

And in general any affirmative defense may be joined with a denial, provided it is possible for both defenses to be true.[1]

The Statute of Limitations Joined with Other Affirmative Defenses.—The plea of the statute of limitations, besides being allowed to be joined with a denial, may be joined with other affirmative defenses.[2]

Fraud and Breach of Warranty.—Fraud in the making of a contract, and also a breach of warranty contained in the same contract, are not inconsistent defenses.[3]

All Affirmative Defenses May Be Joined.—In analogy to the rule that an affirmative defense may be joined with a denial when both may be true, two affirmative defenses may be joined when the proof of one does not disprove the other.[4]

is inconsistent with a denial. Cochran *v.* Webb, 4 Sandf. (N. Y.) 653. See Dewey *v.* Hoag, 15 Barb. (N. Y.) 365.

1. Mott *v.* Burnett, 2 E. D. Smith (N. Y.) 50, infancy and a general denial; Otis *v.* Ross, 8 How. Pr. (N. Y. Supreme Ct.) 193; Anonymous, 1 Code Rep. (N. Y.) 134; Arnold *v.* Dimon, 4 Sandf. (N. Y.) 680; Freeman *v.* Frank, 10 Abb. Pr. (N. Y. Supreme Ct.) 370; Lewis *v.* Acker, 11 How. Pr. (N. Y. Supreme Ct. 163.

In an action for false representations a general denial and also a plea that the representations are true are not inconsistent. Otis *v.* Ross, 8 How. Pr. (N. Y. Supreme Ct.) 193.

And a plea of general denial and one of ratification are not inconsistent. Moore *v.* Macon Sav. Bank, 22 Mo. App. 684.

In an action to recover possession of personal property the defendant may answer by a general denial and also set up a justification. Hackley *v.* Ogmun, 10 How. Pr. (N. Y. Supreme Ct.) 45. See Townsend *v.* Platt, 3 Abb. Pr. (N. Y. C. Pl.) 325.

And a plea of estoppel *in pais* may be joined with a general denial. Blodgett *v.* McMurtry (Neb., 1894), 57 N. W. Rep. 985. See also Grady *v.* American Cent. Ins. Co., 60 Mo. 117; McAdow *v.* Ross, 53 Mo. 199; Spencer *v.* Tooker, 12 Abb. Pr. (N. Y. Supreme Ct.) 353; Petrakion *v.* Arbelly, 23 Civ. Pro. Rep. (N. Y. C. P.) 184; Arnold *v.* Dimon, 4 Sandf. (N. Y.) 680; Radde *v.* Ruckgaber, 3 Duer (N. Y.) 684; Livingston *v.* Harrison, 2 E. D. Smith (N. Y.) 197, holding that denial and tender are inconsistent.

2. It may be pleaded with accord and satisfaction, Conway *v.* Wharton, 13 Minn. 158; and with a plea that the note sued on was given for the accommodation of plaintiff, Ostrom *v.* Bixby, 9 How. Pr. (N. Y. Supreme Ct.) 57.

But see Adair *v.* Adair, 78 Mo. 630, where, in a suit to enforce a vendor's lien it was held that a plea of payment waived a plea of the statute of limitations.

The two defenses—a bar of the statute of limitations to an action for a balance struck between partners, and a claim by defendant of a balance due on the same account—are inconsistent. Auld *v.* Butcher, 2 Kan. 136.

3. Kelly *v.* Bernheimer, 3 Thomp. & C. (N. Y.) 140, where the defendant was allowed to set up a breach of warranty and also fraud in the representations as to the quality of the grain sold.

The defense of a rescission on the ground of fraud or mistake may be joined with one of breach of warranty. Bruce *v.* Burr, 67 N. Y. 237.

4. In an action of trespass the defense that plaintiff is not the owner is not inconsistent with the defense of license. Booth *v.* Sherwood, 12 Minn. 426.

Usury, extension of time to the principal debtor, and payment are consistent defenses. Shed *v.* Augustine, 14 Kan. 282.

But usury and tender are inconsistent, and the plea of tender should be stricken out. Breunich *v.* Weselman, 100 N. Y. 609.

And see Kline *v.* Hanke (Mont., 1894), 36 Pac. Rep. 454; Luckett *v.* Williamson, 37 Mo. 388; Grier Commission Co. *v.* Dockstader, 47 Mo. App. 42; Hooven, etc., Co. *v.* National Cordage Co., 27 Wkly. L. Bull. (Ohio) 18; McMullen *v.* Rafferty, 89 N. Y. 456; Brown *v.* Porter, 7 Wash. 327, where the de-

6. Remedies for Inconsistency—Election.—Where the defenses are inconsistent, the defendant may be required to elect which he will rely on.[1]

Bound by Allegations Against Him.—Some authorities hold that where allegations in different defenses are inconsistent with each other, the defendant is bound by those against him.[2]

Waiver.—If inconsistent defenses are set up, advantage of the irregularity must be taken by motion or demurrer, otherwise the defect is waived, and upon the trial the party may rely upon such defenses.[3]

XV. JOINT AND SEVERAL ANSWERS—1. The Right to Join in an Answer—Optional to Join.—There is no limit to the right of proper parties defendant to join in an answer, the averments of which they are able and willing to verify in accordance with the requirements of the Code.[4]

fenses were held consistent. Also see Bell *v.* Campbell (Mo., 1894), 25 S. W. Rep. 359, and Smith *v.* Culligan, 74 Mo. 388, where the defenses were held inconsistent.

1. Shellenbarger *v.* Biser, 5 Neb. 195; Cook *v.* Finch, 19 Minn. 407; Conway *v.* Wharton, 13 Minn. 160; Foster *v.* Henry, 5 Alb. L. J. (N. Y.) 173; Ostrom *v.* Bixby, 9 How. Pr. (N. Y. Supreme Ct.) 57; Hallenbeck *v.* Clow, 9 How. Pr. (N. Y. Supreme Ct.) 289; Lansingh *v.* Parker, 9 How. Pr. (N. Y. Supreme Ct.) 288; Smith *v.* Wells, 20 How. Pr. (N. Y. Supreme Ct.) 158.

Where the defendants set up in their answer that the contract sued on was "revoked, annulled, and modified," they were compelled to elect upon which defense they would stand, the annulling of a contract being inconsistent with its modification. Cook *v.* Finch, 19 Minn. 407.

And specific denials after a general denial are improper, and defendant may be required to elect. School Dist. *v.* Holmes, 16 Neb. 486.

The statute does not authorize the striking out of a defense for inconsistency. Conway *v.* Wharton, 13 Minn. 158.

2. Butler *v.* Kaulback, 8 Kan. 671; Bierer *v.* Fretz, 32 Kan. 330; Cole *v.* Woodson, 32 Kan. 272; Wright *v.* Bacheller, 16 Kan. 259; Ft. Scott Coal, etc., Co. *v.* Sweeney, 15 Kan. 244; Yandle *v.* Crane, 13 Kan. 344; McIntire *v.* Wiegand, 24 Abb. N. Cas. (N. Y. City Ct.) 312; McLaughlin *v.* Alexander, 2 S. Dak. 227.

Where the allegations of a special defense are inconsistent with a general denial, they limit and control the denial to the extent that they are inconsistent with it. Queen Ins. Co. *v.* Hudnut Co. (Ind. App., 1893), 35 N. E. Rep. 397; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 9 Am. St. Rep. 865; Warbritton *v.* Demorett, 129 Ind. 346; Moyer *v.* Ft. Wayne, etc., R. Co., 132 Ind. 88; Derby *v.* Gallup, 5 Minn. 119; Wiley *v.* Keokuk, 6 Kan. 94; Barnum *v.* Kennedy, 21 Kan. 181.

3. Conway *v.* Clinton, 1 Utah 215.

And it is too late after verdict to object that the defenses are inconsistent. Schaefer *v.* Causey, 8 Mo. App. 142. *Compare* Merchants' Nat. Bank *v.* McNaughton, 1 Abb. N. Cas. (N. Y.) 293; Hamburger *v.* Baker, 35 Hun (N. Y. Supreme Ct.) 456.

4. Union Bank *v.* Bell, 14 Ohio St. 211.

Duty of Husband to Put in Joint Answer.—In an action relating to real estate, against husband and wife, where process is served only on the husband, he is bound, except where the estate is the separate property of the wife, to enter a joint appearance and put in a joint answer for himself and wife. Eckerson *v.* Vollmer, 11 How. Pr. (N. Y. Supreme Ct.) 42.

A Several Defense.—Where a defendant has a defense applicable to himself alone, and not to the other defendants, he must plead separately. Thus, in an action for the partition of real estate, the several defendants answered jointly, alleging title in one of them only, under a certain will, made part of the answer by copy. *Held*, on demurrer, that the will was not the foundation of the defense, but only

2. How a Joint Answer is Construed.—A joint answer is construed as a single indivisible one; it must be good as to all. When it is insufficient as to one defendant, it is bad as to all.[1]

3. The Right to Interpose a Separate Answer.—Every defendant has a right to put in his separate answer. One defendant is not bound by the answer of a codefendant.[2] The right to interpose a separate answer is peculiarly applicable where one defendant has an interest separate from that of the other.[3]

4. The Defense in One Answer Enuring to All.—The rule is that a defendant answering cannot assert the rights of one who does not answer.[4] And if the defense pleaded in one answer is a several one, it will not enure to the benefit of the others.[5] But if the defense is joint in its nature, and goes to the validity of the

evidence, and that the answer, as it showed title in only one of the defendants, was insufficient as a joint answer. Black *v.* Richards, 95 Ind. 184.

1. Bryan *v.* Wilson, 27 Ala. 208; Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778; Gibson *v.* Marquis, 29 Ala. 668; Livingston *v.* Pippin, 31 Ala. 542; Rodgers *v.* Brazeale, 34 Ala. 512; Morton *v.* Morton, 10 Iowa 58; Brownfield *v.* Weicht, 9 Ind. 394; Ward *v.* Bennett, 20 Ind. 440. See Poulk *v.* Slocum, 3 Blackf. (Ind.) 421.

2. Mobley *v.* Dubuque Gas Light, etc., Co., 11 Iowa 71.

The rule that each defendant has a right to his separate answer obtains although one defendant may plead such a defense as enures to the benefit of all. It is error to sustain a demurrer to one answer because the same defense can be interposed under the answer of a codefendant. Moyer *v.* Brand, 102 Ind. 306.

Where two persons are sued as partners, and service is had on only one of them, he cannot by joint answer bind the other alleged partner if no partnership actually exists. Nixon *v.* Downey, 42 Iowa 78.

And the failure of one of several partners sued upon a partnership claim to set up a defense will not deprive another of the right to do so. Brayley *v.* Goff, 40 Iowa 76.

3. Husband and Wife.—In an action against husband and wife, where the husband is joined in right of his wife, it is not now necessary, as it was under the former practice, that application be made to the court for the wife to answer separately. She may answer separately as of right. Harlay *v.* Ritter, 18 How. Pr. (N. Y. C. Pl.) 147.

Where the wife has an interest separate from that of her husband and they answer jointly, the answer should be verified by both. Youngs *v.* Seely, 12 How. Pr. (N. Y. Supreme Ct.) 395.

A married woman sued with her husband in respect to her separate estate may put in a separate demurrer. Arnold *v.* Ringold, 16 How. Pr. (N. Y. Supreme Ct.) 158.

Without Consideration as to One Defendant.—One of the joint makers of a promissory note can make the defense that as to him such note is without consideration. Moyer *v.* Brand, 102 Ind. 301.

But a separate answer which alleges that the note was given by the defendant to the plaintiff "without any consideration of any kind to this defendant," is bad on demurrer. It is not necessary that the consideration for the note should pass to the defendant. Bingham *v.* Kimball, 33 Ind. 184; Anderson *v.* Meeker, 31 Ind. 245.

4. Cathcart *v.* Peck, 11 Minn. 45.

But where evidence to support a defense pleaded by one defendant alone is offered and received, generally, on behalf of all the defendants without objection, no objection thereto can be raised on appeal. Devyr *v.* Schaefer, 55 N. Y. 446.

5. If the defense set up by the party taking the second trial is several only, leaving a valid cause of action against the other defendants, the liability of those not taking a second trial, as fixed by the findings on the first trial, will remain unaffected by such second trial. Sprague *v.* Childs, 16 Ohio St. 108.

cause of action, it will, to the extent it may be established, enure to the benefit of the other defendants.[1]

5. Adoption of an Answer.—Closely allied with the subject of joint answers is that of the adoption of answers. A defendant subsequently brought in by substitution may adopt the answer of the one for whom he is substituted.[2]

1. Sprague *v.* Childs, 16 Ohio St. 108; Cooke *v.* Altvater, 21 Ohio St. 628.

If a separate answer by one of several defendants goes to the merits of the case, and is such that the proof of it will defeat a recovery, it will enure to the benefit of the other defendants. Moyer *v.* Brand, 102 Ind. 301; Sutherlin *v.* Mullis, 17 Ind. 19; Stapp *v.* Davis, 78 Ind. 128; Kirkpatrick *v.* Armstrong, 79 Ind. 384.

Thus, in an action against several for a joint and several tort, if the answer of one shows that plaintiff could have no cause of action against any of them, the others, though they do not plead it, will have the benefit of a finding on it against the plaintiff. Williams *v.* McGrade, 13 Minn. 40.

A separate defense, that the consideration of the note sued on was illegal interest, enures to the benefit of all the defendants. Miller *v.* Longacre, 26 Ohio St. 291.

2. Louisville etc., R. Co. *v.* Utz, 133 Ind. 265, where a defendant corporation, after suit, consolidated with other corporations, and the consolidated corporation was made a party, and it was held that the answer of the original corporation was the answer of the consolidated one. See also Beel *v.* Corbin (Ind., 1894), 36 N. E. Rep. 23; Alliance Milling Co. *v.* Eaton (Tex. Civ. App., 1893), 23 S. W. Rep. 455.

The subject of the adoption of pleadings is closely allied with the cognate subjects of PARTIES and AMENDMENTS. See those articles.

ANSWERS IN EQUITY PLEADING.

By W. A. MARTIN and S. R. PERRY.

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I. DEFINITION.—An answer in equity pleading consists of a defense in writing made by a defendant to the charges contained in a bill or information filed by the complainant against him in a court of equity.[1]

II. FORM OF ANSWERS—1. Parties.—Several defendants may join in the same answer, and should generally do so where their interests are the same.[2]

2. Frame of Answer—Caption.—The answer begins with the title of the cause, specifying of which of the defendants it is the answer, and the names of the plaintiffs.[3]

1. Bouvier L. Dict. 74. An answer is a defense in writing made by a defendant to the allegations contained in a bill or information filed against him. Black L. Dict. 74. The answer is the regular mode of replying to a bill or petition setting up an equitable cause of action. The plea and demurrer were originally unknown in equity pleading, and did not come into general use until comparatively recent times. They were borrowed from the common law. Langdell's Eq. Pl. § 92. The term is sometimes used in a general sense to denote any pleading whereby an issue, whether of law or of fact, is made or tendered by defendant. Howell *v.* Howell, 15 Wis. 59.

2. Daniell Ch. Pr. (5th Am. ed.) 730; Story Eq. Pl. § 869; Van Sandau *v.* Moore, 1 Russ. 441.

Severance.—Where defendants have a joint interest only, they will not in general be permitted to sever. Dan. Ch. Pr. (5th Am. ed.) 731. Thus trustees will not generally be allowed costs for separate defenses unless they have some beneficial interest or some special reason for severing. Dan. Ch. Pr. (5th Am. ed.) 731. Trustees and *cestuis que trustent*, husband and wife, bankrupt and assignee, will be allowed only one set of costs if they have not conflicting interests. Dan. Ch. Pr. (5th Am. ed.) 731.

If defendants are allowed to sever they will be allowed costs of separate counsel though their defense be practically the same. Dan. Ch. Pr. (5th Am. ed.) 731.

Adopting Codefendant's Answer. — A defendant to a bill in equity may sufficiently answer by adopting his codefendant's answer. Binney's Case, 2 Bland (Md.) 99, *citing* Anonymous, 1 P. Wms. 200; Whitworth *v.* Davis, 1 Ves. & B. 549; Jones *v.* Magill, 1 Bland (Md.) 177; Lingan *v.* Henderson, 1 Bland (Md.) 236. See Warfield *v.* Banks, 11 Gill & J. (Md.) 98.

An answer merely alleging that the facts stated in a paper purporting to be the answer of a codefendant "are substantially correct as far as this defendant is concerned, is" bad both in form and substance. Carr *v.* Weld, 18 N. J. Eq. 41.

3. Daniell Ch. Pr. (5th Am. ed.) 732; Story Eq. Pl. § 870.

General Form of Caption.—"The answer of A.B., one of the abovenamed defendants to the bill of complaint of the abovenamed plaintiff." Dan. Ch. Pr. (5th Am. ed.) 732.

Form Where Bill Amended After Answer.—The caption states that the answer is "to the amended bill of complaint of the abovenamed plaintiff." Dan. Ch. Pr. (5th Am. ed.) 732.

Several Defendants. — If there are more than one defendant the caption is "The joint and several answer"; but if the defendants are man and wife the heading is, "The joint an-

Reservation.—Following the title is a reservation of all advantages that might be taken by exceptions to the bill. This form, however, is unnecessary.[1]

Substance.—The next part of the answer is the substance, containing the answer to the matter of the bill and the interrogatories, and additional matter as defense.[2]

In Conclusion the answer traverses generally the allegation of unlawful combination charged in the bill, and all other matter therein contained.[3]

swer." Dan. Ch. Pr. (5th Am. ed.) 732.

Marriage of Female Defendant.—If a female defendant marry after bill filed, but before answer, she may obtain leave of court to answer separately or to answer jointly with her husband; in the latter case the caption should be, "The answer of A. B. and C., his wife, lately and in the bill called C. D., spinster," or "widow," as the case may be. Dan. Ch. Pr. (5th Am. ed.) 732.

Infants.—The answer of an infant, which must be by guardian, is headed, "The answer of A. B., one of the abovenamed defendants, under the age of 21 years, by———his guardian." Dan. Ch. Pr. (5th Am. ed.) 2112.

Lunatics.—The heading of an answer by a lunatic is, "The answer of A. B., a lunatic, by C.D., his committee." Dan. Ch. Pr. (5th Am. ed.) § 2143.

Defective Captions.—A defect occurring in the caption, so that it does not appear whose answer it is or to what bill it is an answer, renders it irregular and liable to be taken from the files for irregularity. Dan. Ch. Pr. (5th Am. ed.) 732. Thus, if there be a misnomer of plaintiff, the answer will be deemed a nullity. Griffiths *v.* Wood, 11 Ves. Jr. 62; Fry *v.* Mantell, 4 Beav. 485; Upton *v.* Sowton, 12 Sim. 45. An answer is bad where it purports to be the bill of five complainants, and six were named in the bill. Cope *v.* Parry, 1 Madd. 83. So an answer purporting to be the answer of a definite number of defendants will be bad if there are more or less than that number. Harris *v.* James, 3 Bro. C. C. 399; Cooke *v.* Westal, 1 Madd. 265; Thatcher *v.* Lambert, 5 Hare 228. A paper purporting to be an answer, but not referring to any bill as pending, is deficient, and this defect is a sufficient ground for taking it from the file. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 365.

Notice of Motion to Take Answer from Files for Defective Caption should describe it not as an answer, but as "a paper writing purporting to be an answer." Griffiths *v.* Wood, 11 Ves. Jr. 62.

1. Story says the form "is probably intended to prevent a conclusion, that the defendant, having submitted to answer the bill, admits everything which by his answer he does not expressly controvert, and especially to such matters as he might have objected to by demurrer or plea. It will not in general have that effect." Story Eq. Pl. (10th ed.) § 870. See also *United States* Eq. Rule 39.

Infants.—In the case of infants the reservation is always omitted. Story Eq. Pl. (10th ed.) § 871.

2. Story Eq. Pl. (10th ed.) § 870; Cooper Eq. Pl. 323; Mitford Eq. Pl. (by Jeremy) 313.

3. Story Eq. Pl. (10th ed.) § 870; Cooper Eq. Pl. 323; Mitford Eq. Pl. (by Jeremy) 313; 1 Barb. Ch. Pr. 383.

It has been held, though, that the omission of the general traverse does not render the pleading bad. Mitford Eq. Pl. (by Jeremy) 313, 314, 315. And in this connection Story says: "But although it is the practice now to answer every clause in the bill, and a general traverse therefore seems impertinent and has been held to be unnecessary, yet this formulary is still continued in answers." Story Eq. Pl. (10th ed.) § 870.

It has also been held that the technical traverse usually inserted as the conclusion of an answer does not amount to an admission of the allegations of the bill not expressly denied in the answer; and such allegations in the bill must be substantiated by proof. Litch *v.* Clinch, 136 Ill. 410.

Infants.—In the answer of infants the general traverse is always omitted. Story Eq. Pl. (10th ed.) § 871.

3. Oath—*a.* NECESSITY OF OATH.—The party filing an answer (except corporations aggregate or peers) must make oath thereto, unless exempted by statute or rule of court.[1] The answer, however, may be received without oath by consent of complainant,[2] or complainant may by his bill waive oath thereto.[3]

b. HOW ADMINISTERED.—In the case of Christians the oath is upon the Evangels;[4] persons not believing in the Christian

1. Dan. Ch. Pr. (5th Am. ed.) 735; Story Eq. Pl. (10th ed.) § 874; Union Bank *v.* Geary, 5 Pet. (U. S.) 110.

But if complainant proceeds with the cause without objection he cannot object in appellate court that the answer was insufficient for want of verification. Mitchell *v.* Tishomingo Sav. Inst., 53 Miss. 614; Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494; Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307.

Several Defendants. — An answer sworn to by only a part of the defendants cannot be admitted as their joint answer. Masterson *v.* Craig, 5 Litt. (Ky.) 39.

An answer must be sworn to by each of the defendants unless the oath be waived, otherwise it will be no answer as to the defendant not making oath. Cooke *v.* Dews, 2 Tenn. Ch. 496; Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307; Binney's Case, 2 Bland (Md.) 99.

Where an answer is filed by one of several judgment creditors joining with him therein his coplaintiffs in the judgment, but is only sworn to by him, it will be permitted to stand as his answer, notwithstanding the fact that it purports to be the answer of his coplaintiffs also. Young *v.* Clarksville Mfg. Co., 27 N. J. Eq. 67.

An answer purporting to be that of several defendants, but not sworn to by all, may on special order be directed to be filed as the answer of those defendants only who have made oath thereto. Dan. Ch. Pr. (5th Am. ed.) 753.

Where one of the defendants is out of the jurisdiction when the answer is filed, an order may be made subsequently directing him to swear to it, and when so sworn to the answer may be treated as the joint answer of all the parties whose answer it purports to be. Dan. Ch. Pr. (5th Am. ed.) 733.

Corporations Aggregate.—If the defendant is a corporation aggregate the answer need not be under oath, but should be put in under the corporate seal. Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 192; McLard *v.* Linnville, 10 Humph. (Tenn.) 164; Vermilyea *v.* Fulton Bank, 1 Paige (N. Y.) 37; Champlin *v.* New York, 3 Paige (N. Y.) 573; Fulton Bank *v.* New York, etc., Canal Co., 1 Paige (N. Y.) 311; Griffin *v.* State Bank, 17 Ala. 258; Gamewell Fire Alarm Tel. Co. *v.* Mayor, 31 Fed. Rep. 312; Colgate *v.* Compagnie Française, 23 Blatchf. (U. S.) 88; Kittredge *v.* Claremont Bank, 1 Woodb. & M. (U. S.) 244; Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

But where a corporation desires to obtain the dissolution of an injunction the answer must be verified by some of the corporators or officers acquainted with the facts, for the reason that an injunction cannot be dissolved on an answer, without oath denying the equity of the bill. Griffin *v.* State Bank, 17 Ala. 258, *overruling* Hogan *v.* Branch Bank, 10 Ala. 485; Fulton Bank *v.* New York, etc., Canal Co., 1 Paige (N. Y.) 311. *Contra*, Haight *v.* Morris Aqueduct, 4 Wash. (U. S.) 601.

In *Mississippi* the answer of a corporation need not be under seal, but should be sworn to by its president, general manager, superintendent, or other general officer, unless answer under oath be waived. Ann. Code 1892, § 534.

In *Massachusetts* answers need not be under seal except in cases of discovery only. Supp. Pub. Sts. Mass. 126.

Peers, instead of making oath, answer upon protestation of honor. Dan. Ch. Pr., (5th Am. ed.) 735.

2. Contee *v.* Dawson, 2 Bland (Md.) 264; Billingslea *v.* Gilbert, 1 Bland (Md.) 567.

3. Dan. Ch. Pr. (5th Am. ed.) 736; Story Eq. Pl. (10th ed.) § 874.

4. Dan. Ch. Pr. (5th Am. ed.) 736; Braithwaite Pr. 343.

Forms of Oath.—Story cites the fol-

oath may be sworn according to their notion of an oath or in the manner most binding on their conscience.[1] See article OATHS.

c. BEFORE WHOM TAKEN.—Under the early *English* practice it was generally necessary for defendant to swear to his answer before a master in chancery,[2] but now an answer may be filed without any further formality as to oath than is required in filing an affidavit.[3] The practice in the *United States* in this regard is usually regulated by statute or rule of court.[4]

4. Signature.—The answer must generally be signed by the defendant [5] and by counsel.[6]

Waiver.—Complainant, however, may waive signature; and where, after an answer defective in this respect was filed, complainant filed a replication, it was held that the filing of the replication was evidence of such waiver.[7]

Modification of Rule.—In some states the requirement as to signature has been modified, and it is not necessary that both defendant and counsel sign the answer.[8]

lowing as a form of oath: "You swear (or solemnly affirm) that what is contained in this your answer, as far as concerns your own act and deed, is true to your own knowledge, and that what relates to the act and deed of any other person or persons, you believe to be true." Story Eq. Pl. (10th ed.) § 872, note 3.

1. Daniell Ch. Pr. (5th. Am. ed.) 736.

2. Snowden *v.* Snowden, 1 Bland (Md.) 550.

3. 2 Dan. Ch. Pr. (5th Am. ed.) 744, *citing* 15 & 16 Vic. c. 86, § 1. See Guice *v.* Parker, 46 Ala. 616.

4. **United States.**—Equity Rule 59 provides that every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a state or territory. See also Guice *v.* Parker, 46 Ala. 616.

5. Bayley *v.* De Walkiers, 10 Ves. Jr. 441; Denison *v.* Bassford, 7 Paige (N. Y.) 370; Kimball *v.* Ward, Walk. (Mich.) 439; Cook *v.* Dews, 2 Tenn. Ch. 496.

Exceptions.—The rule is otherwise where there is a good and sufficient excuse for defendant's not signing it. Thus, where the defendant, an officer in the army, had sailed for India under orders immediately after service of subpœna and appearance, and before he had time to answer, the answer was by mutual consent put in without his signature. —— *v.* Lake, 6 Ves. Jr. 171. The answer of a defendant abroad, not required to be under oath, was ordered to be put in by a person having a general power of attorney to act for him, without signature. Bayley *v.* De Walkiers, 10 Ves. Jr. 441.

Where defendant, in the hurry of going abroad, forgot to sign his answer, it was ordered taken without signature. —— *v.* Gwillim, 6 Ves. Jr. 285.

Where defendants were out of the jurisdiction, their answer was ordered taken without signature on affidavit of their father that he had authority to act for them. Harding *v.* Harding, 12 Ves. Jr. 159.

6. Dan. Ch. Pr. (5th Am. ed.) 733; Story Eq. Pl. § 876.

Exceptions.—If the answer is taken by commissioners, the signature of counsel is unnecessary. Davis *v.* Davidson, 4 McLean (U. S.) 137.

7. Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307; Collard *v.* Smith, 13 N. J. eq. 43.

8. **In Alabama** it is not necessary that an answer be signed by counsel, as every person has the constitutional right (Const., art. 1, § 29) to defend any suit against himself by himself or counsel. May *v.* Williams, 17 Ala. 23.

In Illinois it is not necessary that defendant sign his own name. It may be signed by counsel for him. Fulton

5. Jurat.—The jurat, or certificate of the officer administering the oath made by defendant to the answer, states the substance of the oath, and is written at the end of the answer at the opposite side from the signature.[1] See also AFFIDAVITS, *ante*, p. 316.

County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

In Maine, if the complainant in his bill asks for answer under oath, the answer shall be signed by respondent and sworn to by him, otherwise it may be signed by respondent, or by his attorney or agent. Rev. Sts. 629, § 15.

In Massachusetts answers may be signed by the party or his attorney, and no other signature is necessary. Supp. to Pub. Sts. 1882–1886, p. 126, § 10.

In Michigan it seems that the signature of a solicitor to an answer would be sufficient, since under the practice in that state solicitors are also counsellors. Henry *v.* Gregory, 29 Mich. 68. The signature, however, must be in writing; a printed signature is bad. Eveland *v.* Stephenson, 45 Mich. 394.

In New Jersey the signature of either defendant or counsel is sufficient; and in this connection it may be stated that the answer may be signed by a solicitor instead of counsel, even though the solicitor is not of the degree of counsel. Freehold Mut. Loan Assoc. *v.* Brown, 28 N. J. Eq. 42; Dickerson *v.* Hodges, 43 N. J. Eq. 45. So it would also seem that a signature to answer in the firm name of several counsellors would be sufficient. Hampton *v.* Coddington, 28 N. J. Eq. 557.

In New York it was held that defendant's answer should be actually signed by him, though oath thereto was waived, unless a special order of the court was obtained allowing him to put in his answer without oath, and that the signature by his attorney was insufficient. Denison *v.* Bassford, 7 Paige (N. Y.) 370. But there is a reported case in which it seems that the answer need not be actually signed by defendant in person, and that it would be sufficient if defendant's name were signed by solicitor or counsel. Hatch *v.* Eustaphieve, Clarke Ch. (N. Y.) 63.

Where discovery was not the object of the bill, and where the suit was merely for the safety of the administrator, the answer of a defendant living in another state signed only by the attorney in fact is sufficient. Dumond *v.* Magee, 2 Johns. Ch. (N. Y.) 240.

It has also been held that an omission of the signature will not affect the validity of the decree. Sears *v.* Hyer, 1 Paige (N. Y.) 483.

In Tennessee answer should be signed by the parties, Johnson *v.* Murray, 12 Lea. (Tenn.) 109); but signing by solicitors is sufficient where no oath is required, Stadler *v.* Hertz, 13 Lea (Tenn.) 315.

1. Barb. Ch. Pr. (2d ed.) 144; 1 Hinde Ch. 227; Beach Mod. Eq. Pr. § 359; Dan. Ch. Pr. (5th Am. ed.) 746.

Usual Form. — The usual form is, "Sworn to before me this day of , 18 ." Foster Fed. Pr. § 273.

Jurat of Deaf, Dumb, or Blind Persons, Marksmen, or Foreigners who do not understand English must express that steps have been taken from which it may appear that defendant fully understood the contents of the answer before swearing thereto. Dan. Ch. Pr. (5th Am. ed.) 748.

Jews.—Where the jurat of Jews to their answer was in the ordinary form, and the commissioner certified that they had been "duly sworn," a motion to strike the answer off the files was refused, there being no proof that defendants were not sworn according to their creed. Fryatt *v.* Lindo, 3 Edw. Ch. (N. Y.) 239.

Several Defendants.—If there are several defendants, and they are sworn together, one jurat is sufficient. If sworn at different times there must be a separate jurat for each defendant. Dan. Ch. Pr. (5th Am. ed.) 746.

Immaterial Defects.—Where a foreign notary affixed his seal and signed his name, but without adding his official designation, the jurat was held sufficient, the official designation appearing in the body of the jurat. Feuchtwanger *v.* McCool, 29 N. J. Eq. 151.

Under a rule of court providing that the "matters" stated in an answer should be sworn to, a jurat stating that the defendant swore that the "facts" alleged, etc., instead of the

III. NATURE OF ANSWER.—The answer usually denies all or a part of the facts alleged in the bill, and sets out others showing defendant's rights in the subject of the suit. Sometimes, however, it admits the case made by the bill, and submits for judgment the questions arising thereon, with or without alleging further facts.[1] If the bill seeks relief as well as discovery, the an-

"matters" alleged, is sufficient. Whelpley *v.* Van Epps, 9 Paige (N. Y.) 332, 38 Am. Dec. 400.

Waiver of Jurat. — Though answer on oath is not waived by complainant in his bill, the irregularity of service of an answer without a jurat attached is waived where complainant files a replication and goes to a hearing without objection. Reed *v.* Warner, 5 Paige (N. Y.) 650.

Want of Jurat—Effect.—Where the bill requires an answer under oath, and the paper purporting to be an answer has attached to it the draft of an affidavit signed by two of the defendants, but the jurat is not authenticated by the signature of an officer authorized to take an answer, the paper will be treated as no answer. Westerfield *v.* Bried, 26 N. J. Eq. 357.

Amendment of Jurat.—Where defendant obtains leave to amend by adding a proper jurat to the answer, the amendment is not complete till a copy of the amended jurat is served on complainant's solicitor. Taylor *v.* Bogert, 5 Paige (N. Y.) 33.

Signature.—If the verification be in the form of an affidavit, defendant's name should appear at the foot of the affidavit; if in the form of a certificate of the officer administering the oath, it should be subscribed to the answer. Anderson *v.* Stather, 9 Jur. 1085; Pincers *v.* Robertson, 24 N. J. Eq. 348; Hathaway *v.* Scott, 11 Paige (N. Y.) 173.

1. Story Eq. Pl. (10th ed.) § 849; Mitford Eq. Pl. (by Jeremy) 15, 16.

The Answer is the Ordinary Mode of Defense in an equitable proceeding, and may be put in to the whole bill or to such parts thereof as are not covered by plea or demurrer. Since it may embrace more circumstances than a plea, it may be used with greater propriety where defendant is not anxious to prevent a discovery, though the plea might be a complete bar. But where, by introducing additional circumstances, he has an opportunity of exhibiting his case in a more favorable light, the answer is the best method of defense. 1 Barb. Ch. Pr. 130, 131.

An Answer is Preferable to a Plea as a means of defense, because less precision is required in an answer than in a plea. McCabe *v.* Cooney, 2 Sandf. Ch. (N. Y.) 314.

Answer to Part of Bill.—If a divisible cause of action is alleged, defendant may deny a part of the cause of action and leave the remainder unanswered. Smith *v.* Shufelt, 3 Code Rep. (N. Y.) 175. So also defendant may plead in bar to the whole bill or to a part only, and in the latter case he must answer to the remainder. Graves *v.* Blondell, 70 Me. 190.

Defenses.—All the defenses on the merits relied on must be set out in a plea or in the answer, in accordance with the rule that the decree must follow the pleadings as well as the proof. Williams *v.* Burg, 9 Lea. (Tenn.) 464; Williams *v.* Bartlett, 4 Lea. (Tenn.) 620; Turley *v.* Turley, 85 Tenn. 251; Genthner *v.* Fagan, 85 Tenn. 491.

Several Defenses.—Defendant may set up in his answer as many defenses as he may think proper. Dan. Ch. Pr. (5th Am. ed.) 713, 714; Hopper *v.* Hopper, 11 Paige (N. Y.) 46.

Where defendant wishes to set up more than one defense to the bill, he must generally do so by answer and not by plea; and in order to justify a departure from this general rule he must show a special case of hardship and inconvenience if he were required to make his several defenses by answer. Didier *v.* Davison, 10 Paige (N. Y.) 515; Saltus *v.* Tobias, 7 Johns. Ch. (N. Y.) 214; Van Hook *v.* Whitlock, 3 Paige (N. Y.) 419.

In setting up an immemorial payment in lieu of tithes, defendant was permitted to rely on it either as a modus, or as a composition real existing from time immemorial, or as a composition undetermined by notice. Dan. Ch. Pr. (5th Am. ed.) 714.

Distinct or Separate Defenses. — De-

swer should contain, first, a defense, and second, the sworn responses touching the matters sought to be discovered.[1]

Answer Not Demurrable.—A demurrer to an answer is a pleading unknown to chancery practice, and the sufficiency of the defenses thereby raised cannot be thus tested.[2]

Cross-Bill Necessary for Affirmative Relief.—Defendant usually cannot pray anything but to be dismissed the court, a cross-bill being necessary if discovery or affirmative relief be desired.[3]

fendant may deny the allegations on which claimant's right to relief is based, and at the same time set up in his answer any other matters not inconsistent with the denial as a distinct or separate defense to the suit or to some part of the relief claimed by the bill. Hopper *v.* Hopper, 11 Paige (N. Y.) 46.

Matters Occurring Since Bill Filed may be set up in the answer. Lyon *v.* Brooks, 2 Edw. Ch. (N. Y.) 110. But see Musselman *v.* Manly, 42 Ind. 462; Carr *v.* Ellis, 37 Ind. 465.

1. Beech *v.* Haynes, 1 Tenn. Ch. 574; Smith *v.* St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 601.

2. Travers *v.* Ross, 14 N. J. Eq. 254; Adams *v.* Bridgewater Iron Co., 6 Fed. Rep. 179; Crouch *v.* Kerr, 38 Fed. Rep. 549; Brown *v.* Scottish American Mortg. Co., 110 Ill. 235; Edwards *v.* Drake, 15 Fla. 666; Raymond *v.* Simonson, 4 Blackf. (Ind.) 79; Thomas *v.* Brashear, 4 T. B. Mon. (Ky.) 65; Mitford Eq. Pl. (by Jeremy) 107; Barton Suits in Eq. 96; Langdell Eq. Pl. § 83; Cooper Eq. Pl. 110. See also Winters *v.* Claitor, 54 Miss. 341.

3. Lubé Eq. Pl. 55, 142; Andrews *v.* Kilbee, 12 Mich. 94, 83 Am. Dec. 766; Andrews *v.* Gilman, 122 Mass. 471; Chapin *v.* Walker, 6 Fed. Rep. 794; Armstrong *v.* Chemical Nat. Bank, 37 Fed. Rep. 466; Carnochan *v.* Christie, 11 Wheat. (U. S.) 446; Ringo *v.* Woodruff, 43 Ark. 469; Wickliffe *v.* Clay, 1 Dana (Ky.) 589; Hubbard *v.* Turner, 2 McLean (U. S.) 519; Morgan *v.* Tipton, 3 McLean (U. S.) 339; Weisman *v.* Smith, 6 Jones Eq. (N. Car.) 124; Miller *v.* Gregory, 16 N. J. Eq. 274; Hoff *v.* Burd, 17 N. J. Eq. 201; McGuckin *v.* Kline, 31 N. J. Eq. 454; Aspinwall *v.* Aspinwall, 49 N. J. Eq. 302; Hathaway *v.* Hagan, 59 Vt. 75; Norman *v.* Hudleston, 64 Ill. 11; Tarleton *v.* Vietes, 6 Ill. 470; Mason *v.* McGirr, 28 Ill. 322; White *v.* White, 103 Ill. 438; Ballance *v.* Underhill, 4 Ill. 453; Edwards *v.* Helm, 5 Ill. 143. See CROSS-BILLS.

Reason for Rule.—The answer is a mode of defense; hence defendant, if he has any relief to pray or discovery to seek, must do so by bill of his own. Cullum *v.* Erwin, 4 Ala. 452; Cummings *v.* Gill, 6 Ala. 562; Goodwin *v.* McGehee, 15 Ala. 232.

Illustrations of Rule.—On a bill for rents collected by defendant, if defendant claims the right thereto on the ground of a resulting trust, he must file a cross-bill in order to procure a decree establishing the trust. Beck *v.* Beck, 43 N. J. Eq. 40.

Except in matters of account, affirmative relief cannot be given to defendant on the facts stated in the answer; and if the bill cannot prevail against a defendant on account of his superior right, the bill should be dismissed as to him, unless he files a cross-bill setting forth his rights, with a proper prayer for relief against all other parties. Wooten *v.* Bellinger, 17 Fla. 289.

Rescission of Contract.—Under a bill filed by a purchaser for the rescission of a contract, when the facts only justify a decree allowing him a credit on the unpaid notes for the purchase-money, the defendant cannot without a cross-bill have a decree in his favor for the balance of the unpaid purchase-money. Gallagher *v.* Witherington, 29 Ala. 420.

Specific Performance.—Substantive relief by way of specific performance of an answer cannot be granted on answer; a cross-bill is necessary for that purpose. Duryee *v.* Linsheimer, 27 N. J. Eq. 366.

On a bill to enforce specific performance of a contract, relief based on an alleged rescission of the contract can only be had on cross-bill. Leicester Piano Co. *v.* Front Royal, etc., Imp. Co., 55 Fed. Rep. 196.

On a bill to foreclose a mortgage, reformation cannot be granted on a prayer therefor in the answer; it must be by cross-bill. French *v.* Griffin, 18

Waiver.—If, however, matters only proper for a cross-bill are included in the answer, and no objection is made after evidence has been introduced by both parties, and the issues have been determined thereon, the irregularity is waived, and affirmative relief may be granted as if a cross-bill had been filed.[1]

So also, when the parties stipulated that the answer might be treated as a cross-bill with any appropriate prayer, the court so treated it, and made a decree thereon.[2]

Statutory Change of Rule.—In some jurisdictions the rule has been so changed by statutes and rules of court that the answer is not limited to matters of defense, but may seek affirmative relief.[3]

N. J. Eq. 279; Allen *v.* Roll, 25 N. J. Eq. 163.

Reformation of Contract.—In the absence of fraud a defendant cannot show under an answer alone that a contract complete and perfect in all its parts differs materially from the contract which he made; if he demurs to show that fact, he must ask by cross-bill to have the contract reformed. Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233, 826.

1. Book *v.* Justice Min. Co., 58 Fed. Rep. 827. See also Kelsey *v.* Hobby, 16 Pet. (U. S.) 277; Coburn *v.* Credit Valley Land Co., 138 U. S. 221.

2. Passumpsic Sav. Bank *v.* First National Bank, 53 Vt. 82.

3. **In Michigan.**—A chancery rule authorizes a defendant in his answer to present the facts on which his equity rests without filing a cross-bill. Under this rule it is still necessary for the defendant to state a cause for equitable relief touching the matter in question in the original bill; and an answer to a bill to quiet title is insufficient as a basis for affirmative relief if it alleges that the deed under which complainant claims was obtained by fraud, with knowledge, etc., without stating by whom or how the fraud was committed. McGuire *v.* Van Buren County, 69 Mich. 593.

This rule does not deprive a party of any of the substantial rights secured to him by a resort to a cross-bill, but preserves to him all the benefits to be derived from a cross-bill by stating the substance thereof in his answer; and the complainant is entitled to make defense to matter so set up in the answer as fully as he could have done before the rule was made. Hackley *v.* Mack, 60 Mich. 59.

Though the answer contains no specific prayer for relief, but simply prays to have the bill dismissed, if the facts shown clearly entitle the defendant to relief, the court will treat the prayer as amended. Cooley *v.* Harris, 92 Mich. 135.

Mississippi.—In *Mississippi* defendant may make his answer a cross-bill against the complainant, or his codefendant or codefendants, or all of them, and may introduce any new matter material to his defense, and require the same to be answered. So, also, he may require of the complainant or of any of the defendants a discovery of any matter material to his defense, and he shall have process thereon against the defendants to such cross-bill, and the like proceedings thereon as in other cross-bills. Ann. Code, 1892, § 537.

If defendant in his answer relies for any cause on the invalidity of an instrument relied on by complainant for recovery, he cannot have the affirmative relief of cancellation unless he makes his answer a cross-bill. Bay *v.* Shrader, 50 Miss. 326; Weeks *v.* Thrasher, 52 Miss. 144.

An answer seeking specific relief, but not made a cross-bill, will not entitle defendant to relief. Millsaps *v.* Pfeiffer, 44 Miss. 805; Arnold *v.* Miller, 26 Miss. 152.

But on a bill by one tenant in common for partition, where a defendant by his answer set up a claim for contribution, from the other co-tenants, for expenditures by him for taxes and repairs on the common estate, it was held that the relief could be granted him, although he did not make his answer a cross-bill. Harrison *v.* Harrison, 56 Miss. 174.

Rhode Island.—In *Rhode Island* no cross-bill is necessary in any suit in equity, but defendant may avail himself of any matter in defense which

IV. Requirements of Answer—1. Must be Full.—Generally if defendant attempts to make defense by answer, he must answer fully all the statements and charges of the bill, with all their material circumstances, without any special interrogatories in the bill for that purpose.[1]

would be open to him as a cross-bill by setting up such matter in his answer; and the court, on the hearing of the case, may make any decree, final or interlocutory, for or against either party, warranted by the merits of the case, that it could have made had such a cross-bill been filed. Pub. Sts. 1882, 507, § 16.

Tennessee.—The defendant may, by proper allegations, file his answer as a cross-bill and require a discovery from the complainant; in which case demurrer or pleas may be filed, or other proceedings had upon the answer, as upon a cross-bill. M. & V. Code, § 5066.

Under this statute an answer, filed as a cross-bill, is on the same footing as a cross-bill, and is not limited to purposes of defense. Nichol *v.* Nichol, 4 Baxt. (Tenn.) 147.

An answer filed as a cross-bill need not necessarily be a bill for discovery, specifically, but may well be based on any proper matters of equity growing out of the original bill or connected with it, on which the respondent would be entitled to affirmative relief on a cross-bill filed separately. Odom *v.* Owen, 2 Baxt. (Tenn.) 446.

An answer filed as a cross-bill under the statute can only be treated as a cross-bill proper, and, being defensive, will go with the original bill. And the court cannot be required to notice original matter set up therein, at any rate if the original matter be a cause of action against the heir, when the original bill is by the personal representative of a decedent. Elliston *v.* Morrison, 3 Tenn. Ch. 280.

West Virginia.—Defendant may allege any new matter constituting a claim for affirmative relief against plaintiff or any delendant therein, in the same manner and with like effect as if the same had been alleged in a cross-bill filed by him therein; and if the plaintiff or defendant against whom such a relief is claimed desire to controvert the relief prayed for in the answer, he shall file a special reply in writing, denying such allegations of the said answer as he does not admit to be true, and stating any facts constituting a defense thereto. But in case a defendant allege new matter in his answer upon which he relies, and prays affirmative relief, such defendant shall not file a cross-bill in the same cause except upon condition of striking from his answer all such matter and prayer for affirmative relief as are contained in such cross-bill. Code, 785, § 35.

An answer alleging new matter, constituting a claim to affirmative relief in the suit, within the meaning of the statute, was intended simply to be allowed in lieu of a cross-bill in the cause as to such new matter, and not to make any other change in the practice as to the pleading in courts of equity. Moore *v.* Wheeler, 10 W. Va. 35.

An answer setting up affirmative matter and asking relief thereon will be bad on demurrer if the relief asked for is foreign to the original bill. Rust *v.* Rust, 17 W. Va. 901; McMullen *v.* Eagan, 21 W. Va. 234.

Any affirmative relief available in a cross-bill is available by an answer if properly pleaded under the statute. Middleton *v.* Selby, 19 W. Va. 167; Armstrong *v.* Wilson, 19 W. Va. 108.

United States.—Under Rev. Sts. U. S. § 4918, providing for suits touching interfering patents, defendant may have affirmative relief without filing a cross-bill. Lockwood *v.* Cleaveland, 6 Fed. Rep. 721; American Clay Bird Co. *v.* Ligowski Clay Pigeon Co., 31 Fed. Rep. 466.

1. Bank of Utica *v.* Messereau, 7 Paige (N. Y.) 517, 49 Am. Dec. 189; Cuyler *v.* Bogert, 3 Paige (N. Y.) 186; Disosway *v.* Carroll, 3 Chan. Sent. (N. Y.) 57; Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205; Methodist Episcopal Church *v.* Jacques, 1 Johns. Ch. (N. Y.) 65; Mechanics' Bank *v.* Levy, 3 Paige (N.Y.) 606; Champlin *v.* Champlin, 2 Edw. Ch. (N. Y.) 362; Whitney *v.* Belden, 1 Edw. Ch. (N. Y.) 386; Davis *v.* Mapes, 2 Paige (N. Y.) 105; Miles *v.* Miles, 27 N. H. 440; Salmon

Exceptions.—This rule is subject to several well-established exceptions. Thus, all matters merely scandalous, impertinent, irrelevant, or immaterial need not be answered.[1]

Defendant need not answer anything which will subject him to any penalty or forfeiture.[2]

He need not divulge matters where such divulgence would involve a breach of professional confidence.[3]

Nor need he discover the facts relating to his own title, but only those relating to plaintiff's title.[4] So also statutes and rules

v. Clagett, 3 Bland. (Md.) 125; Neale *v.* Hagthrop, 3 Bland. (Md.) 551; Chappell *v.* Funk, 57 Md. 465; Harvey *v.* Lance, 1 Luz. Leg. Obs. (Pa.) 315; Parkinson *v.* Trousdale, 4 Ill. 367; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338; Hopkins *v.* Medley, 97 Ill. 402; Vreeland *v.* New Jersey Stone Co., 25 N. J. Eq. 140; Hogencamp *v.* Ackerman, 10 N. J. Eq. 267; Brown *v.* Fuller, 13 N. J. Eq. 271; Cartwright *v.* Hateley, 1 Ves. Jr. 292; Shepherd *v.* Roberts, 3 Bro. C. C. 239; Story Eq. Pl. (10th ed.) §§ 38, 846; Beach Mod. Eq. Pr. § 334. See also Rev. Sts. Ill. 1845, p. 96, § 23; Ann. Code Miss. 1892, § 533.

Method of Compelling Full Answer.—If the answer be in any respect evasive or insufficient, the plaintiff may except to it, and thus extract from his opponent a full and perfect answer. Beam Orders, 28, 179; King *v.* Marissal, 3 Atk. 192; Radford *v.* Wilson, 3 Atk. 815, Hepburn *v.* Durand, 1 Bro. C. C. 503; Deane *v.* Rastron, 1 Anst. 64; Prout *v.* Underwood, 2 Cox 135; Mountford *v.* Taylor, 6 Ves. 792; White *v.* Williams, 8 Ves. 193; Somerville *v.* Mackay, 16 Ves. 382; ——— *v.* Harrison, 4 Madd. 252; Wharton *v.* Wharton, 1 Cond. Ch. Rep. 117. See *post*, section EXCEPTIONS.

1. Story Eq. Pl. (10th ed.) § 846; Mitford Eq. Pl. (by Jeremy) 367, note h; Wigram on Discovery (1st ed.) 195, 198; Agar *v.* Regents Canal Co., G. Coop. 212; Waldron *v.* Bayard, 1 Phila. (Pa.) 484; Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210; Wiswall *v.* Wandell, 3 Barb. Ch. (N. Y.) 312. See also Batterson *v.* Ferguson, 1 Barb. (N. Y.) 490; Neale *v.* Hagthrop, 3 Bland (Md.) 551. But there are cases holding that if defendant submits to answer, he is bound to answer every immaterial as well as material statement of the bill. Hogencamp *v.* Ackerman, 10 N. J. Eq. 267; Brown *v.* Fuller, 13 N. J. Eq. 271.

2. Story Eq. Pl. § 846; Smith *v.* Read, 1 Atk. 526; Harrison *v.* Southcote, 1 Atk. 528; Bird *v.* Hardwicke, 1 Vern. 110; Sharp *v.* Carter, 3 P. Wms. 375; Wrottesley *v.* Bendish, 3 P. Wms. 236; Chancey *v.* Fenhoulet, 2 Ves. 265; Boteler *v.* Allington, 3 Atk. 453; Chauncey *v.* Tahourden, 2 Atk. 392; Fane *v.* Atlee, 1 Eq. Cas. Abr. 77, pl. 15; Uxbridge *v.* Staveland, 1 Ves. 56; Claridge *v.* Hoard, 14 Ves. 59; Patterson *v.* Patterson, 1 Hayw. (N. Car.) 168; Butler *v.* Catling, 1 Root (Conn.) 310; Higdon *v.* Heard, 14 Ga. 255; Atterbury *v.* Knox, 8 Dana (Ky.) 284; Leigh *v.* Everhart, 4 T. B. Mon. (Ky.) 379, 16 Am. Dec. 160; Adams *v.* Porter, 1 Cush. (Mass.) 170; Taylor *v.* Bruen, 2 Barb. Ch. (N. Y.) 302; Union Bank *v.* Barker, 3 Barb. Ch. (N. Y.) 358; Leggett *v.* Postley, 2 Paige (N. Y.) 599; Livingston *v* Harris, 3 Paige (N. Y.) 528; McIntyre *v.* Mancius, 16 Johns. N. Y.) 592; Skinner *v.* Judson, 8 Conn. 527, 21 Am. Dec. 691; Northrop *v.* Hatch, 6 Conn. 361; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31.

Protection by Statute—Effect.—But defendant must answer as to a fraud charged in the bill, though it amounts to an indictable offense, where it is provided by statute that the answer shall not be used as evidence against him. Schott *v.* Bragg, 1 T. & H. Pr. (Pa.) 96.

Penalty Barred by Statute of Limitations or Waived.—If the forfeiture or penalty be barred by the statute of limitations, defendant is no longer protected from answering fully. Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691. *Contra*, Northrop *v.* Hatch, 6 Conn. 361.

3. Story Eq. Pl. (10th ed.) § 846; Wigram on Disc. (1st ed.) 195, 196; Beach Mod. Eq. Pr. § 335; Stratford *v.* Hogan, 2 Ball. & B. 164; Jones *v.* Pugh, 12 Sim. 470; Greenough *v.* Gaskell, 1 Myl. & K. 98.

4. Story Eq. Pl. (10th ed.) § 846;

of court have modified the rule in some jurisdictions.[1]

2. Must be Certain.—The answer should be certain as far as practicable; and to so much of the bill as it is necessary to answer defendant must speak directly, without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but must confess or traverse the substance of each positively and with certainty; particular precise charges must be answered particularly, not in a general manner.[2]

Hare on Disc. 266, 268; Beach Mod. Eq. Pl. 335.

Other Exceptions.—So also a party in whose favor a judgment has been entered up is not bound to answer any inquiries in a bill filed by a subsequent purchaser which go to impeach the consideration or validity of the judgment. French *v.* Shotwell, 6 Johns. Ch. (N. Y.) 235.

On a bill against bankrupt's assignees for an accounting and to enjoin proceeding at law, an answer by one of the defendants setting forth that his name was used in the action at law without his authority, and that his actions as assignee were in reference to matters not connected with the subject of the bill therein set forth, was held good though he had not answered each interrogatory. Jones *v.* Wiggins, 2 Y. & J. 385.

A defendant may answer in part, and by his answer state grounds why he should not be compelled to make further answer. Hunt *v.* Gookin, 6 Vt. 462. See also M. E. Church *v.* Jacques, 1 Johns. Ch. (N. Y.) 65; Cuyler *v.* Bogert, 3 Paige (N. Y.) 186; Phillips *v.* Prevost, 4 Johns. Ch. (N.Y.) 205; Desplaces *v.* Goris, 1 Edw. Ch. (N. Y.) 350; Bentley *v.* Cleaveland, 22 Ala. 814.

On a bill for an accounting, where it does not appear on the face of the bill that the account will be necessary in establishing complainant's right thereto, but it appears merely that the account is that which must ultimately be rendered in fulfilment of an obligation sought to be enforced, the account need not be set out in the answer, where resort to answer is preferable to plea or demurrer in resisting the complainant's alleged right to account; but if the alleged right may be resisted by plea or demurrer, and defendant chooses to answer, he must answer setting out the account fully. Pace *v.* Bartles, 45 N. J. Eq. 371. See also Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205; French *v.* Rainey, 2 Tenn. Ch. 640; Armstrong *v.* Crocker, 10 Gray (Mass.) 269.

1. **In Alabama** a defendant in his answer may protect himself from making a full answer to the allegations of the bill. Code 1886, §3440.

United States Equity Rule 39 provides as follows: "The rule that if a defendant submits to answer he shall answer fully to all the matters of the bill shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar, and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona-fide* purchaser for a valuable consideration without notice may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such a plea." Equity Rule 44 provides that "a defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer."

In Maryland Chancery Rule 23 is an exact copy of United States Eq. Rule 39, *supra*.

2. Boh. Cur. Can. 111; Wy. P. Reg. 13; 1 Har. Ch. Pr. 303; Mitf. Eq. Pl.

Defendant cannot shelter himself behind equivocal, evasive, or doubtful terms, and thus mislead complainant, nor behind a literal denial which amounts to no more than a negative pregnant or an evasion of the points of substance.[1]

3. Must be on Knowledge, Information, Remembrance, or Belief.—As a general rule the answer of a defendant in an equitable proceeding should be as to his knowledge, information, remembrance, or belief.[2]

Where the facts are within defendant's knowledge, he must answer positively and not as to his information and belief;[3] and

247; Coop. Eq. Pl. 314; Dan. Ch. Pr. (5th Am. ed.) 726; Story Eq. Pl. (10th ed.) § 852; Wood *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; Leacraft *v.* Demprey, 4 Paige (N. Y.) 124; Chan. 1821, Smith *v.* Lasher, 5 Johns. Ch. (N. Y.) 247; Morris *v.* Parker, 3 Johns. Ch. (N. Y.) 297; Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210; Pettit *v.* Chandler, 3 Wend. (N. Y.) 618; Morris *v.* Barker, 3 Johns. (N. Y.) 297; Hall *v.* Wood, 1 Paige (N. Y.) 404; Devereaux *v.* Cooper, 11 Vt. 105; Hepburn *v.* Durand, 1 Bro. C. C. 503; Taylor *v.* Luther, 2 Sumn. (U. S.) 228; Mountford *v.* Taylor, 6 Ves. 792; New England Bank *v.* Lewis, 8 Pick. (Mass.) 119; Hunter *v.* Bradford, 3 Fla. 285; Barrow *v.* Bailey, 5 Fla. 9; Savage *v.* Benham, 17 Ala. 119; Smith *v.* Loomis, 5 N. J. Eq. 60. See also Jenkins *v.* Greenbaum, 95 Ill. 11.

Illustrations of Rule.—If the bill charges defendant with having writings and papers in his custody, possession, or power, an answer alleging that there are writings or papers in the West Indies, and that he cannot set forth the particulars thereof, but not alleging whether or not they are in defendant's custody, possession, or power, is insufficient for the reason that, if he admitted them to be in his possession, custody, or power, the court might order them brought into court within a reasonable time on a motion by complainant therefor. Farquharson *v.* Balfour, T. & R. 190; Dan. Ch. Pr. (5th Am. ed.) 726; Story Eq. Pl. (10th ed.) § 852.

An answer alleging that defendant had not certain books, papers, and writings in his possession, custody, or power, because they were coming over to this country, was held bad in that they were in his possession, and he should have so stated in his answer. Dan. Ch. Pr. (5th Am. ed.) 726; Story Eq. Pl. (10th ed.) § 852.

On a bill for a general accounting, which required defendant to show whether he had received specified sums, and if so, when, from whom, and on what accounts he had received them, it was held that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums received, was insufficient, it being considered necessary that the answer should be specific to the specific charges of the bill. Story Eq. Pl. (10th ed.) § 852; 1 Mitf. Eq. Pl. (by Jeremy) 309; Cooper Eq. Pl. 314; Hepburn *v.* Durand, 1 Bro. C. C. 503.

1. Hill *v.* Lackey, 9 Dana (Ky.) 83; McLain *v.* Waters, 9 Dana (Ky.) 55; Talbot *v.* Sebree, 1 Dana (Ky.) 56; Bailey *v.* Wilson, 1 Dev. & B. Eq. (N. Car.) 187; Bissell *v.* Bozman, 2 Dev. Eq. (N. Car.) 163; Grady *v.* Robinson, 28 Ala. 289.

2. Daniell Ch. Pr. (5th Am. ed.) 722; Bailey *v.* Wilson, 1 Dev. & B. (N. Car.) 182, 187; Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 146; Kinnaman *v.* Henry, 6 N. J. Eq. 90; Utica Ins. Co. *v.* Lynch, 3 Paige Ch. (N. Y.) 210; Brotherton *v.* Downey, 21 Hun (N. Y.) 436; Tradesmen's Bank *v.* Hyatt, 2 Edw. Ch. (N. Y.) 195; Robinson *v.* Woodgate, 3 Edw. Ch. (N. Y.) 422; Kittridge *v.* Claremont Bank, 1 Woodb. & M. (U. S.) 573; Kinnman *v.* Henry, 6 N. J. Eq. 90; Devereux *v.* Cooper, 11 Vt. 103; Sanderlin *v.* Sanderlin, 24 Ga. 583; Steinman *v.* Lancaster, 2 L. Bar. (Pa.) Nov. 12, 1870; Painter *v.* Harding, 3 Phila. (Pa.) 144.

3. Miles *v.* Miles, 7 Fost. (N. H.) 440; Dinsmore *v.* Hazleton, 2 Fost. (N. H.) 535; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 107; Noyes *v.* Inland, etc., Coasting Co., 4 McArth. (D. C.) 1; Carey *v.* Jones, 8 Ga. 516; McAllister *v.* Clopton, 51 Miss. 257; Mead *v.* Day, 54 Miss. 58.

if not within his knowledge he must answer as to his information and belief, and not as to his information only, without stating his belief.[1]

If defendant answers that he has no knowledge or information of the facts charged in the bill, he need not admit or deny them, or express any belief as to them one way or the other.[2]

If defendant denies all knowledge of facts charged in the bill, but admits belief, he need not deny information.[3]

If facts are within defendant's knowledge, but are not of recent occurrence, he has sometimes been permitted to answer as to his remembrance.[4]

1. Miles *v.* Miles, 7 Fost. (N.H.) 440; Dinsmore *v.* Hazleton, 2 Fost. (N. H.) 535; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 107; Noyes *v.* Inland, etc., Coasting Co., 4 McArthur (D. C.) 1; Carey *v.* Jones, 8 Ga. 516; Mead *v.* Day, 54 Miss. 58; McAllister *v.* Clopton, 51 Miss. 257.

Illustration. — Thus an answer admitting that the facts charged in the bill might be true, but asserting that defendant has no knowledge of such matters except from the bill, is insufficient. Rienzle *v.* Barker, 4 Atl. Rep. (N. J.) 309; Reese *v.* Cumberland Ins. Co., 36 N. J. Eq. 146.

Answer in Effect Denying Information. —Where defendant answered to the facts charged in the bill, that "it might be true for anything he knew to the contrary, but that he was an utter stranger to all and every such matter," it was held that the answer was sufficient in that it also (at least in effect) denied information concerning the facts. Amhurst *v.* King, 2 Sim. & Stu. 183.

So also an answer as to matters to which the defendant is not alleged to be privy, stating that they may be true for anything he knows to the contrary, but that he is a stranger to and cannot form any belief respecting them, is sufficient. Stetson *v.* Peters, 16 Leg. Int. (Pa.) 147, decided on the authority of Amhurst *v.* King, 2 Sim. & Stu. 183.

If the Court is Satisfied that Defendant Cannot Answer Positively, an answer as to his belief will be allowed even as to his own acts. Hall *v.* Wood, 1 Paige (N. Y.) 404.

Answer that Defendant is a Stranger to Facts Should be on Information and Belief. — An answer that the facts charged may be true, but that defendant is a stranger to such facts and has no knowledge thereof, is bad if it does not also answer as to information and belief, if he has information, since defendant might be a stranger to the facts charged and yet have information and belief concerning them. Smith *v.* Lasher, 5 Johns. Ch. (N. Y.) 246.

Failure to Deny Information and Express Belief—Effect.—An answer which fails to deny charges made in the bill *prima facie* within the knowledge, information, or belief of defendant, or to express belief as to the falsity of such charges, and which does not allege that he cannot form any belief respecting their truth, will be deemed to admit them. Grady *v.* Robinson, 28 Ala. 289; Smilie *v.* Siler, 35 Ala. 88; Clark *v.* Jones, 41 Ala. 349.

2. King *v.* Ray, 11 Paige (N. Y.) 255; Morris *v.* Parker, 3 Johns. Ch. (N. Y.) 297; Jones *v.* Wiggins, 2 Younge & J. 385. See also Norton *v.* Warner, 3 Edw. Ch. (N. Y.) 186.

When Answer Need not Express Belief. —If defendant has neither knowledge nor information of the matters charged except what he may derive from the bill, he need not express any belief. Utica Ins. Co. *v.* Lynch (N. Y.) 210; Sloan *v.* Little, 3 Paige (N. Y.) 110.

An answer containing a response to a material allegation of the bill, that defendant, having no personal knowledge thereof, leaves complainant to make such proof as he may be advised, is bad. Ryan *v.* Anglesea R. R. Co. (N. J. Eq.), 12 Atl. Rep. 539.

3. Davis *v.* Mapes, 2 Paige (N. Y.) 105.

4. Story Eq. Pl. (10th ed.) § 855.

Illustrations. — Defendant was permitted to answer as to his remembrance, where the facts occurred more than six years before. Carey *v.* Jones,

4. Must Not Contain Inconsistent Defenses.—Though defendant may set up as many defenses in his answer as he may think proper, it is essential that such defenses be consistent.[1]

Waiver.—If, however, no exception is taken to an answer containing inconsistent defenses, and one of them is sustained by the proof, such inconsistency will not be a ground to reverse a decree for defendant.[2]

5. Must State Facts.—The answer should consist of averments of fact, not of conclusions of law.[3] See article LEGAL CONCLUSIONS.

V. DEFENSES TAKEN BY ANSWER—1. Usury.—The defense of usury may either be set up by plea or relied on in the answer.[4] The facts and circumstances of the alleged usurious bargain should be set forth with certainty.[5] See article USURY.

8 Ga. 516. See also Hall *v.* Wood, 1 Paige (N. Y.) 404.

Where defendant in his answer said that to his remembrance he had received no other sum than what was mentioned in his answer, the answer was held good. Hall *v.* Bodily, 1 Vern. 470.

1. Hopper *v.* Hopper, 11 Paige (N. Y.) 46; Stone *v.* Moore, 26 Ill. 165; Scanlan *v.* Scanlan, 134 Ill. 630.

Where several defenses are pleaded in an answer, each defense must be complete in itself and a full answer to the action; but the several defenses need not be harmonious throughout, or such as will admit of comparison in respect to the facts alleged by them. Hummel *v.* Moore, 25 Fed. Rep. 380.

Effect of Inconsistency. — "That answer is bad which either contains inconsistent defenses, or an alternative of inconsistent defenses" (per Alderson, B., in Jesus College *v.* Gibbs, 1 Y. & C. 160); and defendant will be deprived of the benefit of either.

2. Scanlan *v.* Scanlan, 134 Ill. 630.

3. Ormes *v.* Beadel, 2 De G., F. & J. 333; Atty. Gen. *v.* Oakland County Bank, Walk. (Mich.) 90; Chambers *v.* Chalmers, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572; Strike's Case, 1 Bland (Md.) 57; Hood *v.* Inman, 4 Johns. Ch. (N. Y.) 437; McKim *v.* Mason, 2 Md. Ch. 510. Thus the mere denial in an answer of a fraudulent intent in conveying property beyond the reach of an execution against the grantors, while admitting all the facts which in law and equity constitute a fraudulent conveyance, is not such a denial as must be overcome by the testimony of several witnesses or equivalent evidence. Such denial must relate to facts charged, not to the conclusions and arguments following from the facts. Gainer *v.* Russ, 20 Fla. 157.

4. Smith *v.* Nicholas, 8 Leigh (Va.) 330; McKim *v.* Mason, 2 Md. Ch. 510; Jenkins *v.* Greenbaum, 95 Ill. 11; Maher *v.* Lanfrom, 86 Ill. 513; Homeopathic Mut. L. Ins. Co. *v.* Crane, 25 N. J. Eq. 418, 27 N. J. Eq. 484; New Jersey Patent Tanning Co. *v.* Turner, 14 N. J. Eq. 326; Taylor *v.* Morris, 22 N. J. Eq. 611; Beatty *v.* Van Brenner, 24 N. J. Eq. 312; Turrell *v.* Byard, 24 N. J. Eq. 135; Hannas *v.* Hawk, 24 N. J. Eq. 124; Watson *v.* Conkling, 24 N. J. Eq. 230; Vroom *v.* Ditmas, 4 Paige (N. Y.) 526; Rowe *v.* Phillips, 2 Sandf. Ch. (N.Y.) 14; New Orleans, Gas Light etc., Co. *v.* Dudley, 8 Paige (N. Y.) 452; Curtis *v.* Masten, 11 Paige (N. Y.) 15; Suydam *v.* Bartle, 10 Paige (N. Y.) 94; Clarke *v.* Hastings, 9 Gray (Mass.) 64.

But it has been held that the purchaser of the mere equity of redemption in premises covered by an usurious mortgage, who purchases subject to the lien of the mortgage, cannot set up usury as a defense to the incumbrance. Brolasky *v.* Miller, 9 N. J. Eq. 814; Vroom *v.* Ditmas, 4 Paige (N. Y.) 527.

5. Homeopathic Mut. L. Ins. Co. *v.* Crane, 25 N. J. Eq. 418, 27 N. J. Eq. 484; Taylor *v.* Morris, 22 N. J. Eq. 606; Hannas *v.* Hawk, 24 N. J. Eq. 124; Turrell *v.* Byard, 24 N. J. Eq. 135; Beatty *v.* Van Brenner, 24 N. J. Eq. 312; New Jersey Patent Tanning Co. *v.* Turner, 14 N. J. Eq. 326; Vroom *v.* Ditmas 4 Paige (N. Y.) 526; Rowe *v.* Phillips, 2 Sandf. Ch. (N. Y.) 14; New Orleans Gas Light, etc., Co. *v.* Dudley, 8 Paige (N. Y.) 452; Curtis *v.* Masten, 11 Paige (N. Y.) 15; Suydam

Waiver.—But after the parties have joined issue on an answer alleging usury generally, complainant will not be permitted to ob-

v. Bartle, 10 Paige (N. Y.) 94; Clarke *v.* Hastings, 9 Gray (Mass.) 64.

Precision and Certainty Required.—An answer by an endorser to an action on a promissory note, that "the plaintiff reserved a greater rate of interest than is allowed by law at the time of discounting said note for defendant, to wit," the sum of $4.50, is insufficient because it does not set forth any usurious contract made by the defendants with the plaintiff, nor any reservation of usurious interest with the certainty and precision required to enable defendant to enforce the forfeiture. Clarke *v.* Hastings, 9 Gray (Mass.) 64.

General Charge of Usury Insufficient.—An answer in which the defendant states in general terms that he believes the transaction was tainted with usury is insufficient. Suydam *v.* Bartle, 10 Paige (N. Y.) 94.

A plea or answer which merely contains a general charge that the mortgage for the foreclosure of which the bill was filed is usurious and was founded on a corrupt agreement by which the lender was to receive or in some way obtain a greater interest than was lawful, either by a pretended sale of property at more than its value or in some other way, is bad both in form and in substance. New Orleans Gas Light, etc., Co. *v.* Dudley, 8 Paige (N. Y.) 452.

An answer denying that defendants received the whole sum of money mentioned in the mortgage sought to be foreclosed, and alleging that a "large amount of money was unjustly and unlawfully detained by the complainants as a bonus and unlawful interest in excess of seven per cent per annum and not paid over to the defendants at the time of the execution of the mortgage, and that it has not been paid to them or to any other person in their behalf since the execution of the mortgage, was held insufficient as failing to give any particulars of the transaction, as not alleging an usurious agreement, and as not even stating the amount of the alleged bonus. Watson *v.* Conkling, 24 N. J. Eq. 231.

Illustration of Answer Sufficiently Clear and Specific.—A charge, in an answer to a bill to foreclose a mortgage or deed of trust given to secure the payment of a note of $10,000 loaned, that $1000 was retained out of the loan, and only $9000 received by the borrower when he gave the note, is sufficiently clear and specific that $1000 was reserved as usury. So, a charge that a party had paid unlawful interest on a $2000 note, at the rate of over twenty per cent per annum from a certain time to a given day, and a claim that if such note be held valid such amount should be deducted from the amount due thereon, and that all right to interest on such note be declared forfeited, was held sufficient to raise the question of usury. Maher *v.* Lanfrom, 86 Ill. 513.

Defense when Available Without Being Set Up.—Where a bill to foreclose a deed of trust prays that an account may be taken of what is due on the notes secured, even if the answer does not set up the technical defense of usury by claiming a forfeiture of all the interest, but simply claims that the usurious interest paid in excess of six per cent be applied as a credit on the debt, and that the account be stated on equitable principles, it will be sufficient to enable the defendant to take advantage of any usurious payments made in excess of six per cent on the notes secured or in the various transactions upon which they were based. Jenkins *v.* Greenbaum, 95 Ill. 11.

Usury under Laws of Another State.—Where defendant desires to set up usury as a defense, on the ground that the securities alleged to be usurious were first sold in another state or country, in violation of the usury laws in force there, he must state in his answer what those laws were at the time of the supposed usurious sale, and the particular facts and circumstances of the case which rendered the transaction usurious under those laws, so that the court may see that, if the answer is true, the securities are void for usury in the hands of purchasers and holders thereof. Curtis *v.* Masten, 11 Paige (N. Y.) 15. If the defense relied on is that the contract was usurious under the laws of another state, in which the contract was made, it must be so averred in the answer. Andrews *v.* Torrey, 14 N. J. Eq. 355; Dolman *v.* Cook, 14 N. J. Eq. 56; Campion *v.* Kille, 14 N. J. Eq. 229, 15 N. J. Eq. 476.

ject at the hearing that the answer was not taken with more legal precision.[1]

2. Statute of Limitations.—The statute of limitations may be set up as a defense by answer as well as by plea or demurrer,[2] but to be available it must be pleaded.[3] Where the statute is relied on in the answer as a defense, as much strictness as in a plea is not required.[4]

How Pleaded.—It is not necessary to refer in terms to the statute which creates the bar. Defendant need only state the necessary facts to bring the case within the statute, and then insist that, by reason of the existence of such facts, complainant's cause of action is barred.[5]

3. Laches.—This defense may be made by answer where the facts on which it rests do not sufficiently appear on the face of the bill.[6] The authorities are in conflict as to whether or not it must be pleaded to be available.[7]

4. Innocent Purchase.—The defense that defendant is a *bona-fide* purchaser for a valuable consideration without notice may be taken by answer as well as by plea.[8]

1. Chambers *v.* Chalmers, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572.

2. Van Hook *v.* Whitlock, 7 Paige (N. Y.) 373; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178; Smith *v.* Hickman, Cooke (Tenn.) 330; Maury *v.* Mason, 8 Port. (Ala.) 213; Highstone *v.* Franks, 93 Mich. 52; Nichols *v.* Padfield, 77 Ill. 253; Borders *v.* Murphy, 78 Ill. 81; Pierce *v.* McClellan, 93 Ill. 245; Phelps *v.* Elliott, 35 Fed. Rep. 455. See LIMITATIONS, STATUTES OF.

Illustrations.—Thus heirs of a debtor may rely on the statute of limitations as a defense of real assets of decedent, although the executor may have had judgment rendered against him on account of the same claim. Strike's Case, 1 Bland (Md.) 57.

Under an answer alleging that complainant's right to sue did not accrue at any time within six years before the filling of the bill, defendant may rely upon the benefit of a statute of limitations requiring complainant to sue within three years after his right of action had accrued. Van Hook *v.* Whitlock, 7 Paige (N. Y.) 373.

Effect—Where the statute of limitations is so interposed by answer it has the effect of and operates as a plea. Pierce *v.* McClellan, 93 Ill. 245.

3. Borders *v.* Murphy, 78 Ill. 81; Chambers *v.* Chalmers, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572; Strike's Case, 1 Bland (Md.) 57; Gibson *v.* Green, 89 Va. 524; Crutcher *v.* Trabue, 5 Dana (Ky.) 80.

4. Maury *v.* Mason, 8 Port. (Ala.) 213; Price *v.* Price, 1 Vern. 185; Anonymous, 3 Atk. 70; Hilyard *v.* Crassy, 3 Atk. 303; Jones *v.* Pengree, 6 Ves. Jr. 580; Bailey *v.* Adams, 6 Ves. Jr. 583.

5. Van Hook *v.* Whitlock, 7 Paige (N. Y.) 373.

6. Snow *v.* Boston Blank Book Mfg. Co., 153 Mass. 456.

7. **Laches Must Be Pleaded.**—A defendant, to avail himself of this defense, should set it up in his answer, so as to give complainant an opportunity to amend his bill by inserting allegations accounting for the delay. School Trustees *v.* Wright, 12 Ill. 432; Zeigler *v.* Hughes, 55 Ill. 288. But such defense need not be set up in the answer where it has been anticipated and an excuse set up in the bill. Williams *v.* Rhodes, 81 Ill. 571; Sloan *v.* Graham, 85 Ill. 26. See also Hall *v.* Fullerton, 69 Ill. 448.

Contra.—Laches is a defense which the court will take notice of even though not pleaded. Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46. See also Maxwell *v.* Kennedy, 8 How. (U. S.) 222; Landsdale *v.* Smith, 106 (U. S.) 391.

Who May Make Defense.—The defense of laches in asserting title to land is not available by one whose claim to the land has never been united with the possession. Bush *v.* Stanley, 122 Ill. 406.

8. High *v.* Batte, 10 Yerg. (Tenn.)

How Pleaded.—In pleading this defense it is essential to state briefly the instrument of purchase, the date, and the parties;[1] to show the consideration and to allege the *bona-fide* payment thereof;[2] to allege possession by the grantor at the time of the purchase;[3] and to deny notice.[4] This denial is necessary even though notice is not charged in the bill.[5]

335; Jerrard *v.* Saunders, 2 Ves. 455; Rowe *v.* Teed, 15 Ves. 372; Weston *v.* Berkeley, 3 P. Wms. 244, note; Stephens *v.* Gaule, 2 Vern. 701; Aston *v.* Curzon, 3 P. Wms. 244, note; Bradlin *v.* Ord, 1 Atk. 538; Harrison *v.* Southcote, 1 Atk. 508; Fitzgerald *v.* Burk, 2 Atk. 397; Hardingham *v.* Nicholls, 3 Atk. 304; Fox *v.* Coon, 64 Miss. 465; Donnell *v.* King, 7 Leigh (Va.) 393; Downman *v.* Rust, 6 Rand. (Va.) 587; Tompkins *v.* Mitchell, 2 Rand. (Va.) 430; Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280; Rorer Iron Co. *v.* Trout, 83 Va. 397; Moore *v.* Clay, 7 Ala. 742; Ledbetter *v.* Walker, 31 Ala. 175; Wells *v.* Morrow, 38 Ala. 125; Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212; Harris *v.* Fly, 7 Paige (N. Y.) 424; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 332; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Countryman *v.* Boyer, 3 How. Pr. (N. Y. Supreme Ct.) 389; Balcom *v.* New York L. Ins., etc., Co., 11 Paige (N. Y.) 455; Wyckoff *v.* Sniffin, 2 Edw. Ch. (N. Y.) 580; Murray *v.* Finster, 2 Johns. Ch. (N. Y.) 155; Galatian *v.* Erwin, Hopk. (N. Y.) 48; Griffith *v.* Griffith, Hoffm. Ch. (N. Y.) 153, note; Makepeace *v.* Davis, 27 Ind. 352; Wood *v.* Mann, 1 Sumn. (U. S.) 510; Flagg *v.* Mann, 2 Sumn. (U. S.) 563; Wormley *v.* Wormley, 8 Wheat. (U. S.) 449; Boone *v.* Chiles, 10 Pet. (U. S.) 177; U. S. Eq. Rule 39; Maryland Rule of Chancery 293.

Contra.—Story (*citing* Portarlington *v.* Soulby, 7 Sim. 28; Ovey *v.* Leighton, 2 Sim. & Stu. 234; Gordon *v.* Shaw, 14 Sim. 393) says: "It is now well settled that a defendant cannot by answer set up a defense to a bill for discovery and relief that he is a *bona-fide* purchaser for a valuable consideration without notice; but if he means to insist on it he must do so by way of plea, because if he answers at all he must answer fully." Story Eq. Pl. (10th ed.) § 847.

1. Boone *v.* Chiles, 10 Pet. (U. S.) 177.

2. Boone *v.* Chiles, 10 Pet. (U. S.) 177; Wormley *v.* Wormley, 8 Wheat. (U. S.) 449; Wood *v.* Mann, 1 Sumn. (U. S.) 510; Flagg *v.* Mann, 2 Sumn. 563; Harrison *v.* Southcote, 1 Atk. 538; Bradlin *v.* Ord, 1 Atk. 538; Fitzgerald *v.* Burk, 2 Atk. 397; Hardingham *v.* Nicholls, 3 Atk. 304; Wells *v.* Morrow, 38 Ala. 125; Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280; Rorer Iron Co. *v.* Trout, 83 Va. 397.

An averment in an answer that a "full and fair consideration was paid" is insufficient; defendant must state what he paid or of what the consideration consisted, in order that the court may judge whether the consideration was valuable. High *v.* Batte, 10 Yerg. (Tenn.) 335.

3. Boone *v.* Chiles, 10 Pet. (U. S.) 177; Rorer Iron Co. *v.* Trout, 83 Va. 397.

4. Weston *v.* Berkeley, 3 P. Wms. 244, note; Aston *v.* Curzon, 3 P. Wms. 244, note; Harrison *v.* Southcote, 1 Atk. 538; Bradlin *v.* Ord, 1 Atk. 538; Fitzgerald *v.* Burk, 2 Atk. 397; Hardingham *v.* Nicholls, 3 Atk. 304; Moore *v.* Clay, 7 Ala. 742; Wells *v.* Morrow, 38 Ala. 125; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 345; Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280; Wood *v.* Mann, 1 Sumn. (U. S.) 510; Flagg *v.* Mann, 2 Sumn. (U. S.) 563.

Reason for Rule.—Where a defendant wishes to protect himself as a *bona-fide* purchaser without notice, he must deny such notice in his answer, so as to give the adverse party an opportunity to put the fact in issue and prove it. Harris *v.* Fly, 7 Paige (N. Y.) 422; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 345; Moore *v.* Clay, 7 Ala. 742.

5. Boone *v.* Chiles, 10 Pet. (U. S.) 177; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 332; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Countryman *v.* Boyer, 3 How. Pr. (N. Y. Supreme Ct.) 389; Balcom *v.* New York L. Ins., etc., Co., 11 Paige (N. Y.) 455; Harris *v.* Fly, 7 Paige (N. Y.) 424; Galatian *v.* Erwin,

5. Undue Influence.—The defense that defendant was induced by undue influence to sign a contract sought to be enforced in equity may be set up by answer.[1]

6. Res Judicata.—This defense, to bar a hearing on the merits, must be set up by proper averments in the answer or by separate plea, otherwise it cannot be relied on in the proof.[2]

How Pleaded.—So much of the former proceedings must be set out as will clearly show that the issues in the former and in the pending suit are identical.[3]

7. Statute of Frauds.—It is a general rule of equity that a party desiring to avail himself of the benefit of this defense must insist on it or it will be deemed to have been waived.[4] Where the

Hopk. (N. Y.) 56; Griffith *v.* Griffith, Hoffm. Ch. (N. Y.) 153, note; Murray *v.* Finster, 2 Johns. Ch. (N. Y.) 156; Makepeace *v.* Davis, 27 Ind. 352; Wilson *v.* Hillyer, 1 N. J. Eq. 63; Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280; Rorer Iron Co. *v.* Trout, 83 Va. 397; Downman *v.* Rust, 6 Rand. (Va.) 587; Tompkins *v.* Mitchell, 2 Rand. (Va.) 430; Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212.

1. Rau *v.* Von Zedlitz, 132 Mass. 164.

2. Galloway *v.* Hamilton, 1 Dana (Ky.) 576; Ferguson *v.* Miller, 5 Ohio 459; Arnold *v.* Kyle, 8 Baxt. (Tenn.) 319; Jourolmon *v.* Massengill, 86 Tenn. 81; Turley *v.* Turley, 85 Tenn. 251; Bank of U. S. *v.* Beverly, 1 How. (U. S.) 134.

Where a bill is filed seeking cancellation of a note executed by the complainant on the ground that execution thereof was obtained by fraud, an answer that the note had been answered and judgment rendered, from which there was no appeal, is equivalent to a formal plea of *res judicata*, and is sufficient. Arnold *v.* Kyle, 8 Baxt. (Tenn.) 319.

Where a former decree is relied on as a bar, a prayer in the answer, that "*the pleadings and proofs* in a former suit may be made a part of this cause," does not present *the decree*; and though it be copied in the transcript, it will not be regarded in the appellate court. Galloway *v.* Hamilton, 1 Dana (Ky.) 576.

Former Suit Pending.—The objection that a former suit is pending must be taken by plea and not by answer. The practice in such case is, not to reply to the plea nor to set it down for argument, but to refer to it on motion at once to a master to ascertain and report whether or not both suits are for the same matter; and if they are found to be, the plea is allowed, and if they are found not to be, it is overruled, etc. Battell *v.* Matot, 58 Vt. 271; Pierce *v.* Feagans, 39 Fed. Rep. 587.

3. Jourolmon *v.* Massengill, 86 Tenn. 81; Marvin *v.* Hampton, 18 Fla. 131.

4. Tarleton *v.* Vietes, 6 Ill. 470; Thornton *v.* Vaughan, 3 Ill. 218; Dyer *v.* Martin, 5 Ill. 146; Esmay *v.* Gorton, 18 Ill. 483; McClure *v.* Otrich, 118 Ill. 320; Cozine *v.* Graham, 2 Paige (N. Y.) 177; Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Angel v. Simpson, 85 Ala. 53; Ashmore *v.* Evans, 11 N. J. Eq. 151; Coop. Eq. Pl. 256.

When Unnecessary to Plead Statute.—Where complainant sets up an agreement which would be invalid by the Statute of Frauds unless in writing, and defendant denies by answer the agreement, he need not insist on the statute as a bar. Ontario Bank *v.* Root, 3 Paige (N. Y.) 478. See also Cole *v.* Bowne, 10 Paige (N. Y.) 526; Champlin *v.* Parish, 11 Paige (N. Y.) 405; Ridgway *v.* Wharton, 3 DeG., M. & G. 677.

So, also, if an agreement for the sale of lands alleged in a bill praying specific performance is denied by the answer, defendant may, if there be no written evidence of such agreement, insist on the statute of frauds at the hearing as effectually as if it had been pleaded. May *v.* Sloan, 101 U. S. 231.

Where a complainant claims that defendant holds land subject to a trust in his favor under an agreement creating it, and defendant denies the agreement, his denial entitles him to the benefit of the Statute of Frauds

answer admits a parol agreement, defendant will nevertheless be entitled to the benefit of the statute if the answer sets it up;[1] otherwise if it is not so set up.[2] See article FRAUDS, STATUTE OF.

8. Fraud.—This defense may be generally taken by answer,[3] and the allegations of fraud should be distinct and positive, setting forth the specific acts.[4]

9. Want of Jurisdiction.—The objection that the court has no jurisdiction because there is an adequate remedy at law may be taken by answer.[5]

without pleading it. Busick *v.* Van Weis, 44 N. J. Eq. 82; Van Duyne *v.* Vreeland, 12 N. J. Eq. 142; Walker *v.* Hill, 21 N. J. Eq. 513; Whyte *v.* Arthur, 17 N. J. Eq. 521; Wakeman *v.* Dodd, 27 N. J. Eq. 564.

It is not necessary to set up the statute as a defense unless the contract against which it is set up is that on which the relief prayed is founded. Force *v.* Dutcher, 18 N. J. Eq. 401.

1. Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Cozine *v.* Graham, 2 Paige (N. Y.) 181; Ontario Bank *v.* Root, 3 Paige (N. Y.) 478; Champlin *v.* Parish, 11 Paige (N. Y.) 405; Van Duyne *v.* Vreeland, 12 N. J. Eq. 142; Walker *v.* Hill, 21 N. J. Eq. 191; Dean *v.* Dean, 9 N. J. Eq. 425; Ashmore *v.* Evans, 11 N. J. Eq. 151; Wakeman *v.* Dodd, 27 N. J. Eq. 564.

2. Buttermere *v.* Hayes, 5 M. & W. 456; Johnson *v.* Dodgson, 2 M. & W. 653; Leaf *v.* Tuton, 10 M. & W. 393; Eastwood *v.* Kenyon, 11 Ad. & El. 438; Walker *v.* Hill, 21 N. J. Eq. 191; Van Duyne *v.* Vreeland, 12 N. J. Eq. 142; Dean *v.* Dean, 9 N. J. Eq. 425; Ashmore *v.* Evans, 11 N. J. Eq. 151; Wakeman *v.* Dodd, 27 N. J. Eq. 564; Cozine *v.* Graham, 2 Paige (N. Y.) 181; Champlin *v.* Parish, 11 Paige (N. Y.) 405; Vaupell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143.

3. Watkins *v.* Clifton Hill Land Co., 91 Tenn. 683; Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 413; Bertine *v.* Varian, 1 Edw. Ch. (N. Y.) 343; Carroll *v.* Potter, Walk. (Mich.) 355.

But to enable a defendant to avail himself of the defense of fraud in the consideration of a mortgage, which does not go to the extent of complete nullification thereof, he must have recourse to a cross-bill. O'Brien *v.* Hulfish, 22 N. J. Eq. 472; Graham *v.* Berryman, 19 N. J. Eq. 29; Parker *v.* Jameson, 32 N. J. Eq. 222; Parker *v.* Hartt, 32 N. J. Eq. 225; Miller *v.* Gregory, 16 N. J. Eq. 274.

Illustrations. — A married woman who has been induced to join in the execution of a mortgage on her homestead, through the fraudulent representations of her husband and the mortgagee that the homestead was not included in the mortgage, may defend against a bill to foreclose by answer impeaching the mortgage for fraud. Genthner *v.* Fagan, 85 Tenn. 491. See also Furguson *v.* Coleman, 5 Heisk. (Tenn.) 378.

On bill to foreclose, fraud in the consideration of a prior incumbrance may be set up by a mortgagee in his answer without filing a cross-bill. McGuckin *v.* Kline, 31 N. J. Eq. 454.

The defense that the mortgagee materially misrepresented the contents of the mortgaged premises to the mortgagor on the sale thereof by the former to the latter, the sale having been by the acre, and the mortgage having been given for part of the purchase-money, might be set up by answer in a suit by the mortgagee against the mortgagor to foreclose the mortgage. Dayton *v.* Melick, 27 N. J. Eq. 362; Melick *v.* Dayton, 34 N. J. Eq. 245. See also O'Brien *v.* Hulfish, 22 N. J. Eq. 477.

4. Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 413; Bertine *v.* Varian, 1 Edw. Ch. (N. Y.) 343.

5. Ryan *v.* Duncan, 88 Ill. 144; Heyer *v.* Burger, Hoffm. Ch. (N. Y.) 1; Grandin *v.* Le Roy, 2 Paige (N. Y.) 509; Whitlock *v.* Duffield, Hoffm. Ch. (N. Y.) 122; Cowman *v.* Sedgwick, Hoffm. Ch. (N. Y.) 67; Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 574, 49 Am. Dec. 109; Tenney *v.* State Bank, 20 Wis. 161; Peck *v.* School Dist. No. 4, 21 Wis. 516; Burroughs *v.* M'Neill, 2 Dev. & B. Eq. (N. Car.) 300.

Jurisdiction of Person or Subject-matter.—Under M. & V. Code (Tenn.) §§ 5060, 5061, 5064, providing that

10. Other Defenses.—There are also many other defenses which are most properly taken by answer.[1]

defendant need not plead specially in any case, except to the jurisdiction of the court; nor demur except for want of jurisdiction of the subject-matter, or of the person; and that the filing of an answer is a waiver of objection to the jurisdiction of the court, a defendant who seeks to raise the objection of want of jurisdiction must plead specially or demur; he cannot do so by answer. Lowry *v.* Naff, 4 Coldw. (Tenn.) 370; Bennett *v.* Wilkins, 5 Coldw. (Tenn.) 240; Kirkman *v.* Snodgrass, 3 Head. (Tenn.) 370; Holcomb *v.* Canady, 2 Heisk. (Tenn.) 610; Brazleton *v.* Brooks, 2 Head. (Tenn.) 194; Vincent *v.* Vincent, 1 Heisk. (Tenn.) 333; Leverton *v.* Waters, 7 Coldw. (Tenn.) 20.

1. **Want of Notice of Protest.**—When an endorser wishes to defend in equity against liability for want of due notice he should set up the defense in his answer. Williams *v.* Bartlett, 4 Lea. (Tenn.) 620.

Set-Off.—On a bill to foreclose a mortgage or to obtain satisfaction of the amount due, the defendant may set off a debt due to him from the complainant which would be a proper subject of set-off in a suit brought by complainant at law to recover the amount due on the mortgage, 2 Rev. Sts. N. Y. 174, § 40, providing that in suits for the recovery of money a set-off shall be allowed in courts of equity in the same manner and with like effect as in action at law. Chapman *v.* Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264.

Where defendant is entitled to set off a debt due to himself against the debt claimed by complainant in the bill, he may state the facts in his answer and claim the right of set-off without filing a cross-bill. Jennings *v.* Webster, 8 Paige (N. Y.) 503, 35 Am. Dec. 722.

But in a foreclosure suit defendant cannot set off an unliquidated demand not connected with the mortgage debt, and which is not a proper subject of set-off at law, unless there is some peculiar equity in the case to take it out of the general rule that unliquidated demands cannot be set off. Jennings *v.* Webster, 8 Paige (N. Y.) 503, 35 Am. Dec. 722.

In *Alabama*, where no such statute exists, it has been held that a set-off in defendant's favor may be had only on cross-bill, but that, if the defense is only in the nature of a set-off in equity by showing a discharge of the obligations sought to be enforced before the filing of the bill, no cross-bill is necessary. Goodwin *v.* McGehee, 15 Ala. 233. See also Cartwright *v.* Clark, 4 Met. (Mass.) 104.

And in *New Jersey* it has been held that a bill for board or any other demand which the debtor may have cannot be set off against a mortgage debt upon proceedings for foreclosure except by agreement of the parties. Bird *v.* Davis, 14 N. J. Eq. 468; White *v.* Williams, 3 N. J. Eq. 383; Dolman *v.* Cook, 14 N. J. Eq. 56.

Insufficiency of Complainant's Offer to Do Equity.—Under a bill filed for the reformation of a contract, the defense may be set up in the answer, without filing a cross-bill, that complainant's offer to do equity is insufficient. Billingsley *v.* Billingsley, 37 Ala. 425.

Mistake.—Under a bill for partition and account filed by two tenants in common against the heirs and administrator of a deceased tenant who executed the deed under which plaintiffs claim, the defense may be set up by answer, without filing a cross-bill, that the deed was executed through mistake and misrepresentation as to material facts, and therefore ought not to be sustained in equity. Trippe *v.* Trippe, 29 Ala. 637.

On a bill to foreclose a mortgage which by mistake included property not intended to be covered thereby, defendant may set up the mistake, and claim exemption for such property, by answer; a cross bill for that purpose is unnecessary. Ames *v.* New Jersey Franklinite Co., 12 N. J. Eq. 66, 72 Am. Dec. 385.

Want of Capacity.—This defense to the enforcement of a contract may be taken by answer, but to be available must be distinctly set up in the answer. Miller *v.* Miller, 25 N. J. Eq. 354.

Invalidity of Mortgage Sought to Be Foreclosed. — A subsequent incumbrancer may take the objection by answer that the mortgage sought to be foreclosed is of a homestead, and invalid for want of the wife's signature;

VI. Answers by Persons Under Disability—1. Married Women.—Where a wife is made a party defendant with her husband to a suit in equity she must answer jointly with him unless leave of court be granted for her to make a separate answer;[1] but in a proper case such leave will be granted on application therefor.[2]

Suppressing Answer.—If the wife, sued jointly with her husband, puts in a separate answer without having previously obtained leave therefor, it will, on motion, be suppressed.[3]

a cross-bill is not necessary for the purpose. Dye *v.* Mann, 10 Mich. 291.

Subrogation to Rights of Prior Mortgage.—On a bill to foreclose a mortgage defendant may make the defense by answer that he is entitled to be subrogated to the rights of a prior mortgagee; he is not compelled to resort to a cross-bill. Gerrish *v.* Bragg, 55 Vt. 329.

Estoppel.—The defense that defendant is estopped from maintaining a bill may be taken by answer, but if relied on must be pleaded. So an averment, in an answer to a bill to quiet title and to restrain an ejectment, that a person alleged to be a solicitor urged the institution of ejectment suit and represented that complainant knew he had no title and desired an ejectment prosecuted to judgment to enable him to have recourse against his warrantor, but which is not pleaded as matter of estoppel, is insufficient, even if established, to make out a valid defense of estoppel. Dale *v.* Turner, 34 Mich. 405.

1. Getzler *v.* Saroni, 18 Ill. 511; Robbins *v.* Abrahams, 5 N. J. Eq. 51; Collard *v.* Smith, 13 N. J. Eq. 43; Kerchner *v.* Kempton, 47 Md. 590; Lingan *v.* Henderson, 1 Bland (Md.) 236; Toole *v.* De Kay, 4 Sandf. Ch. (N. Y.) 385; Leavill *v.* Cruger, 1 Paige (N. Y.) 421; Farmer's Loan, etc., Co. *v.* Jewett, 3 Chan. Sent. (N. Y.) 53; Perine *v.* Swaine, 1 Johns. Ch. (N. Y.) 24; Ferguson *v.* Smith, 2 Johns. Ch. (N. Y.) 139; English *v.* Roche, 6 Ind. 62; Vanderveer *v.* Holcomb, 22 N. J. Eq. 558; Gee *v.* Cottle, 3 Myl. & C. 180.

But if it appears that the marriage has been entered into with a view to defraud creditors, the wife may be made to answer separately, as though she were a *feme sole*. Cooper Eq. Pl. 325; Story Eq. Pl. § 873.

2. Robbins *v.* Abrahams, 5 N. J. Eq. 51; Toole *v.* DeKay, 4 Sandf. Ch. (N. Y.) 385; Getzler *v.* Saroni, 18 Ill. 511; Kerchner *v.* Kempton, 47 Md. 590; Lingan *v.* Henderson, 1 Bland (Md.) 236.

Demand Against Wife's Separate Estate.—Generally the husband and wife must answer jointly, but where the suit relates to a demand against the wife's separate estate, and the husband is joined solely for conformation, a separate answer from the wife may be had on application therefor. Dubois *v.* Hole, 2 Vern. 613.

Where the Husband and Wife Are Living Apart, on application of either, leave may be granted to make separate answers. 1 Dan. Ch. Pr. (5th Am. ed.) 180.

Where a Wife Has a Distinct or Separate Interest in the subject-matter of the bill, or where her interest is adverse to that of her husband, or where for other reasons her interests demand it, the court on application will give her leave to answer separately. Getzler *v.* Saroni, 18 Ill. 511.

Improper Defense by Husband. — If there be ground of apprehension that the husband will not make proper defense, leave may be granted to the wife to answer separately. Robbins *v.* Abrahams, 5 N. J. Eq. 51.

Bill Taken Pro Confesso Against Husband.—If the husband suffers the bill to be taken as confessed as against him, and the wife subsequently appears, and complainant desires no more than to take the bill as confessed against her, he may proceed with the common order that she answer within forty days or that the bill be taken as confessed by her; and if she deem it necessary or proper to answer she must obtain an order for leave to answer separately, inasmuch as none but a separate answer can be filed at that stage of the suit. Toole *v.* De Kay, 4 Sandf. (N. Y.) Ch. 385.

3. Perine *v.* Swaine, 1 Johns. Ch. (N. Y.) 24; Robbins *v.* Abrahams, 5 N. J. Eq. 51; Collard *v.* Smith, 13 N. J. Eq. 43.

Answer Where Husband Complainant.—If the husband be complainant, and the wife be made defendant, she may answer separately without order of court, and without guardian or next friend.[1]

2. Infants, Lunatics, etc.—The answer of an infant is by guardian *ad litem*,[2] and that of an idiot or lunatic by his committee,[3] or, if his interests conflict with those of his committee, by guardian *ad litem*.[4] Persons who are superannuated and of weak intellect, and persons who are lunatics or idiots, but not so found by inquisition, may answer by guardian *ad litem*, like infants.[5]

3. Corporations Aggregate.—The answers of corporations aggregate are under their corporate seal,[6] but no particular form of

1. Copeland *v.* Granger, 3 Tenn. Ch. 487, *citing Ex p.* Strangeways, 3 Atk. 478; Brooks *v.* Brooks, Pr. Ch. 24; Ainslie *v.* Medlicott, 13 Ves. 266; Higginson *v.* Wilson, 11 Jur. 1071.

2. Story Eq. Pl. § 873; Dan. Ch. Pr. (5th Am. ed.) 754; Williams *v.* Wynn, 10 Ves. Jr. 159; Tappen *v.* Norman, 11 Ves. 563; Hill *v.* Smith, 1 Madd. 290; Walsh *v.* Walsh, 116 Mass. 377, 17 Am. Rep. 162; Tucker *v.* Bean, 65 Me. 352; Wakefield *v.* Marr, 65 Me. 341; Mills *v.* Dennis, 3 Johns. Ch. (N. Y.) 367; Lane *v.* Hardwicke, 6 Beav. 148.

United States Equity Rule 87 provides that the court or any judge thereof may appoint a guardian *ad litem* for infants or other persons who are under guardianship, or are otherwise incapable of suing for themselves.

In all cases where it is sought to affect the interests of infants, more especially their interest in land, by an attempt to charge it or to make partition and sale thereof, whether the application be by a stranger, by an adult codefendant, or by others claiming a right to do so, the infants must be made defendants, and it is the solemn duty of the court to select a suitable person as guardian *ad litem*. Davidson *v.* Bowden, 5 Sneed (Tenn.) 134.

3. Westcomb *v.* Westcomb, Dick. 233; Harrison *v.* Rowan, 4 Wash. (U. S.) 202; Teal *v.* Woodworth, 3 Paige (N. Y.) 470; Brasher *v.* Van Cortland, 2 Johns. Ch. (N. Y.) 242.

4. Dan. Ch. Pr. (5th Am. ed.) 754; Story Eq. Pl. §70; Snell *v.* Hyat, Dick. 287; Howlett *v.* Wilbraham, 5 Madd. 423.

5. Ld. Redfield, 103; *In re* Barber, 2 Johns. Ch. (N. Y.) 235; Newman *v.* Selfe, 11 W. R. 764; Brassington *v.* Brassington, 2 Anst. 369; Wilson *v.* Grace, 14 Ves. 172; Gason *v.* Garnier, 1 Dick. 286.

6. Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40; Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212; Haight *v.* Morris Aqueduct, 4 Wash. (U. S.) 601; Griffin *v.* State Bank, 17 Ala. 258; Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 192; McLard *v.* Linnville, 10 Humph. (Tenn.) 164; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599; Maryland, etc., Co. *v.* Wingart, 8 Gill (Md.) 170; Rex *v.* Wyndham, Cowp. 377; Cooper Eq. Pl. 325; Story Eq. Pl. 874; 1 Dan. Ch. Pr. (6th Am. ed.) 876, note 1; 3 Hoff. Ch. Pr. 239.

Making Corporate Officer Party.—Where discovery is sought from a corporation, its principal officer or agent may be joined as defendant for that purpose, though he has no individual interest, and though relief as against him cannot be had. Lindsley *v.* James, 3 Coldw. (Tenn) 478; Vermilyea *v.* Fulton Bank, 1 Paige (N. Y.) 37; Brumly *v.* Westchester County Mfg. Soc., 1 Johns. Ch. (N. Y.) 366; Dumner *v.* Chippenham, 14 Ves. 245.

Answers by Stockholders.—Stockholders who have been allowed to put in an answer in the name of a corporation cannot be regarded as answering for the corporation itself. But if it is alleged that the directors refused to attend to the corporate interests, the court will in its discretion allow a stockholder to become a defendant to protect from unfounded and illegal claims against the company his own interests and those of others who desire to join him in the defense. Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283.

By Whom Answer Filed.—Where, after a corporation has been brought into

seal is necessary.[1]

Suppressing Answer Without Seal.—If the answer is put in without seal, it may be suppressed as irregular.[2]

Dispensing With Seal.—The seal may be dispensed with, however, by leave of court, but leave should be obtained before answering.[3]

VII. Answers in Patent Cases—1. Defenses Allowed by Statute.—Certain defenses which may be taken by answer to a suit for infringement of letters patent are prescribed by statutory enactment.[4] If the thing patented is an entirety, these defenses must be addressed to the entire invention, and not to part of it.[5]

The question as to whether or not the defense of insufficient description can be set up by answer, without also alleging intent to deceive the public, is unsettled.[6]

An answer setting up that the patentee fraudulently and sur-

court, but before it has answered, a change occurs in its officers, the answer must be filed by the persons who are officers at the time it is filed. Mechanics' Nat. Bank of Newark *v.* Burnet Mfg. Co., 32 N. J. Eq. 237.

1. Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212, holding that a corporation may adopt a seal *pro hac vice*, and that "if any seal whatever is attached to the answer by the authority of the corporation it becomes their seal."

2. Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212.

3. Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212.

4. In an action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters:

1. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect;

2. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same;

3. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof;

4. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented;

5. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of patentees and dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant and with the like effect. Rev. Sts. U. S. § 4920.

5. Parks *v.* Booth, 102 U. S. 96; Bates *v.* Coe, 98 U. S. 31.

More than one patent may be included in one suit, and more than one invention may be secured in the same patent, in which cases the several defenses may be made to each patent in the suit and to each invention to which the charge of infringement relates. Bates *v.* Coe, 98 U. S. 31; Parks *v.* Booth, 102 U. S. 96.

6. Loom Co. *v.* Higgins, 105 U. S. 580. See also, as bearing on the question, Grant *v.* Raymond, 6 Pet. (U. S.) 218; Whittemore *v.* Cutter, 1 Gall. (U. S.) 429; Gray *v.* James, Pet. (C. C.) 394.

reptitiously obtained the patent for that which he knew was invented by another is insufficient unless it also alleges that the prior inventor was using due diligence to perfect his invention.[1]

The defense that the invention had been fully described and publicly made known in several patents is insufficient without a further statement that the invention had been patented.[2]

The defense of prior invention, to be available, should be set up by answer.[3]

Waiver.—But if such defense is not set up in the answer in the manner required by statute, an objection to the answer for that reason, if not taken at the hearing, cannot be taken thereafter.[4]

Prior Use.—An answer setting up sale or public use with the inventor's consent prior to the filing of application is bad if it does not also allege that such sale or use was for more than two years before the patent was applied for.[5]

1. Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583. See also Reed *v.* Cutter, 1 Story (U. S.) 590.

2. Saunders *v.* Allen, 53 Fed. Rep. 109. In this case the court said: "The answer does not set forth that this invention was patented to * * * any one, but only that it was fully described and publicly made known in several patents. * * * The statutory defense required to be set forth is that the invention had been before patented, giving the name and date. It might be described and publicly made known by a patent, and not be patented."

3. Loom Co. *v.* Higgins, 105 U. S. 580.

When Sufficiently Pleaded.—In a suit for infringement an answer which expressly denies that the patentee is the first and original inventor, and setting up prior patents in justification, sufficiently raises the question of priority of invention, though it does not allege abandonment by complainant. Pennsylvania Diamond Drill Co. *v.* Simpson, 29 Fed. Rep 288.

When an Insufficient Defense.—In a suit for infringement of a patent for making oil-cans, an answer alleging that defendant manufactured the cans under an older patent, but admitting that the cans contained the features of the first claim of the patent alleged to be infringed, amounts to a complete admission of infringement, the affirmative averment that an older patent existed being, in the absence of proof, insufficient to avoid the effect of the admission. Lane *v.* Sovereign, 43 Fed. Rep. 890.

4. Loom Co. *v.* Higgins, 105 U. S. 580; Roemer *v.* Simon, 95 U. S. 214; Zane *v.* Soffe, 110 U. S. 200.

5. Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583.

General Allegation of Prior Knowledge and Use Insufficient.—In a suit for infringement, where the answer merely avers, generally, prior knowledge and use of invention, but does not state the name or residence of any person alleged to have had prior knowledge of the patented invention, or set up a defense of the abandonment of the invention to the public by the inventor, the defenses that the invention was, with the inventor's consent, in public use at a place named for more than two years before the patent was applied for, and that the invention was previously known by persons named, are not available. Union Paper Bag Mach. Co. *v.* Newell, 11 Blatchf. (U. S.) 549.

Illustration of Defense Properly Pleaded.—An answer to a suit for infringement, that articles such as are described in the patent alleged to have been infringed "had been made and in public use and on sale by divers and sundry persons for many years prior to plaintiff's application, and that several years before complainant applied for a patent defendant had sold and manufactured articles of the pattern and design of the one filed, contains a sufficient notice of the defense of want of novelty and two years' public use to satisfy the requirements of the statute (Rev. Sts. U. S., § 4920), that such notice shall "state

2. Other Defenses.—Besides the defenses provided for by statute there are others which may be taken by answer, and which, to be available, should be so taken.[1]

VIII. JOINDER OF SEVERAL DEFENSES.—It is an established rule of equity pleading that defendant may meet the bill by several modes of defense.[2] He may demur, answer, plead, or disclaim as to different parts of the bill,[3] but these defenses must be put

the names and residences of those alleged to have invented, or to have had prior knowledge of, the thing patented." Anderson *v.* Miller, 129 U. S. 70.

Fourth and Fifth Defenses, Separate Defenses.—The fourth and fifth defenses, to suits for infringements of patents, authorized by sec. 4920 Rev. Sts. U. S., i.e., that plaintiff was not the original or prior inventor, and that the invention had been in public use for more than two years, etc., are separate and independent defenses, and each requires its appropriate notice or answer in order to let in testimony to establish the defense. Meyers *v.* Busby, 32 Fed. Rep. 670.

1. **Non-compliance of Patentee with Statutory Requirements.**—In a suit for infringement the defense that complainant's articles were not marked with the date of his patent as required by statute must be raised by answer, and cannot be raised for the first time at the hearing. Anderson *v.* Saint, 46 Fed. Rep. 760. So, also, the defense that the patented article had not fixed upon it the word "patented," as required by the statute, must be taken by answer. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 789.

Want of Knowledge of Existence of Patent.—A defendant in a suit for infringement, who relies upon want of knowledge upon his part of the actual existence of the patent, should aver the same in his answer, so that plaintiff may be duly advised of the defense. Sessions *v.* Romadka, 145 U. S. 29; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788; Allen *v.* Deacon, 10 Sawy. (U. S.) 210.

An answer setting up that neither complainant nor any one for it duly notified defendant of the existence of the patent charged to be infringed presents no defense, since it devolves on defendant to negative notice of such patent from any source whatever. Winchester Repeating Arms Co. *v.* American Buckle & Cartridge Co., 54 Fed. Rep. 703.

License to Use Invention.—The question as to whether or not defendant has a license to use an invention or interest therein under an agreement must be raised by the pleadings, or it will not be considered. Puetz *v.* Bransford, 31 Fed. Rep. 458.

But Non-patentability of an infringed claim may be availed of as a defense without setting it up in the answer. Hendy *v.* Golden-State & Miners' Iron Works, 127 U. S. 370; Dunbar *v.* Myers, 94 U. S. 187; Slawson *v.* Grand St. R. Co., 107 U. S. 649; Mahn *v.* Harwood, 112 U. S. 354.

2. Livingston *v.* Story, 9 Pet. (U. S.) 632; Dan. Ch. Pr. (5th Am. ed.) 787.

3. Livingston *v.* Story, 9 Pet. (U. S.) 632; Leacraft *v.* Demprey, 4 Paige (N. Y.) 124; Pieri *v.* Shieldsboro, 42 Miss. 493; Dan. Ch. Pr. (5th Am. ed.) 787.

So, also, a defendant may put in separate demurrers to separate parts of the bill, and likewise plead different matters to separate parts of the same bill. Dan. Ch. Pr. (5th Am. ed.) 787.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination and the facts on which the charge is founded. U. S. Rules of Equity Practice, 32.

Captions.—Where there is a demurrer to part of the bill, and answer to the remainder, the caption should be: "The demurrer of A. B., the abovenamed defendant, to part of the bill, and the answer of the said defendant to the remainder of the bill of complaint of the abovenamed plaintiff." Dan. Ch. Pr. (5th Am. ed.) 788; Braithwaite Pr. 43; Tomlinson *v.* Swinnerton, 1 Keen 9.

If the defense is a plea to part of the bill, and an answer as to the re-

in to separate and distinct parts of the bill.[1] If there is a demurrer to part of the bill, there cannot be a plea or answer to the same part without overruling the demurrer.[2] So, also, if there is a plea and answer to the same matter, the answer overrules the plea;[3] and if a disclaimer and answer are inconsistent, the matmainder, the same rule is applicable, except where the answer is in support of the plea, in which case the caption is: "The plea and answer." Dan. Ch. Pr. (5th Am. ed.) 788, 789.

1. Dan. Ch. Pr. (5th Am. ed.) 787; Souzer *v.* De Meyer, 2 Paige (N. Y.) 574; Brownell *v.* Curtis, 10 Paige (N. Y.) 210; Clark *v.* Phelps, 6 Johns. Ch. (N. Y.) 214; Bolton *v.* Gardner, 3 Paige (N. Y.) 273; Bruen *v.* Bruen, 4 Edw. Ch. (N. Y.) 640; Bank *v.* Dugan, 2 Bland (Md.) 254; Bell *v.* Woodward, 42 N. H. 181; Robertson *v.* Bingley, 1 McCord Eq. (S. Car.) 333; Joyce *v.* Gunnels, 2 Rich. Eq. (S. Car.) 259; Livingston *v.* Story, 9 Pet. (U. S.) 632; Cottington *v.* Fletcher, 2 Atk. 155; Jones *v.* Strafford, 3 P. Wms. 80.

2. Clark *v.* Phelps, 6 Johns. Ch. (N. Y.) 214; Souzer *v.* De Meyer, 2 Paige (N. Y.) 574; Leacraft *v.* Demprey, 4 Paige (N. Y.) 124; Spofford *v.* Manning, 6 Paige (N. Y.) 383; Jarvis *v.* Palmer, 11 Paige (N. Y.) 650; Chase's Case, 1 Bland (Md.) 206; Bank *v.* Dugan, 2 Bland (Md.) 254; Pieri *v.* Shieldsboro, 42 Miss. 493; Robertson *v.* Bingley, 1 McCord Eq. (S. Car.) 333; Miller *v.* Furse, 1 Bailey Eq. (S. Car.) 181; Adams *v.* Howard, 9 Fed. Rep. 347; Jones *v.* Strafford, 3 P. Wms. 81; Dan. Ch. Pr. (5th Am. ed.) 787.

But a demurrer of one codefendant cannot be deemed overruled by plea of another codefendant. Dakin *v.* Union Pac. R. Co., 5 Fed. Rep. 665.

Illustration of Rule.—Where a defendant demurred to both discovery and relief as to part of the bill, and answered as to the other part, but in his answer inserted a general denial of knowledge as to any matters of the bill other than those which he had answered, and concluded his answer with the usual traverse, the answer was held to cover a part of the discovery to which the demurrer related, and to overrule the demurrer. Spofford *v.* Manning, 6 Paige (N. Y.) 383.

Exceptions to Rule.—*United States* Supreme Court Equity Rule 37 provides that a demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

Maine Rule of Chancery Practice 6 provides that defendant may demur or plead in bar to parts of the bill, and answer the residue; or may have the benefit of a plea in bar by inserting its substance in his answer; and that demurrers, pleas, and answers will be decided on their own merits, and one will not be regarded as overruling another. See also Hartshorn *v.* Eames, 31 Me. 97; Smith *v.* Kelley, 56 Me. 65.

M. & V. Code of *Tennessee*, §§ 5061, 5062, provides that defendant may incorporate all matters of defense in his answer, and need not plead specially in any case, and that he may have all the benefit of a demurrer by relying thereon in his answer.

A defendant in chancery in *Virginia* may *answer and demur* at the same time to the same matter in the bill. Bassett *v.* Cunningham, 7 Leigh (Va.) 402. Tucker, C., *dissenting*.

3. Summers *v.* Murray, 2 Edw. Ch. (N. Y.) 205; Bolton *v.* Gardner, 3 Paige (N. Y.) 273; Souzer *v.* De Meyer, 2 Paige (N. Y.) 574; Ferguson *v.* O'Hara, 1 Pet. (U. S.) 493; Stearns *v.* Page, 1 Story (U. S.) 204; Chase's Case, 1 Bland (Md.) 217, 17 Am. Dec. 277; Cottington *v.* Fletcher, 2 Atk. 155; Blacket *v.* Langlands, 1 Anst. 14; Forum Rom. 58.

So, also, if an answer commences as an answer to the whole bill, it overrules a plea or demurrer to a part of the bill, though such part is not actually answered. Leacraft *v.* Demprey, 4 Paige (N. Y.) 124. But see *United States* Supreme Court Equity Rule 37; *Maine* Rules of Chancery Practice, 6; M. & V. Code *Tennessee*, §§ 5061, 5062, *supra*.

Where complainant, in his bill charging a fraudulent transfer of property, waives defendant's oath to the required answer, a plea in abatement "to the said bill, so far as the same makes any charges or seeks any relief against" defendant, need not be supported by an answer, as in such case —both pleadings covering the same

ter will be taken most strongly against defendant on the disclaimer.[1]

IX. Filing and Serving Answers.—**Filing.**—The answer is not strictly considered such until it is filed, and if costs for contempt in not answering have been incurred, the answer should not be filed till such costs are paid.[2] The time of filing answers is usually regulated by statute,[3] and after the regular time for filing an answer has expired it cannot be filed without special leave of court, for good cause shown.[4]

Waiver.—If complainant goes to hearing, notwithstanding the fact that the answer was not filed in time, and a decree is rendered in the cause, he must be deemed to have waived the objection that the answer was not filed in time.[5]

parts of the bill—the answer would overrule the plea *in toto*. Cheatham *v.* Pearce, 89 Tenn. 668. See also Newaygo County Mfg. Co. *v.* Stevens, 79 Mich. 398; Godwin *v.* Neustadl, 42 La. Ann. 735; Welsh *v.* Solenberger, 85 Va. 441.

1. Dan. Ch. Pr. (5th Am. ed.) 788; Ld. Redfield, 319.

2. Dan. Ch. Pr. (5th Am. ed.) 756.

Exception. — Sometimes, however, the answer is filed before costs of contempt are paid; in that case plaintiff should not take an office copy thereof, or do any other act in acceptance thereof, or he will be deemed to have waived the contempt. Dan. Ch. Pr. (5th Am. ed.) 756.

3. See Code Ala. 1886, § 3434; Rev. Sts. *Illinois* (1845), p. 95, § 18; Rev. Sts. *Maine*, p. 629, §§ 14, 15; Pub. Gen. Laws *Maryland*, 177; Code *Virginia*, 1873, ch. 167, § 35; Bowles *v.* Woodson, 6 Gratt. (Va.) 81; Bean *v.* Simmons, 9 Gratt. (Va.) 391; Preston *v.* Heiskell, 32 Gratt. (Va.) 48; Radford *v.* Fowlkes, 85 Va. 820.

Legal Holiday.—Where the last day for filing is a legal holiday, the answer may be filed on the next day on which the clerk's office is open. Feuchtwanger *v.* McCool, 29 N. J. Eq. 151.

How Time Computed.—The time intervening between the day when an order for complainant to give security is served and the day when security is given is not to be reckoned in computing the time allowed defendant to answer. Feuchtwanger *v.* McCool, 29 N. J. Eq. 151.

Granting Further Time. — Where, after demurrer is overruled, defendants are ordered to put in their answer within a certain time and pay costs, or that the bill be taken as confessed against them, the court cannot grant further time to answer on a subsequent *ex-parte* hearing, and an order granting further time on such hearing is irregular. Hurd *v.* Haynes, 9 Paige (N. Y.) 604.

Answer Filed in Time as to One Defendant Only.—Where one of several judgment creditors files an answer purporting to be in behalf of all, and the answer is filed in time as to himself but not as to the others, the answer will be permitted to stand as his answer as having been filed in time by him, but will be stricken out as to the others. Young *v.* Clarksville Mfg. Co., 27 N. J. Eq. 67.

4. Lindsey *v.* Stevens, 5 Dana (Ky.) 104. A defendant coming in after a decree *pro confesso* regularly taken upon any reasonable ground of indulgence without unnecessary delay will be permitted to answer upon payment of costs. Emery *v.* Downing, 13 N. J. Eq. 59. Though there has been a delay of a year and a half in filing answer, an answer may nevertheless be permitted if defendant shows that he has a meritorious defense, and that there is good excuse for his delay. Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. Rep. 846.

Restricted to Equitable Defenses.—If defendant fail to answer the bill within the prescribed time, and is compelled to appeal to the favor of the court for leave to file his answer, he will be restricted to an equitable defense, and will not be permitted to set up usury. Vanderveer *v.* Holcomb, 22 N. J. Eq. 556; Collard *v.* Smith, 13 N. J. Eq. 43; Remer *v.* Shaw, 8 N. J. Eq. 355; Campion *v.* Kille, 15 N. J. Eq. 476.

5. Perkins *v.* Hendryx, 31 Fed. Rep. 522.

Service.—After the answer has been filed, a copy thereof, properly endorsed, should be served on complainant's solicitor.[1]

X. STRIKING ANSWERS FROM FILE.—Answers irregular either in form or frame may, on motion, be stricken from the files.[2]

1. I Barb. Ch. Pr. (2d ed.) 146.

Time of Serving Answer.—The answer need not have been filed at the moment the copy thereof is served, but it will be sufficient if it is filed on the same day, where no proceeding has been taken in the meantime such as will render the subsequent filing of the answer improper. The service of a copy of an answer, however, is not complete until the original is actually delivered to the proper officer to be filed. Quincy *v.* Foote, 1 Barb. Ch. (N. Y.) 496.

Defendant has the whole of the last day specified in the order in which to serve his answer, and complainant's solicitor cannot enter an order to take the bill as confessed on an affidavit made, after nine o'clock in the evening, on the last day on which defendant could serve his answer. He must wait till the full time has expired before making his affidavit. Hoxie *v.* Scott, Clarke Ch. (N. Y.) 457.

Service on Clerk.—Service of an answer upon a clerk at the door of the solicitor's office in the solicitor's absence was held sufficient service where the clerk immediately carried it in. Quincy *v.* Foote, 1 Barb. Ch. (N. Y.) 496.

Service After Expiration of Time.—After the time of answering has expired defendant may serve his answer at any time before an order to take the bill as confessed is actually entered with the clerk. Hoxie *v.* Scott, Clarke Ch. (N. Y.) 457.

Where complainant is served with an answer accompanied with payment of costs ordered as a condition of being allowed to answer he cannot return the answer as having been served too late without also returning the costs. Hoxie *v.* Scott, Clarke Ch. (N. Y.) 457.

Waiver of Service.—Where it appeared from a decree that an answer duly sworn to and filed was read at the hearing without objection, it will be presumed that the answer was regularly served as an affidavit, or that service was waived. Philadelphia, etc., R. Co. *v.* Little, 41 N. J. Eq. 519.

2. Dan. Ch. Pr. (5th Am. ed.) 784. See also Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307.

Illustrations.—Thus, where a bill is filed against a husband and wife, the filing of a separate answer by the husband without an order authorizing it is irregular, and the answer will be stricken from the files. Leavitt *v.* Cruger, 1 Paige (N. Y.) 421.

So, also, after a defendant has answered the original bill, and the proofs have been taken in the cause, it is irregular and unauthorized for him either to answer the matter of the original bill anew or to put in an answer to a supplemental bill filed for the purpose of bringing additional parties before the court, to which supplemental bill he is not a party; and the answer may be stricken from the files on motion. American L. Ins., etc., Co. *v.* Bayard, 3 Barb. Ch. (N. Y.) 610.

And where the vacation of a decree has been procured upon defendant's agreement with the complainant to file an answer by a certain time admitting certain facts charged in the bill, the court, as a proper mode of enforcing the agreement, may strike from the files an answer putting in issue facts which it was agreed to admit. Pearce *v.* Daughdrill, 54 Ala. 456.

Taking Answer from Files to Prosecute for Perjury.—Application to take answer off the files in order to prosecute for perjury will not be granted unless some ground is laid to enable the court to judge of the propriety of such proceedings. Daly *v.* Toole, 1 Ir. Eq. 414. An answer cannot be taken from the file in order to prosecute defendant for perjury if it shows that the alleged perjury is in a part wholly immaterial to the merits of the case. M'Gowan *v.* Hall, Hayes 17.

Waiver of Irregularity.—Application to take an answer from the files for irregularity must be made before acceptance of the answer, otherwise the irregularity is waived, except in the case of an irregularity in the *jurat*, or an omission of the oath, or an alteration of the name of the defendant, without an order to warrant such omission, in which case there must be an express waiver of such omission. Dan. Ch. Pr. (5th Am. ed.) 785. See also Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307.

Lack of signature or oath to the answer,[1] failure to properly entitle it,[2] and unauthorized erasures and interlineations therein, are sufficient grounds for taking it off the files.[3] If the error for which an answer is taken off the files is merely one of form, the court may permit it to be corrected and the answer filed anew.[4]

An answer so evasive that it is clearly a mere delusion will be ordered to be taken off the files.[5] So also an answer filed by

An answer cannot be taken from the files after exception is taken to it. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 337; Glassington *v.* Thwaites, 2 Russ. 458; Seaton *v.* Grant, L. R. 2 Ch. 459; Bailey Washing Mach. Co. *v.* Young, 12 Blatchf. (U. S.) 199.

1. Denison *v.* Bassford, 7 Paige (N. Y.) 370; Kimball *v.* Ward, Walk. (Mich.) 439; Bernier *v.* Bernier, 72 Mich. 43.

Illustrations of Rule.—The answer of a corporation may be stricken from the files when it is not signed by its chief officer, or the seal is not attached. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 337.

An answer made in the name of three defendants as their joint and several answer, but sworn to by only two of them, will be stricken from the files as irregular, but with leave to the two to erase therefrom the name of the third and to file the answer as that of the two only. Bailey Washing Mach. Co. *v.* Young, 12 Blatchf. (U. S.) 199.

Where the copy of an answer served does not contain the signature of counsel or solicitor, or where it has no seal annexed, the complainant may apply to have the answer taken off the files for irregularity. Littlejohn *v.* Munn, 3 Paige (N. Y.) 280.

Where a joint answer of husband and wife was sworn to by husband only, it was ordered to be taken off the files. New York Chemical Co. *v.* Flowers, 6 Paige (N. Y.) 654.

An answer taken by commissioners will be taken from the files if the *jurat* fails to show where it was sworn. Henry *v.* Costello, 1 Hogan 274.

The answer of a foreigner who does not understand English may be sworn to in the language he speaks, and be filed with an English translation; if it be filed in English only, it will be stricken from the files. Hayes *v.* Lequin, 1 Hogan 274.

Waiver of Signature or Oath.—An answer will not be stricken from the files for lack of signature where signature is waived by the replication. Bernier *v.* Bernier, 72 Mich. 43.

Though an answer must be verified by affidavit, and though complainant may treat it as a nullity if this be omitted, and cause it to be taken from the files, yet if he proceeds with the cause he cannot avail himself of such defect in the appellate court. Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494.

If the oath to an answer be waived, complainant cannot apply to have it taken off the files on the ground that defendant knows it to be false. His remedy in such case is to ask the court at the hearing to have defendant charged personally with the costs to which complainant has been subjected by such false pleading. Denison *v.* Bassford, 7 Paige (N. Y.) 370.

2. Dan. Ch. Pr. (5th Am. ed.) 732; Fulton County *v.* Mississippi R. Co., 21 Ill. 337; Griffiths *v.* Wood, 11 Ves. 62.

In *Alabama* it has been held that the omission of the name of one of the defendants in the title of a cause is not sufficient ground to strike an answer from the files. McLure *v.* Colclough, 17 Ala. 89.

3. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 337.

Interlineation in Material Part.—But the fact that the answer was interlined in a material part before it was filed is not ground to take it off the files, if it does not appear that it was interlined after it was sworn to. McLure *v.* Colclough, 17 Ala. 89.

4. Bailey Washing Mach. Co. *v.* Young, 12 Blatchf. (U. S.) 199.

5. Smith *v.* Searle, 14 Ves. 415; Tomkin *v.* Lethbridge, 9 Ves. 179; Lynch *v.* Lecesne, 1 Hare 626; Read *v.* Barton, 3 K. & J. 166; Brooks *v.* Purton, 1 Y. & C. C. C. 278; Spivey *v.* Frazee, 7 Ind. 661; Travers *v.* Ross, 14 N. J. Eq. 254; Phillips *v.* Overton, 4 Hayw. (Tenn.) 292.

Contra.—In the case of Marsh *v.* Hunter, 3 Madd. 226, a motion to take

a person not named in the bill nor admitted as a defendant.[1] If an answer contains scandalous matter it may on consent of the parties be taken off the files.[2]

Where any part of an answer may be regarded as responsive to any part of the bill, it will not be ordered off the files.[3]

XI. COMPELLING ANSWER BY ATTACHMENT.—In most jurisdictions there are statutes and rules of court providing for the issuance of attachments to compel a defendant to answer where he has failed to do so within the time required by law.[4]

an answer off the files because it was delusive, as answering only a few facts stated in the bill, was denied. See also White *v.* Howard, 2 DeG. & S. 223. In Olding *v.* Glass, 1 Y. & J. 340, the court refused to order an answer to be taken off the files, on the alleged ground that it was illusory, the defendant merely stating that he had no knowledge of any of the matters in the bill mentioned, and left the plaintiff to except.

1. Putnam *v.* New Albany, 4 Biss. (U. S.) 365.

2. Tremaine *v.* Tremaine, 1 Vern. 189; Walton *v.* Broadbent, 3 Hare 334; Jewin *v.* Taylor, 6 Beav. 120; Clifton *v.* Bentall, 9 Beav. 105; Makepeace *v.* Romieux, 8 W. R. 687; Barritt *v.* Tidswell, 7 W. R. 85; V. C. K., Dan. Ch. Pr. (5th Am. ed.) 785.

3. Squier *v.* Shaw, 24 N. J. Eq. 74; Travers *v.* Ross, 14 N. J. Eq. 257; Feuchtwanger *v.* McCool, 29 N. J. Eq. 151; Carpenter *v.* Gray, 38 N. J. Eq. 135; May *v.* Williams, 17 Ala. 23.

4. **United States Equity Rule 18** provides that, unless the time be otherwise enlarged on motion for cause shown, defendant shall file his plea, demurrer, or answer to the bill in the clerk's office on the rule day next succeeding that of entering his appearance; and that if plaintiff require any discovery or answer to enable him to obtain a proper decree, he shall, on defendant's failure to answer, be entitled to process of attachment against the defendant to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom unless, upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading or fully answering the bill within a period to be fixed by the court or judge, and undertaking to speed the cause.

Alabama. — If the bill is filed for discovery, or answer on oath is not waived, answers from resident defendants may be compelled by attachment. Code, § 3435. Such attachments are executed by the arrest of the defendant and bringing him before a chancellor, circuit judge, or register, who may discharge him on his giving bond with surety in such sum as may be fixed by such chancellor, circuit judge, or register, to be approved by the arresting officer, payable to the register of the court in which the bill is filed, and conditioned that he will file a full answer to the bill within a time to be prescribed by the officer before whom such defendant is brought; which bond must be returned with the attachment within the same time after service and in the same manner, if by mail, as a summons is required to be returned under the provisions of this chapter. Code, § 3436.

Florida.—The complainant may, however, instead of causing a decree *pro confesso* to be entered, if he requires any discovery or answer to enable him to obtain a proper decree, have process of attachment against the defendant to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer or otherwise complying with such order as the court may direct as to pleading to or fully answering the bill within a period to be fixed by the court, and undertaking to speed the cause. Rev. Sts. Fla. § 1447.

Illinois.—If defendant in a proceeding in equity, having been served with summons or personally notified, as provided in this act, shall fail or refuse to appear or answer the bill of complaint, he may be attached and otherwise proceeded against according to the practice in equity in cases of contempt. Rev. Sts. Ill. 1893. p. 221, § 41. See also Rev. Sts. Ill. 1893, p. 220, § 24.

XII. TAKING BILL PRO CONFESSO.—Another remedy in case of the defendant's failure to answer is that of taking the bill *pro confesso*.[1]

XIII. EXCEPTIONS TO ANSWERS — 1. Definition and Object. — Exceptions are allegations in writing, stating the particular points or matters in respect to which complainant considers the answer

Maryland.—Where a bill for discovery is filed against a defendant of full age, and the subpœna shall be returned summoned, and the defendant shall fail to appear, or, after appearance, shall fail to answer, an attachment of contempt may issue; and if the said attachment is returned served, and the defendant fails to appear or answer, as the case may be, the court, upon being satisfied of the service of both subpœna and attachment, may pass a decree *pro confesso*; or if in such case the attachment is returned *non est inventus*, an attachment with proclamations may issue; and if the defendant shall fail to appear or answer, as the case may be, the court, upon being satisfied of the service of the subpœna, may pass a decree *pro confesso*, without examining the plaintiff, in its discretion; and such decree, in either case, shall have all the effect, in evidence or otherwise, that the answer of such defendant confessing all the allegations in the bill would have. Pub. Gen. Laws Md. p. 189, § 172.

If any defendant, after appearance, shall fail to answer within the time prescribed by the rules of court, an attachment may issue against such defendant to compel him to answer, and he may be committed as for a contempt for not answering; and if the attachment shall be returned served, and the defendant does not answer by the first day of the term next after that to which the attachment was returnable, or if the attachment be returned *non est*, an attachment with proclamations may issue; and if the defendant shall fail to answer by the first day of the term next after that to which the last named attachment was returnable, the court, in either case, may pass a decree *pro confesso* against such defendant, or may order testimony to be taken *ex parte;* any defendant under this or the preceding section may answer at any time before final decree, on such terms as the court may prescribe. Pub. Gen. Laws Md. p. 190, § 174.

So, also, it has been held that a defendant whose answer on exceptions has been held insufficient, or who has on demurrer or plea failed to protect himself from answering as the bill requires, may be attached and compelled to answer. Buckingham *v.* Peddicord, 2 Bland (Md.) 447.

Mississippi.—When a defendant shall fail to answer within the time required by law, the complainant, instead of taking a decree *pro confesso*, may obtain from the chancellor an order for an attachment, returnable in term-time, to compel such defendant to answer; but affidavit must first be made and filed in the cause by the complainant or his solicitor, that such answer is necessary for the ends of justice, as he believes. Ann. Code Miss. 1892, § 537.

Tennessee. — If the defendant upon whom process has been served fails to appear and defend in the time required by law, the bill may be taken for confessed, or the complainant may proceed by process of contempt to compel an answer. M. & V. Code Tenn. § 5103. The only process of contempt is an attachment, which is issued upon order of the chancellor at the instance of the complainant, upon the return of the subpœna duly served by the proper officer, or upon affidavit by him of such service. M. & V. Code Tenn. § 5104. See also §§ 5106, 5107, 5109.

Virginia.—Although a bill be taken for confessed as to any defendant, the plaintiff may have an attachment against him, or an order for him to be brought in to answer interrogatories. No plea or demurrer shall be received after such attachment, unless by order of court upon motion. Code Va. 1887, § 3287.

West Virginia.—In this state the section of the statute relating to attachments (Code 1887, p. 789, § 48) is identical with the section of the *Virginia* Code above set forth.

1. Dan. Ch. Pr. (5th Am. ed.) 517; Langdell Eq. Pl. § 84.

As to taking bills *pro confesso*, see article DECREES.

insufficient as a response to the bill, or scandalous, or impertinent.

The Object of exceptions is to direct the attention of the court to the points excepted to, and to take its opinion thereon before further proceedings are had, to the end that, if the answer is insufficient, a better answer may be compelled, or if it is scandalous or impertinent, the scandalous or impertinent mattter may be expunged.[1]

They Are Therefore of Two Kinds, (*a*) for insufficiency, (*b*) for scandal or impertinence.[2]

2. Exceptions for Insufficiency — *a.* WHEN THEY LIE. — If the answer of the defendant is conceived to be insufficient, the objection should be taken by exceptions.[3] And, it seems, if the complainant does not except he cannot rely upon the silence of the respondent in relation to any material allegation, but must prove it.[4]

1. Barb. Ch. Pr. (2d ed.) 176; Richardson *v.* Donehoo, 16 W. Va. 703; *followed in* Arnold *v.* Slaughter, 36 W. Va. 589; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 365. The object of exceptions to an answer for insufficiency is to obtain discovery, Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599.

2. As to exceptions for scandal and impertinence, see article SCANDAL AND IMPERTINENCE.

Where, by One Exception to an Answer, the defendant is called upon to answer as to his knowledge of a fact, he cannot, by another exception, be compelled to answer whether or not he has sworn differently in relation to such knowledge, in a former proceeding. Mechanics' Bank *v.* Levy, 3 Paige (N. Y.) 477.

3. Arnold *v.* Styles, 2 Blackf. (Ind.) 391; Ryan *v.* Melvin, 14 Ill. 68; Brown *v.* Scottish American Mortgage Co., 110 Ill. 235; Lane *v.* Roche, Riley Eq. (S. Car.) 215; Blaisdell *v.* Stevens, 16 Vt. 179; Trotter *v.* Bunce, 1 Edw. Ch. (N. Y.) 573; Stat. Mich. (1882) § 8257.

Omissions in an answer are not cured by failure to except. Doughty *v.* Doughty, 7 N. J. Eq. 282.

Motion to Compel Defendant to Answer Interrogatories.—A defendant cannot, by a motion to that effect, be compelled to answer certain interrogatories annexed to the bill. If the answer is deemed insufficient, the complainant must present exceptions. Fuller *v.* Knapp, 24 Fed. Rep. 100.

Demurrer Does Not Amount to Answer. —No demurrer amounts to an answer in equity; hence, if there be any answer, however defective, the complainant must either file exceptions or a replication, or set down the cause for hearing upon bill and answer. Travers *v.* Ross, 14 N. J. Eq. 254; Stone *v.* Moore, 26 Ill. 165; Squier *v.* Shaw, 24 N. J. Eq. 74.

Taking Exceptions Implies an Answer. —Upon appeal it is too late for the appellee to say that the paper filed as an answer was no answer. He treated it as an answer by taking exceptions to it as the statute required. Holly *v.* Powell, 63 Ill. 139. But see Mayer *v.* Tyson, 1 Bland (Md.) 559.

4. Warfield *v.* Gambrill, 1 Gill & J. (Md.) 503; Pegg *v.* Davis, 2 Blackf. (Ind.) 281; Coleman *v.* Lyne, 4 Rand (Va.) 454; Squier *v.* Shaw, 24 N. J. Eq. 74.

Defendant's Admissions not Available. —"The rule in future will be understood as settled, that where the answer is not responsive to a material allegation of the bill, the plaintiff may except to it as insufficient, or may move to have that part of the bill taken for confessed; but if he does neither, he shall not, on the trial, avail himself of any implied admissions by the defendant; for where the defendant does not answer at all, the plaintiff cannot take his bill for confessed, without an order of the court to that effect, and having it served upon the defendant; and this is the only evidence of his admission." Per Taylor, Ch., in Dangerfield *v.* Claiborne, 2 Hen. & M. (Va.) 17.

Burden of Proof.—"If a bar set up in the answer be insufficient as such, the

Material Allegation or Interrogatory Unanswered.—But exceptions will only be allowed where some material[1] allegation, charge, or interrogatory in the bill has not been fully answered.[2]

Confined to Discovery.—Exceptions are confined to matters of discovery,[3] where the complainant must rely on the defendant to prove his case.[4]

complainant would be entitled to except as for want of a full answer; and to avoid answering the exceptions, the defendant, in such case, would require leave of court before he could amend the bar. If, instead of excepting, the complainant should go to proof, the burden would be on him to prove the bill and on the defendant to prove the bar, each being entitled to examine the other as a witness." Per Bradley, C. J., in Gaines *v.* Agnelly, 1 Woods (U. S.) 238.

Amount of Proof.—Where an answer is objectionable as insufficient, but no exceptions are taken to it, the effect is to put the complainant to proof of the allegations in the bill, though the same amount of proof is not required. Savage *v.* Benham, 17 Ala. 119; *citing* Goodwin *v.* McGehee, 15 Ala. 232; Waters *v.* Creagh, 4 Stew. & P. (Ala.) 410; Wilkins *v.* Woodfin, 5 Munf. (Va.) 183.

1. **Frivolous Exceptions.**—Frivolous exceptions, even though technical ly well taken, are discountenanced. Johnson *v.* Tucker, 2 Tenn. Ch. 244; Del Pont *v.* De Fastet, 1 T. & R. 486; Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 393. See Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210.

Verbal Criticism—Slight Defects, etc.—Exceptions for insufficiency will not be allowed when founded upon mere verbal criticism, slight defects, or omissions in matter not material. Cleaves *v.* Morrow, 2 Tenn. Ch. 592; Baggott *v.* Henry, 1 Edw. Ch. (N. Y.) 7. In the last case McCoun, V.-Ch., expressed himself thus: "I wish to have it understood that whilst, on the one hand, I shall always hold a defendant to a full, frank, and explicit disclosure of all matters material or necessary to be answered, whether resting within his own knowledge or upon his information and belief, so, on the other hand, I mean as far as lies in my power to discourage the taking of those exceptions which are founded upon mere verbal criticism, slight defects, or omissions in matter not material to the cause, and when it is evident the defendant can have no design or intention to suppress the truth, or evade a full and fair answer; and whenever exceptions of the latter character are brought before me I shall not hesitate to overrule them and impose payment of all such costs as a litigious and vexatious proceeding deserves."

Allegations Neither Admitted Nor Denied.—If an exception be taken to an answer in chancery upon the ground that certain allegations in the bill are neither admitted nor denied, it becomes necessary to inquire whether the facts charged in the allegations are material, and might, if established, contribute to support the equity of the complainant. If they will not, the omission to answer the allegations is not a good ground for exceptions to the answer. Hardiman *v.* Harris, 7 How. (U. S.) 726.

Correctness of Arithmetical Problem.—An exception for insufficiency on the ground that defendant has not answered as to the correctness of a mere arithmetical proposition will not be allowed. McIntyre *v.* Union College, 6 Paige (N. Y.) 239.

No Occasion for Controversy.—The complainant cannot by means of an exception to the answer make that a matter of controversy as to which, according to the frame of his bill, no controversy can arise. Gleaves *v.* Morrow, 2 Tenn. Ch. 592.

2. Stafford *v.* Brown, 4 Paige (N. Y.) 88; Richardson *v.* Donehoo, 16 W. Va. 703; West *v.* Williams, 1 Md. Ch. 358.

3. U. S. *v.* McLaughlin, 24 Fed. Rep. 823; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599.

Discovery Must Be Beneficial.—Exceptions for insufficiency are proper only for obtaining a discovery which would be beneficial to the complainant. Clute *v.* Bool, 8 Paige (N. Y.) 83; Fay *v.* Jewett, 3 Edw. Ch. (N. Y.) 323; Davis *v.* Mapes, 2 Paige (N. Y.) 105.

4. **Not Applicable to Bills for Relief.**—This doctrine does not apply to bills

Under General Interrogatory.—The practice in many states allows exceptions to be taken to an answer that fails to notice material charges and statements in the bill under the general interrogatory, though no special interrogatories be introduced.[1]

Several Defendants.—Where several defendants answer separately, exceptions should be taken to each answer.[2] And if a defendant, answering jointly with another, dies, exceptions may be taken to the answer, as being that of the survivor only.[3]

Setting Up Questions of Law.—Where an answer sets up questions of law instead of facts, exceptions are well taken.[4]

Waiver.—The right to except may be waived.[5]

b. WHEN THEY DO NOT LIE—**New Matter.**—A substantive defense not responsive to the inquiries of the bill, but consisting of new matter exclusively, is not the subject of exceptions.[6]

for relief. McClaskey *v.* Barr, 40 Fed. Rep. 559. See U. S. *v.* McLaughlin, 24 Fed. Rep. 823.

1. Miles *v.* Miles, 27 N. H. 440; Tucker *v.* Cheshire R. Co., 21 N. H. 29; M. E. Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 65; Bank of Utica *v.* Messereau, 7 Paige (N. Y.) 517; Cuyler *v.* Bogert, 3 Paige (N. Y.) 186. See also Langdon *v.* Goddard, 3 Story (U. S.) 13; Brakeley *v.* Tuttle, 3 W. Va. 129.

2. 1 Dan. Ch. Pr. (5th ed.) 674; Sydolph *v.* Monkston, 2 Dick. 609.

3. 1 Dan. Ch. Pr. (5th ed.) 764; Lord Herbert *v.* Pusey, 1 Dick. 255.

4. Craig *v.* People, 47 Ill. 487.

5. **Waiver of Exceptions Judicious at Times.** — "The plaintiff may, if he choose, waive his right to except; and it is always most judicious to do so where his proofs are ample and at hand and the character or conduct of the defendant indicates that he is not altogether trustworthy upon oath; for in such cases he will attain his object much sooner and better by taking the answer at once, as he can get it, and proceeding directly to collect proof, without loss of time, than by stopping to take exceptions." Per Bland, C., in Hagthorp *v.* Hook, 1 Gill & J. (Md.) 274.

Taking Bill as Confessed Waives Exceptions.—It is a waiver of exceptions if complainant takes his bill as confessed as to those points not responded to. Griffith *v.* Depew, 3 A. K. Marsh. (Ky.) 177, 13 Am. Dec. 141.

Moving to Amend Bill Waives Exceptions.—If a plaintiff excepts to an answer and afterward moves to amend his bill, that operates as a waiver of the exceptions to the answer; for the plaintiff by the amendments may strike out the very passages excepted to. De La Torre *v.* Bernales, 4 Madd. 395.

Waiver of Exceptions to First Answer.—After objecting to the filing of an answer because verified by a clerk in another state, plaintiff offered to reply to it and filed an amended petition, and also waived any objections to a subsequent answer of the same party. Any of these acts should have been deemed a waiver of objections to the first answer, especially as no exception was taken until the submission of the case. Mason *v.* Mason, 5 Bush (Ky.) 190.

6. Bower Barff Rustless Iron Co. *v.* Wells Rustless Iron Co., 43 Fed. Rep. 391; Adams *v.* Bridgewater Iron Co., 6 Fed. Rep. 179; Spencer *v.* Van Duzen, 1 Paige (N. Y.) 555.

Exceptions Lie Only for Matters Alleged in Bill.—Exceptions do not lie to an answer because it does not state matter set forth in avoidance fully and explicitly. They lie only for matters alleged in the bill and not sufficiently answered. Lanum *v.* Steel, 10 Humph. (Tenn.) 280; Stafford *v.* Brown, 4 Paige (N. Y.) 88.

"A defendant may allege any facts in his answer, as an avoidance, which gives rise to an equity that constitutes a good defense, as payment, a release, etc.; and however generally or darkly such matter may be stated, the plaintiff cannot except because they form no part of that response he had called for; and if such statements are so obscure as to be of no avail it can be of no injury to him. The defendant alone

Failure to Answer, Admission of Truth.—Nor are exceptions for insufficiency proper where by statute the failure to answer a material averment admits its truth.[1]

Interrogatory as to Books and Papers.—Where the bill contains an interrogatory as to books and papers which the defendant does not answer, an exception for this reason should not now be taken.[2]

Interrogatories Substantially Answered.—And where interrogatories are substantially answered, exceptions will be allowed with reluctance.[3]

Bill Inexplicit.—If the bill is inexplicit and ambiguous, exceptions to the answer should not be allowed.[4]

Objection of Res Judicata.—And the objection of *res judicata* to the defenses set up by an answer cannot be taken by exceptions.[5]

Disclaimer.—Exceptions will not be allowed to a simple disclaimer.[6]

Irregularities in Practice.—They do not lie for irregularities in practice.[7]

bears the consequence of the lame and imperfect manner in which he puts forward his own defense." Per Bland, C., in Salmon *v.* Clagett, 3 Bland (Md.) 141.

Answer Stating Immaterial Fact—Improper Interrogatories.—Exceptions to an answer will not be sustained because it states a fact totally immaterial; nor because it answers interrogatories which were improperly put, and which the party was not bound to answer. Conway *v.* Turner, 8 Ark. 356.

1. Richardson *v.* Donehoo, 16 W. Va. 685, holding, however, that in such a case an answer may be excepted to on the ground that its denials are not sufficiently specific.

What is Admitted.—Under such a statute only averments of facts charged to be or clearly within the defendant's knowledge are admitted by failure to deny. Cowen *v.* Alsop, 51 Miss. 158.

2. 1 Dan. Ch. Pr. (5th ed.) 760; Law *v.* London Indisputable L. Policy Co., 10 Hare App. 20; Rochdale Canal Co. *v.* King, 15 Beav. 11; Kidger *v.* Worswick, 5 Jur. N. S. 37; Barnard *v.* Hunter, 1 Jur. N. S. 1065; Pifford *v.* Beeby, L. R. 1 Eq. 623. But see Hudson *v.* Grenfell, 3 Giff. 388.

Failure to Answer as to Particular Documents Exceptable.—But if the interrogatory is as to particular documents, a failure to answer this would be exceptable. Catt *v.* Tourle, 18 W. R. 966.

3. Read *v.* Woodruffe, 24 Beav. 421.

Separate Questions Not Separately Answered.—If the whole answer, taken together, is a substantial reply to the whole interrogatory, that is sufficient, though each separate question may not be separately answered. Mott *v.* Hall, 41 Ga. 117.

4. The court must see by referring to the bill, in connection with the exception, that the precise matters as to which a further answer in the bill is sought are stated in the bill, or that such an answer was called for by interrogatories. A plaintiff should not be allowed to except to an answer for insufficiency when his own bill is inexplicit and ambiguous, and it is consequently doubtful what information he seeks to obtain from the defendant. West *v.* Williams, 1 Md. Ch. 358.

Failure to Append Footnote to Bill.—The complainant's omission to append a footnote to his bill precludes him from claiming advantage of the failure of the defendant to answer any of its allegations. Sprague *v.* Tyson, 44 Ala. 338.

5. Thrifts *v.* Fritz, 101 Ill. 457.

6. Remedy for Disclaimer — Accompanied by Answer.—Where defendant files a mere disclaimer, the remedy of the complainant who is entitled to an answer is to move to have the disclaimer taken off the files. If, however, it be accompanied by an insufficient answer, that may be excepted to. Ellsworth *v.* Curtis, 2 Chan. Sent. (N. Y.) 72.

7. Thus, the verification of an answer, taken abroad, was alleged to be not properly authenticated; where-

Oath.—Nor are they applicable to an answer not under oath,[1] nor where the oath has been waived.[2]

Answer of Corporation.—Neither can exception be taken to the answer of a corporation under its corporate seal.[3]

Answer of Attorney-General.—Exceptions will not lie to the answer of the Attorney-General.[4]

Answer of Infant.—Likewise they cannot be taken to the answer of an infant.[5]

Guardians.—Exceptions are not applicable to the answer of a guardian of a person of unsound mind, against whom no commission has issued.[6]

Answer in Aid of Plea.—Nor will they lie to an answer in aid of a plea.[7]

Answer Used as Plea.—Nor where the answer is used as a plea in bar.[8]

upon the complainant excepted to certain portions of the answer for insufficiency, relying upon its being no answer by reason of the defect in its verification. *Held*, that he had mistaken his remedy, which was by moving to take it from the files, not by excepting. Vermilya *v.* Christie, 4 Sandf. Ch. (N. Y.) 376.

1. Goodwin *v.* Bishop, 145 Ill. 421; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 366; Brown *v.* Scottish American Mortgage Co., 110 Ill. 235. Mr. Hoffman says: "The general rule is that exceptions cannot be taken to an answer without oath, or upon protestation of honor." 1 Hoff. Ch. Pr. 240, note, *citing* Hill *v.* Earl of Bute, 2 Fowl. 11.

2. Mix *v.* People, 116 Ill. 265; Sheppard *v.* Akers, 1 Tenn. Ch. 326; McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543; U. S. *v.* McLaughlin, 24 Fed. Rep. 823.

New Jersey.—But see Ryan *v.* Anglesea R. Co. (N. J. 1888), 12 Atl. Rep. 539, where it was held that under *New Jersey* statutes a person calling for an answer not under oath might nevertheless except to the answer filed.

3. Wallace *v.* Wallace, Halst. Dig. (N. J.) 173; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 365. Exceptions to the answer of a corporation under its corporate seal alone, as a discovery, will not lie, and as a pleading would be a useless form. Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599.

Corporation Required to Answer, Though Not Under Oath.—In Gamewell Fire Alarm Tel. Co. *v.* Mayor, 31 Fed. Rep. 312, it was held that although a corporation cannot be compelled to answer to a bill in equity under oath, it can be required to answer and must answer fully. Exceptions in this case were sustained. And see Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 393; Colgate *v.* Compagnie Française, 23 Blatch. (U. S.) 88, 23 Fed. Rep. 82; Hale *v.* Continental L. Ins. Co., 16 Fed. Rep. 718; Kittredge *v.* Claremont Bank, 1 Woodb. & M. (U. S.) 244, 3 Story (U. S.) 590.

Voluntary Answer of Corporation Officer.—A complainant is not entitled to file exceptions to the voluntary answer of a corporation officer to a judgment creditor's bill, especially when the answer contains an express denial of the allegations of the bill. McCreery *v.* Circuit Judge, 93 Mich. 463.

4. Davison *v.* Att.-Gen., 5 Price 398.

5. Lucas *v.* Lucas, 13 Ves. Jr. 274; Copeland *v.* Wheeler, 4 Bro. C. C. 256; Leggett *v.* Sellon, 3 Paige (N. Y.) 84. See Bulkley *v.* Van Wyck, 5 Paige (N. Y.) 536.

6. Micklewaithe *v.* Atkinson, 1 Coll. 173.

7. Leftwich *v.* Orne, 1 Freem. Ch. (Miss.) 207.

8. Under the new rule in equity, 39th, where the answer sets up a bar to the whole bill, and claims the benefit of it as of a plea in bar, it is no longer a ground of exception that it does not fully answer the allegations of the bill. Gaines *v.* Agnelly, 1 Woods (U. S.) 238.

c. PLEA STANDING FOR ANSWER.—Where a plea is ordered to stand for an answer, a direction is frequently inserted giving the plaintiff liberty to except.[1]

Express Leave.—And exceptions cannot be taken unless this leave be expressly given.[2]

Prohibiting Exceptions.—The order may of course prohibit the complainant from taking exceptions.[3]

d. ANSWER ACCOMPANIED BY PLEA OR DEMURRER.—Where an answer is accompanied by a plea or demurrer to a part of the

1. 1 Dan. Ch. Pr. (5th ed.) 701; *citing* Glover *v.* Weedon, 3 Jur. N. S. 903; Dean *v.* Webster, 15 W. R. 395.

"Where the complainant is allowed to except to the answer for insufficiency, the order allowing the plea to stand for an answer, with leave to except thereto, only implies that the plea contains matters which, if put in the form of an answer, would have been available as a defense to the whole or a part of the matters which it professes to cover. But the complainant is permitted to except to it, as an answer, because he is entitled to a further discovery in reference to matters of the bill." McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543.

Complainant Not Obliged to Except.—Where a plea is allowed to stand for an answer, the complainant is not obliged to take exceptions, although the order gives him leave so to do. McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543.

2. Order Silent as to Exceptions.—Where the defendant pleaded to the whole bill, and, on arguing the plea, it was ordered to stand for an answer, without saying one way or the other whether the plaintiff might except, it was held that he could not, for the court, in ordering the plea to stand for an answer, must be understood to have meant a sufficient answer, an insufficient answer being as none. Sellon *v.* Lewen, 3 P. Wms. 239.

If a Plea is Ordered to Stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless, by the order, liberty to except is given to the plaintiff. Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242; Coke *v.* Wilcocks, Mos. 73; Maitland *v.* Wheeler, 3 Atk. 814. And see Orcutt *v.* Orms, 3 Paige (N. Y.) 459; McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543; Goodrich *v.* Pendleton, 3 Johns. Ch. (N. Y.) 384; Meeker *v.* Marsh, 1 N. J. Eq. 198.

Exceptions to Part of Bill Not Covered by Plea.—Where the plea is to part only of a bill, and it is accompanied by an answer to the rest, an order that it may stand for an answer, without giving the plaintiff liberty to except, will not preclude the plaintiff from excepting to the answer to that part of the bill which is not covered by the plea. 1 Dan. Ch. Pr. (5th ed.) 700; Coke *v.* Wilcocks, Mos. 73; Ld. Red. 304; Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242.

Complainant May Move for Leave to Except.—In Brien *v.* Jordan, 1 Tenn. Ch. 625, it was held, that inasmuch as the practice of allowing a plea to stand for an answer was unusual in *Tennessee*, the complainant might move for leave to except, and the defendant for leave to file a more complete answer, if either saw proper so to do.

3. Liberty Qualified.—Thus the liberty to except is sometimes qualified, so that the defendant may be protected from any particular discovery he ought not be called upon to make. Pusey *v.* Desbouvrie, 3 P. Wms. 315; Alardes *v.* Campbel, Bunb. 265; Pearse *v.* Dobinson, L. R. 1 Eq. 241; King *v.* Holcombe, 4 Bro. C. C. 439. Or as to matters which he is not legally bound to answer. Orcutt *v.* Orms, 3 Paige (N. Y.) 459; Brereton *v.* Gamul, 2 Atk. 240; Bayley *v.* Adams, 6 Ves. Jr. 586.

Plea Disallowed on Technical Defect.—Where a plea, which constituted a full defense to a particular part of the bill, was disallowed on the ground of technical defect or informality in the manner of pleading, the court permitted it to stand for an answer, and prohibited the complainant from calling, by exceptions, for a further answer to that part of the bill. Leacraft *v.* Demprey, 4 Paige (N. Y.) 124.

bill, exceptions cannot be taken to the answer till the plea or demurrer has been argued, because by so excepting the complainant would admit the validity of the plea or demurrer.[1]

Plea Confined to Relief Prayed.—But where the plea is confined to the relief prayed, it seems that exceptions may be taken to the accompanying answer before the plea is set down for argument.[2]

Plea or Demurrer Overruled. — After the plea or demurrer accompanied by an answer is overruled, the complainant, if he desires a further answer, must take exceptions.[3]

—— **Allowed.**—And so he may except upon their allowance, or upon the allowance of a partial demurrer, or upon the overruling of a partial plea.[4]

3. Form.—Care should be exercised in drawing the exceptions, since, if mistakes occur therein, no new exceptions can properly be added.[5] They should be in writing,[6] signed by counsel,[7] and

1. 1 Dan. Ch. Pr. (5th ed.) 691; Braithwaite Pr. 127, 128; Darnell *v.* Reyny, 1 Vern. 344; Siffkin *v.* Manning, 9 Paige (N. Y.) 222.

Motion to Strike Case from Calendar.—When the complainant before the argument of the plea had filed exceptions for insufficiency in the accompanying answer, it was held that, when the plea was set down for argument, the defendant might have moved to strike the case from the calendar, on the ground that the filing of exceptions admitted the goodness of the plea. Brownell *v.* Curtis, 10 Paige (N. Y.) 210. In this case the language of Lord Redesdale is given thus: "Where a defendant pleads or demurs to any part of the discovery sought by the bill, and answers likewise, if the complainant takes exceptions to the answer before the plea or demurrer has been argued and disallowed, he admits the plea or demurrer to be good; for unless he admits it to be good it is impossible to determine whether the answer is sufficient or not."

In Boyd *v.* Mills, 13 Ves. Jr. 85, where the demurrer was set down for argument after exceptions had been filed to the answer, the application was to strike it from the calendar; and the court gave the complainant leave to withdraw the exceptions, on payment of the costs of the motion, and to again except if the demurrer were allowed.

2. 1 Dan. Ch. Pr. (5th ed.) 691, *citing* Pigot *v.* Stace, 2 Dick. 496; Sidney *v.* Perry, 2 Dick. 602.

3. Kuyper *v.* Reformed Dutch Church, 6 Paige (N. Y.) 570; Siffkin *v.* Manning, 9 Paige (N. Y.) 222; Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 196.

Exceptions Proper as to those Parts Not Covered by Demurrer.—If a provision, that complainant have leave to except to the answer to that part of the bill attempted to be covered by the demurrer, be inserted in the order overruling the demurrer, this does not deprive complainant of his right to except to the answer to that part of the bill which the demurrer did not profess to cover. Siffkin *v.* Manning, 9 Paige (N. Y.) 222.

Time.—Twenty days were allowed complainant within which to except, in Summers *v.* Murray, 3 Edw. Ch. (N. Y.) 205; Siffkin *v.* Manning, 9 Paige (N. Y.) 222; Bragg *v.* Witcomb, Walk. (Mich.) 307. Thirty days were allowed in Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 196.

4. 1 Dan. Ch. Pr. (5th ed.) 761; Cotes *v.* Turner, Bunb. 123; Story's Eq. Pl. § 866.

5. 1 Dan. Ch. Pr. (5th ed.) 764, referring to Partridge *v.* Haycraft, 11 Ves. Jr. 570.

Amendments.—There are cases, however, allowing the exceptions to be amended on the ground of mistake. Dolder *v.* Bank of England, 10 Ves. Jr. 284; Bancroft *v.* Wentworth, *cited* in note to 10 Ves. Jr. 285; Northcote *v.* Northcote, 1 Dick. 22.

6. 1 Dan. Ch. Pr. (5th ed.) 763; *citing* Beames 78, 181.

7. Candler *v.* Partington, 6 Madd. 72; Yates *v.* Hardy, Jac. 223; Hitchcock *v.* Rhodes, 42 N. J. Eq. 495;

properly entitled,[1] else they may be suppressed.

Should be Specific.—Exceptions for insufficiency must be specific,[2] and should state the particular points or matters which are unanswered or imperfectly answered.[3]

Mode Discretionary.—The mode in which the insufficiency shall be pointed out seems to be discretionary with the court.[4]

4. Time.—The time allowed for taking exceptions is in some cases governed by order or rule of court,[5] in others it is prescribed

Cross *v.* Cohen, 3 Gill (Md.) 257; Stephens Eq. Pl. § 864; Mitf. Eq. Pl. (Jeremy) 313; 37 Me. 583; Rule 8, Chancery Rules.

If the Exceptions Are Not Signed by counsel they may, on motion, with notice to the plaintiff, be striken from the files. 1 Dan. Ch. Pr. (5th ed.) 763.

1. 1 Barb. Ch. Pr. (2d ed.) 181, *citing* Williams *v.* Davis, 1 Sim. & Stu. 426.

2. Turnage *v.* Fisk, 22 Ark. 286.

Exception Too General.—An objection to an answer on the ground that it is without fulness and particularity, and not according to the best of defendant's knowledge, information, remembrance, and belief, is too general. Mutual L. Ins. Co. *v.* Cokefair, 41 N. J. Eq. 142.

3. Stafford *v.* Brown, 4 Paige (N. Y.) 88; Buloid *v.* Miller, 4 Paige (N. Y.) 473; Baker *v.* Kingsland, 3 Edw. Ch. (N. Y.) 138; Mix. *v.* People, 116 Ill. 265; Hodgson *v.* Butterfield, 2 Sim. & Stu. 236.

What Should be Stated.—Exceptions for insufficiency should state the charges in the bill, the interrogatory applicable thereto to which the answer is responsive, and the terms of the answer *verbatim*, so that the court may see whether it is sufficient or not. Brooks *v.* Byam, 1 Story (U. S.) 296; Fuller *v.* Knapp, 24 Fed. Rep. 100; Bower Barff Rustless Iron Co. *v.* Wells Rustless Iron Co., 43 Fed. Rep. 391; Richardson *v.* Donehoo, 16 W. Va. 685. See Woodroffe *v.* Daniel, 10 Sim. 243; Brown *v.* Keating, 2 Beav. 581; Esdaile *v.* Molyneux, 1 De G. & S. 218; Hodgson *v.* Butterfield, 2 Sim. & Stu. 236; Duke of Brunswick *v.* Duke of Cambridge, 12 Beav. 279. See also Higginson *v.* Blockley, 1 Jur. N. S. 1104, 25 L. J. Ch. 74 V. C. K. And they must specify that the answer complained of was an answer to the bill. 1 Dan. Ch. Pr. (5th ed.) 763; Earl of Lichfield *v.* Bond, 5 Beav. 513, 6 Jur. 1076.

Extracts from Answer Not Sufficient.—Exceptions to an answer for insufficiency should refer pointedly to the bill. It is not enough to give mere extracts from the answer and declare them insufficient. Baker *v.* Kingsland, 3 Edw. Ch. (N. Y.) 138.

Exception Having No Point Disallowed.—An exception having no point, and which would compel the court to find out what was required to be answered, will be disallowed. McKeen *v.* Field, 4 Edw. Ch. (N. Y.) 379.

Several Questions in One Interrogatory. Where several questions are comprised in one interrogatory, the unanswered questions only should be included in the exceptions. 1 Dan. Ch. Pr. (5th ed.) 764; Higginson *v.* Blockley, 1 Jur. N. S. 1104, V. C. K. See, however, Hambrook *v.* Smith, 17 Sim. 209, 16 Jur. 144; Hoffman *v.* Postill, L. R. 4 Ch. App. 681.

For forms of exceptions, see Langdon *v.* Goddard, 3 Story (U. S.) 13; Kittredge *v.* Claremont Bank, 3 Story (U. S.) 590.

4. Craig *v.* Sebrell, 9 Gratt. (Va.) 131. In this case it was said that, even if the form of exceptions is not discretionary, yet, if they are sustained and a further answer is filed, the objections will be waived.

5. By Order or Rule of Court.—*Illinois.*—All exceptions to answers or to interrogatories exhibited shall be filed within such time as the court may direct, and be argued within such time as may be fixed by the court. Rev. Sts. Ill. (1845) p. 96, sec. 30; Rev. Sts. Ill. (1893), p. 220, sec. 27.

New Jersey.—By the eleventh Rule of this court, exceptions for insufficiency shall not be entered until six days after service of a copy of the exceptions on the defendant or his solicitor. Wyckoff *v.* Cochran, 4 N. J. Eq. 420.

Ten Days Allowed by Court.—An answer from China being objected to as not responsive to all the charges of

by statute.[1]

Enlarging Time.—But the court may, for good cause shown, enlarge the time.[2]

Exceptions Not Filed in Time.—If the exceptions are not filed within the prescribed period, the answer will be deemed sufficient.[3]

After Replication.—Exceptions cannot be taken after replication filed.[4]

In Appellate Court.—And, *a fortiori*, when no exceptions were taken in the court below, it is too late to make objection in the appellate court.[5]

the bill, the court directed the plaintiff to file his exceptions within ten days. Read *v.* Consequa, 4 Wash. (U. S.) 335.

No Rule to Reply.—The complainant may file exceptions to the defendant's answer although two months have elapsed since the answer was put in, if the defendant has not left a rule to reply. Brent *v.* Venable, 3 Cranch (C. C.) 227.

1. By Statute.—*Alabama.*—Exceptions to answers must be made within sixty days after the same are filed. Code Ala. (1886) sec. 3457.

New Jersey.—The complainant shall file exceptions or a replication, or set down the cause for hearing upon bill and answer, within thirty days after the expiration of the time limited or granted for filing the answer; or on failure thereof his bill shall be dismissed, with costs, unless good cause be shown to the contrary. Chan. Acts N. J. (Ridley) sec. 33; Wyckoff *v.* Cochran, 4 N. J. Eq. 420.

Mississippi.—Exceptions to answers must be filed at or before the next term after the answer has been filed. Rev. Code Miss. (1880) sec. 1891.

Tennessee.—Twenty days are allowed within which to file exceptions. Code Tenn. (1884) sec. 5143.

2. Time Prescribed May be Changed.—The time allowed for filing exceptions is limited by the act of 1801, ch. 6, § 24, and the 23rd Rule of chancery practice, but these are not so imperative and inflexible in their nature that the chancellor, upon sufficient cause shown, may not relax them and permit the exceptions to be filed after the time so limited. Marsh *v.* Crawford, 1 Swan (Tenn.) 116.

Withdrawal of Exceptions.—Where the complainant allows the time fixed by rule of court for setting down exceptions to pass by, and the court, after examining the exceptions, is of opinion that the cause will be more speedily determined by a withdrawal of the exceptions, the time will not be enlarged, though good cause be shown, but the complainant will be allowed to withdraw the exceptions, and to reply to the answer. American L. & T. Co. *v.* East, etc., R. Co., 40 Fed. Rep. 384.

Special Application for Enlarging Time.—A chamber order allowing the complainant further time to file exceptions does not operate so as to enlarge the time within which exceptions must be filed to prevent an application for the dissolution of an injunction upon bill and answer. If it is desired to extend the time for excepting beyond the ten days allowed, there must be a special application to the court, upon due notice to the adverse party. Wakeman *v.* Gillespy, 5 Paige (N. Y.) 112.

Moving to Discharge Writ of Ne Exeat before Time for Filing Exceptions Had Expired.—Though the plaintiff has a certain time allowed him to except to the answer to a bill for a *ne exeat*, it is not in all cases necessary for the defendant to await the expiration of that time before moving, on the ground of the answer, for a discharge of the writ. Thorn *v.* Halsey, 7 Johns. Ch. (N. Y.) 189.

3. Pierce *v.* Brown, 7 Wall. (U. S.) 205; Siffkin *v.* Manning, 9 Paige (N. Y.) 222.

Tennessee.—If the plaintiff fail to except within said time (twenty days after answer filed), the cause shall be at issue, and stand for trial at the first term after the answer is filed. Code Tenn. (1884) § 5144.

4. Coleman *v.* Lynn, 4 Rand. (Va.) 454.

Answer Not Regularly Filed.—Exceptions to an answer, where the answer is not regularly filed, may be filed at any time before replication. Knowles *v.* Gwinnup, MS. (N. J.) Jan. 1828.

5. Arnold *v.* Slaughter, 36 W. Va. 598.

Final Hearing.—Or after the cause is opened upon the final hearing.[1]

After Reference for Impertinence.—Exceptions for insufficiency may now be filed after a reference for impertinence.[2]

5. Proceedings.—The exceptions having been properly drawn and signed by counsel, in the manner already indicated, are in the next place to be endorsed and filed in the proper office, and a copy is to be served upon the defendant or his solicitor.[3]

Setting Down for Hearing.—And if the defendant does not submit to the exceptions, he may set them down for hearing.[4]

Two Defendants.—Where two or more defendants put in a joint and several answer, which is excepted to for insufficiency, and one or more of them submit to the exceptions, the others may have them argued.[5]

Disposal of Exceptions.—When exceptions are filed to an answer they must be disposed of before any further proceedings can take place in the cause.[6] The manner of disposing of exceptions varies in different jurisdictions, in some being referred in the first

1. Severns *v.* Hill, 3 Bibb (Ky.) 240.

2. Patriotic Bank *v.* Bank of Washington, 5 Cranch (C. C.) 602.

English Practice—Present Practice.—By the English practice, scandal and impertinence in an answer must be disposed of before its sufficiency can be considered; but here, exceptions for insufficiency and impertinence may be filed and acted on together. Johnson *v.* Tucker, 2 Tenn. Ch. 244.

3. Barb. Ch. Pr. (2d ed.) 185.

New York.—On taking exceptions, it was the duty of the complainant, in addition to the entry of the order of reference, to either serve a copy of the order or a notice that it has been entered; or he had to take out a summons to proceed upon the exceptions, and serve the same within the ten days specified in the fifty-first Rule of the Court of Chancery, or the exceptions were considered as abandoned. Joslin *v.* Joslin, 1 Chan. Sent. (N. Y.) 55; Peale *v.* Bloomer, 8 Paige (N. Y.) 78.

New Hampshire.—Exceptions will be deemed waived unless allowed and delivered to the defendant's solicitor within one month from the delivery of the answer, or unless further time be allowed by the justice. 38 N. H. 609; Rule 20, Chan. Rules.

4. 1 Dan. Ch. Pr. (5th ed.) 767.

Exceptions to Part of Answer Sustained.—Where exceptions to part of the answer are filed and sustained, all of the answer not affected by such exceptions is left standing in the cause. Hemphill *v.* Miller, 16 Ark. 271.

If defendant, in such case, does not ask leave to amend his answer, it is not error to proceed to hear the case on the bill and so much of the answer as is not excepted to. Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 300.

Virginia and West Virginia.—When the plaintiff files exceptions to an answer, they shall at once be set down to be argued. Code Va. (1887) sec. 3276; Code W. Va. (1887) p. 790, sec. 54.

5. 1 Dan. Ch. Pr. (5th ed.) 767, *citing* Hinde 268; Wyatt Pr. 204.

6. Clarke *v.* Tinsley, 4 Rand. (Va.) 250. Strictly speaking, the court should expressly pass upon the exceptions filed to an answer before proceeding to finally hear the case. But if the exceptions are insufficient on their face, or if the allegation, charge, or interrogatory alleged not to be sufficiently answered is not material, or if it appears that the allegation is sufficiently answered, and that the court ought to have disallowed or annulled the exceptions for either of said causes, and the court sees that the plaintiff is not prejudiced by the court below proceeding to finally hear the case, the final decree will not be reversed merely because the court below did not expressly pass upon such exceptions. Richardson *v.* Donehoo, 16 W. Va. 685.

instance to a master,[1] in others being decided upon directly by the court.[2]

Allowed in Part.—Exceptions for insufficiency may be allowed in part and overruled in part.[3]

Appeal.—The defendant is entitled to a writ of error to reverse the order of the court below, sustaining exceptions to the sufficiency of his answer.[4]

When Disallowed.—Where exceptions are disallowed, and no rep lication is filed, the answer will be taken as true.[5]

1. **New York—Tennessee—Vermont.**—In *New York*, *Tennessee*, *Vermont*, and some of the other states exceptions are referred to a master in the first instance, with an appeal to the chancellor. Byington *v.* Wood, 1 Paige (N. Y.) 145; Wood *v.* McFerrin, 2 Baxt. (Tenn.) 493; Hunt *v.* Gookin, 6 Vt. 462. See Davis *v.* Davis, 2 Atk. 24.

New Jersey.—By statute in *New Jersey* it is provided that, when exceptions shall be filed to an answer, a rule may be entered, of course, with the clerk, either in term time or in vacation, to refer the same to a master of the court, who shall decide and report upon them within thirty days after they are filed; but that an appeal from such report shall be allowed, to the chancellor, who shall hear and determine the same at the next term or at such times as the chancellor, upon the application of either party, shall appoint. Chancery Acts N. J. (Ridley) sec. 34; Wyckoff *v.* Cochran, 4 N. J. Eq. 420.

In Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 345, however, it was held that the above provisions were for the relief of the court, and that consequently exceptions might be heard directly by the chancellor at his option.

West Virginia.—In *West Virginia* there may be a reference to a commissioner in the discretion of the Circuit Court. Arnold *v.* Slaughter, 36 W. Va. 589.

Mississippi.—When exceptions shall be filed in vacation, the clerk shall refer the same to a master. Exceptions filed in term time shall be set down on the motion docket by the party excepting, and be disposed of if possible during such term. Rev. Code Miss. (1880) sec. 1891.

South Carolina.—In *South Carolina* exceptions may be heard and decided by the court without any reference to a master, Wardlaw, Ch., saying: "The chancellor is the court, and he may if he chooses dispense altogether with the aid of the master." Satterwhite *v.* Davenport, 10 Rich. Eq. (S. Car.) 305.

New Hampshire.—In *New Hampshire* exceptions may be allowed by a justice. 38 N. H. 609, Rule 20, Chan. Rules.

For proceedings on exceptions when referred to master, see article REFERENCES.

2. **Practice in Federal Courts.**—Under the 63rd Rule of equity practice, exceptions to an answer for insufficiency must be set down on a rule day for hearing before a judge of the court. A reference of such exceptions on a day not a rule day, and to a master instead of a judge of the court, is, unless cured by some subsequent action of the court, a nullity, and is an abandonment of the exceptions. La Vega *v.* Lapsley, 1 Woods (U. S.) 428.

3. 1 Dan. Ch. Pr. (5th ed.) 764; 1 Barb. Ch. Pr. (2nd ed.) 182; East India Co. *v.* Campbell, 1 Ves. 247.

4. Rutherford *v.* Cleghorn, 26 Ga. 154.

Exception for Insufficiency Resembles Demurrer.—An exception to an answer for insufficiency is in the nature of a demurrer, and admits the truth of the matters excepted to; and it is error for the court to sustain an exception to a matter alleged in the answer, which, if true, would be a proper ground of defense to the bill in whole or in part. Blair *v.* Core, 20 W. Va. 265. Exceptions for insufficiency necessarily assume that the answer is valid, and properly before the court, Vermilya *v.* Christie, 4 Sandf. Ch. (N. Y.) 376.

5. Prettyman *v.* Barnard, 37 Ill. 105. This rule, however, applies only when the exceptions are disallowed, not when they are sustained. Mix *v.* People, 116 Ill. 265.

Reading at Trial.—Exceptions to an answer in equity are a part of the pleadings in the case, and as such may be read on the trial.[1]

Injunctions.—The filing of exceptions is of itself no objection to the dissolution of an injunction;[2] and a motion to dissolve an injunction and exceptions to an answer may be taken up and decided at the same time.[3]

6. Further Answer—*a.* PROCEDURE.—If the exceptions taken to the answer are sustained, the proper practice is to take a rule upon the defendant to file a further answer.[4] But he can be required

"If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer plainly, fully, and explicitly. If then any material matter, charged in the complainant's bill, has been neither denied nor admitted by the answers, it stands on hearing of the cause for naught." Hanson, C., in Hopkins *v.* Stump, 2 Har. & J. (Md.) 305.

1. Riggins *v.* Brown, 12 Ga. 271.

2. The court will consider the exceptions only for the purpose of ascertaining whether they relate to those parts of the bill on which the injunction rests. Stitt *v.* Hilton, 31 N. J. Eq. 285; Robert *v.* Hodge, 16 N. J. Eq. 299; Doe *v.* Roe, Hopk. (N. Y.) 276.

Equity of Bill Fully Answered.—The filing of exceptions constitutes no objection to the dissolution of an injunction, if the equity of the bill upon which the injunction rests has been fully answered. McGee *v.* Smith, 16 N. J. Eq. 462. And see Mitchell *v.* Mitchell, 20 N. J. Eq. 234, in which it is said that the English rule that exceptions, undisposed of, are a bar to the dissolution of an injunction upon the denials of the answer, has not been adopted in N. J.

Exceptions Submitted to or Allowed by a Master.—Exceptions to the answer of one of the defendants, if submitted to by the defendant, or if allowed by a master, are a good answer to a motion to dissolve an injunction, if the exceptions go to the merits of the case on which the injunction rests. If not submitted to or not allowed by a master, they are no answer to the motion, and the court will look into them and see that they are not frivolous. Noble *v.* Wilson, 1 Paige (N. Y.) 164.

Notice of Application to Dissolve Injunction.—It is irregular for a party to give notice of an application to dissolve an injunction for a time which is within the ten days allowed by the 38th Rule for excepting to the answer, since, by the 39th Rule, the motion could not be heard within that time. Satterlee *v.* Bargy, 3 Paige (N. Y.) 142. But the provisions of the 39th Rule are not applicable to the case of an answer to which the oath has been waived, and which therefore cannot be excepted to for insufficiency. Livingston *v.* Livingston, 4 Paige (N. Y.) 111.

When Motion to Dissolve Injunction May be Made.—Exceptions being filed within the time allowed by the 38th Rule, it was not in order to make the motion to dissolve the injunction, on bill and answer, until after the time for obtaining the master's report on the exceptions had expired. Parker *v.* Wil iams, 4 Paige (N. Y.) 439.

3. Wyckoff *v.* Cochran, 4 N. J. Eq. 420; Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; Salmon *v.* Clagett, 3 Bland (Md.) 125; Gibson *v.* Tilton, 1 Bland (Md.) 352, 17 Am. Dec. 306; Alexander *v.* Alexander, MS. Dec. 13, 1817.

Injunction Obtained Before Answer Filed.—Where the plaintiff before answer obtains an injunction, and, when the answer is put in, excepts to the same, he cannot move to refer exceptions instanter. Candler *v.* Partington, 6 Madd. 72.

4. Craig *v.* People, 47 Ill. 487. The *Illinois* statute is imperative; if on exceptions filed an answer is adjudged insufficient, the defendant must be ruled to answer further before the cause can be set down for hearing. Holly *v.* Powell, 63 Ill. 139; Stone *v.* Moore, 26 Ill. 165.

Order for Further Answer.—"If all the exceptions to the answer are submitted to by the defendant, or a part are submitted to and the rest abandoned, or on a reference to a master are disallowed, the complainant may have an order of course that the defendant

to answer over only so far as the exceptions extend.[1]

Filing Further Answer.—If the further answer be not filed within the time prescribed,[2] the bill may be taken as confessed.[3]

put in a further answer within twenty days after notice of the order, and pay the costs of the exceptions, or that an attachment issue, or that the bill be taken as confessed, at the election of the complainant." 1 Barb. Ch. Pr. (2d ed.) 193.

Answer Cannot be Taken from Files.—Even the court cannot order an answer to be taken from the files after exceptions to it, notwithstanding the answer be evasive. In mere matters of form or mistakes of dates, etc., an answer may be taken from the files and amended, but it is not allowed to make any material alterations in it. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 366.

No Right to Further Answer Till Report of Master Disposed of.—Until exceptions to the report of a master disallowing some of the exceptions and allowing others were disposed of by order of court, the complainant had no more right to call for a further answer as to the exceptions allowed than he had before the decision of the court below, disallowing the exceptions to the master's report, was pronounced. New York F. Ins. Co. *v.* Lawrence, 6 Paige (N. Y.) 511. See Whitney *v.* Belden, 4 Paige (N. Y.) 140.

Before Exceptions for Impertinence Disposed of.—An order may be entered for a further answer upon exceptions for insufficiency submitted to, before exceptions for impertinence are disposed of. Lawrence *v.* Lawrence, 4 Edw. Ch. (N. Y.) 357.

1. Pegg *v.* Davis, 2 Blackf. (Ind.) 281.

Answer May Be Perfected.—The defendant may, if he chooses, make his answer perfect, though the exceptions do not extend to all the matters in the original answer which might have been objected to as insufficient. Alderman *v.* Potter, 6 Paige (N. Y.) 658.

And the complainant has no right to treat it as an answer to the exceptions only; but if the new answer is insufficient, he must file new exceptions. Hall *v.* Wood, 1 Paige (N. Y.) 404.

2. **Tennessee.**—Exceptions filed shall be acted on by the clerk within ten days, and if they are allowed he shall, by letter or otherwise, notify the defendant's solicitor to file a sufficient answer within thirty days, from which order the defendant may within said time appeal. Code Tenn. (1884) § 5145.

Maine. — If a further answer be directed, it shall be made within twenty days after notice that it has been directed. 37 Me. 583, Rule 8, Chan. Rules.

Florida.—The complainant may enter a rule with the clerk that the defendant make a better answer before the next succeeding rule day, notice of which rule and the filing of exceptions shall be served upon the defendant or his solicitor. If this rule is not complied with the bill may be taken for confessed. Rev. Sts. Fla. (1892) § 1417.

Time May Be Enlarged.—If the defendant finds that he is unable to file his further answer within the time prescribed by the master, he may have the time enlarged on application to the court. 1 Barb. Ch. Pr. (2d ed.) 194.

3. Craig *v.* People, 47 Ill. 487; Work *v.* Hall, 79 Ill. 196; Mayer *v.* Tyson, 1 Bland. (Md.) 559; Lea *v.* Vanbibber, 6 Humph. (Tenn.) 18; Code Tenn. (1884) § 5150; 1 Barb. Ch. Pr. (2d ed.) 194.

Bill Taken as Confessed.—Exceptions had been taken to the answer, but defendant had neglected to answer further. A motion was granted that he answer within thirty days, or that the parts of the bill alleged by the exceptions to be not sufficiently answered be taken as confessed. Weaver *v.* Livingston, Hopk. (N. Y.) 595.

Refusal to Answer After Second Answer Filed.—Where defendant's answer was excepted to for insufficiency, and he made a second answer, which was also excepted to, and the defendant refused to again answer, the bill was taken for confessed as to those parts covered by the exceptions. Cummings *v.* Corey, 58 Mich. 494.

Defendant Not Entitled to Same Discovery by Pro Confesso Order.—If exception to an answer for insufficiency is overruled, the complainant is not entitled to the same discovery by means of a *pro confesso* order upon the same

Further Answer Also Insufficient.—If the defendant puts in a further answer, which also is adjudged insufficient, he may, in some jurisdictions, be examined upon interrogatories, being committed until he answers them; or the complainant may take the bill *pro confesso.*[1]

b. FORM.—The form of the further answer is similar to that of the original answer,[2] and it should be prepared, signed, and filed in like manner.[3]

c. NEW EXCEPTIONS.—New exceptions for insufficiency, founded upon the matter of the original bill, cannot be taken to the further answer.[4] If the further answer is insufficient, it must be referred back upon the old exceptions.[5]

grounds of insufficiency. Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 604.

Decree Without Regard to Answer Is Error.—If a defendant makes full and perfect answer, and upon exceptions thereto the chancellor adjudges it insufficient, and proceeds to decree finally upon the bill and order *pro confesso*, disregarding the answer, that is error which the Supreme Court will revise. Marsh *v.* Crawford, 1 Swan. (Tenn.) 116.

1. Code Va. (1887) sec. 3277; Code W. Va. (1887) p. 790, sec. 55.

Third Answer Insufficient.—If a third answer is reported insufficient on the original exceptions, the complainant may have an order of course for an attachment against the defendant. 1 Barb. Ch. Pr. (2d ed) 198.

English Practice.—After filing four insufficient answers the English practice was to commit the defendant to prison for contempt, and compel him to answer written interrogatories prepared by plaintiff's counsel and settled by the master. 1 Dan. Ch. Pr. (5th ed.) 771; Farquharson *v.* Balfour, T. & R. 184; Langdell Eq. Pl. 64.

2. "The title of it must correspond with the order under which it is put in; and if there are no amendments, it should be entitled 'The further answer of the defendant C. D. to the original bill of complaint of the complainant.' If there are amendments, it should be, 'The further answer of the defendant C. D. to the original bill of complaint, and the answer of the same defendant to the amended bill of the complainant.'" 1 Barb. Ch. Pr. (2d ed.) 197.

What is Further Answer.—The further answer is understood to mean a formal answer, specially directed to the matters excepted to, and to supply the deficiencies of the first answer. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

3. 1 Barb. Ch. Pr. (2d ed.) 197.

4. Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159.

All Exceptions Should be Taken in First Instance.—If an answer is insufficient, the complainant must raise all his objections to it in the first instance. He will not be allowed to take exceptions to the further answer which were not taken to the first. Eager *v.* Wiswall, 2 Paige (N. Y.) 369.

Failure to Except to Original Answer.—Where the plaintiff had not excepted, and the defendant put in a further answer, leave was given to the plaintiff to file exceptions thereto, although he had filed none to the original answer. Atty. Gen. *v.* London, 12 Beav. 219.

5. 1 Barb. Ch. Pr. (2d ed.) 196; Williams *v.* Davis, 1 Sim. & Stu. 426.

Amended Answer Insufficient.—An amended answer being insufficient, the complainant has the right to have it referred to the clerk and master, on the exceptions to the original answer, and it is the duty of the chancellor to require the defendant to put in a full and sufficient answer. Thompson *v.* Paul, 8 Humph. (Tenn.) 114.

Several References on Original Exceptions.—The defendant having submitted to the original exceptions, or the same having been allowed by the master upon a reference thereof, it is too late, upon a reference of a second or third answer for insufficiency on these exceptions, to insist that the original exceptions were not well taken, and that the further discovery called for was immaterial. Higbie *v.* Brown, 1 Barb. Ch. (N. Y.) 320.

Amended Bill.—And this principle applies to the answer to an amended bill.[1]

Bill Stating New Case.—But where the amendment causes the bill to state an entirely new case, exceptions may be taken.[2]

Amendments Insufficiently Answered.—And though exceptions may not be taken to the answer to an amended bill, founded upon matter contained in the original bill, yet they are proper as to those parts of the amendments not sufficiently answered.[3]

XIV. ANSWERS AS EVIDENCE — 1. Responsive Answers — *a.* IN GENERAL.—It is a general rule of equity practice that whatever in the defendant's answer is directly responsive to the complainant's bill is evidence for as well as against the defendant.[4]

1. **Amended Bill.**—Where exceptions are not taken to the answer to the original bill, they cannot be taken to the answer on an amended bill, on the ground that the original bill was not fully answered. Chazournes *v.* Mills, 2 Barb. Ch. (N. Y.) 466; Ovey *v.* Leighton, 2 Sim. & Stu. 234; Wich *v.* Parker, 22 Beav. 59, 2 Jur. N. S. 582; Denis *v.* Rochussen, 4 Jur. N. S. 298. But see Glassington *v.* Thwaites, 2 Russ. 464; also Irving *v.* Viana, M'Clel. & Y. 563.

Objections to an answer to a bill as it stood before amendment cannot be made after amendment, unless the defendant, after being duly called upon to file his answer to the bill as amended, or voluntarily waiving such call, chooses to let it stand as an answer to the amended bill. Angel *v.* Pennsylvania R. Co., 37 N. J. Eq. 92.

Immaterial Amendment.—This principle does not prevent exceptions being taken to the answer where the amendment of the bill consists merely in the substitution of a name, or the addition of another party. Miller *v.* Wheatley, 1 Sim. 296; Taylor *v.* Wrench, 9 Ves. Jr. 315. See also Salisbury *v.* Miller, 14 Mich. 160.

Reason of Rule.—The reason of the rule that a plaintiff, if he does not except to the answer to the original bill, cannot afterwards except to the answer of an amended bill, on the ground that the defendant has not answered matters which were contained in the original bill, is that by amending his bill the plaintiff has admitted the answer to be sufficient. 1 Dan. Ch. Pr. (5th ed.) 762.

2. 1 Dan. Ch. Pr. (5th ed.) 761; Mazarredo *v.* Maitland, 3 Mad. 72; Partridge *v.* Haycraft, 11 Ves. Jr. 581. See also Kaye *v.* Wall, 4 Hare 128; Duncombe *v.* Davis, 1 Hare 193.

3. Partridge *v.* Haycraft, 11 Ves. Jr. 570.

Exceptions and Amendments Answered Together. — Where exceptions to a former answer and amendments to the bill are answered together, if neither the amendments nor exceptions are fully answered, the complainant is only at liberty to file new exceptions founded on the new matter introduced into the bill by such amendments. The answer will then be referred on the new exceptions, and upon such of the old exceptions as are specified in the order of reference. Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159. See Hart *v.* Small, 4 Paige (N. Y.) 333.

Time.—Under the 50th Rule the complainant has twenty days to file new exceptions to a further answer as respects the amendments. Van Wagenen *v.* Murray, 1 Edw. Ch. (N. Y.) 319.

4. *Michigan.*—Schwarz *v.* Wendell, Walk. (Mich.) 267.

New York.—Woodcock *v.* Bennet, 1 Cow. (N. Y.) 743; Forrest *v.* Forrest, 6 Duer (N. Y.) 129; Benson *v.* LeRoy, 1 Paige (N. Y.) 122.

New Jersey.—Fisler *v.* Porch, 10 N. J. Eq. 249.

Pennsylvania. — Com. *v.* Cullen, 13 Pa. St. 143, 53 Am. Dec. 450.

Maryland.—Jones *v.* Slubey, 5 Har. & J. (Md.) 372; Ringgold *v.* Ringgold, 1 Har. & J. (Md.) 11, 18 Am. Dec. 250; Hardy *v.* Summers, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167; Stewart *v.* Duvall, 7 Gill & J. (Md.) 179; Dilly *v.* Barnard, 8 Gill & J. (Md.) 170.

Tennessee.—Spurlock *v.* Fulks, 1 Swan (Tenn.) 289; Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; Ragsdale *v.* Beaufort, 3 Hayw. (Tenn.) 192.

Charging and Stating Part of Bill.—Thus whatever in an answer is fairly a reply to the general scope of the claim set up in the bill,

Alabama, — Grier *v.* Campbell, 21 Ala. 327; Danforth *v.* Laney, 28 Ala. 274; Hogan *v.* Smith, 16 Ala. 600; Walthall *v.* Rives, 34 Ala. 91.

Georgia. — Laughlin *v.* Greene, 13 Ga. 359.

Mississippi.—Oakey *v.* Rabb, Freem. Ch. (Miss.) 546.

North Carolina.—Lyerly *v.* Wheeler, 3 Ired. Eq. (N. Car.) 599; Chaffin *v.* Chaffin, 2 Dev. & B. Eq. (N. Car.) 255; Hughes *v.* Blackwell, 6 Jones Eq. (N. Car.) 73.

Delaware.—Wharton *v.* Clements, 3 Del. Ch. 216.

Ohio.—Steele *v.* Worthington, 2 Ohio 182.

Wisconsin.—Farmers', etc., Bank *v.* Griffith, 2 Wis. 443.

Vermont.—Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697; Adams *v.* Adams, 22 Vt. 50; Blaisdell *v.* Bowers, 40 Vt. 126.

Virginia.—Major *v.* Ficklin, 85 Va. 732.

Arkansas.—King *v.* Payan, 18 Ark. 583.

West Virginia.—Pithole Creek Petroleum Co. *v.* Rittenhouse. 12 W. Va. 313; Jones *v.* Cunningham, 7 W. Va. 707.

United States.—Lenox *v.* Notrebe, Hempst. (U. S.) 251; Hinkle *v.* Wanzer, 17 How. (U. S.) 353; Delano *v.* Winsor, 1 Cliff. (U. S.) 501; Scammon *v.* Cole, 3 Cliff. (U. S.) 479; Clarke *v.* White, 12 Pet. (U. S.) 190; Morgan *v.* Tipton, 3 McLean (U. S.) 350; Reid *v.* McCallister, 49 Fed. Rep. 16.

An answer is competent evidence against the party as his statements on oath. Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 249.

Evidence Against Whom.—An answer in chancery is not evidence except as against the party who made it; as to others, it is *res inter alios acta*. Lunday *v.* Thomas, 26 Ga. 537.

Answer of Complainant to Cross-bill.—The answers of a complainant to interrogatories propounded in a cross-bill filed by the respondent are, if responsive, good evidence for the complainant. Money *v.* Dorsey, 15 Miss. 15; Graham *v.* Berryman, 19 N. J. Eq. 29, 574.

Discovery Sought by Bill.—The rule in equity practice that the responsive answer of the defendant is evidence in his favor applies not only where a material allegation of the bill is denied by the answer, but also where a material disclosure is called for by the bill and made by answer. Fant *v.* Miller, 17 Gratt. (Va.) 187; Thompson *v.* Clark, 81 Va. 422; Chapman *v.* Turner, 1 Call (Va.) 280, 1 Am. Dec. 514; Moors *v.* Moors, 17 N. H. 481.

No Discovery Sought by Bill.—Where the defendant in his answer sets forth circumstances negativing a statement in the bill, the answer is so far evidence as to put the plaintiff upon proof of his case, though no discovery is sought by the bill. Columbia Branch Bank *v.* Black, 2 McCord Eq. (S. Car.) 344.

Bill for Relief—Waiving Discovery.—The defendant is entitled to the benefit of his answer as evidence in the cause if the bill be filed for relief, and the plaintiff cannot, even by expressly waiving a discovery, deprive him of the benefit of it. Fant *v.* Miller, 17 Gratt. (Va.) 187; Thornton *v.* Gordon, 2 Rob. (Va.) 727.

Answer Evidence in Part.—In a suit in chancery brought against a consignee, if in his answer he states that he sold the articles at a specified price, "according to the instructions of the complainants, which he files with his answer," but in fact he files no such instructions, his answer will be evidence merely that he sold at such a price, but not that he was instructed to do so; and he will be answerable for the average price of such articles at the time of sale, at the market at which he sold. Winters *v.* January, Litt. Sel. Cas. (Ky.) 13.

Appeal—Answer Untrue.—Answer of defendant found to be untrue by committee of the court below is not evidence in the court above, of facts therein stated. Callender *v.* Colegrove, 17 Conn. 30.

On a General Bill to Account, the answer is no evidence of disbursements; such a bill is nothing more than a demand on defendant to show his receipts and the legal sufficiency of his expenditures. Ringgold *v.* Ringgold, 1 Har. & G. (Md.) 28, 18 Am. Dec. 250; McNeal *v.* Glenn, 4 Md. 90.

Answer by Committee of a Drunkard.—Where a bill for the payment of money due from a drunkard against a com-

whether in the stating or in the charging part, and whether by way of denial, excuse, or avoidance, is evidence for the defendant.

mittee called for the answer by the committee under oath, the answer of the committee, in reply to an allegation that no part of the debt had been paid, stating the manner in which payment had been made was held to be evidence. Beech *v.* Bradley, 8 Paige (N. Y.) 146.

Answer of Executor.—A general allegation in a bill against an executor, that he retains the money of the estate in virtue of a pretended debt claimed from the testator by a pretended contract, which the bill denies, the prayer of the bill being generally for an answer to the matters charged therein, does not make the answer of the executor evidence to support such debt when he admits there is money of the estate in his hands for which he must account if he does not establish the debt. Tilghman *v.* Tilghman, Baldw. (U. S.) 464.

Answer of Commissioner.—The commissioners of confiscation sold land and gave a deed, describing the lot as containing a certain quantity, "more or less." A third person having substantiated a claim to a large portion of the land, the purchaser filed a bill to rescind the sale, making one of the commissioners a party. *Held*, that the answer of the commissioner was competent to prove that, in accordance with the advertisement of sale, which stated no terms, it was publicly declared, at the time of sale, that there was an adverse claim to a portion of the land, for which, when ascertained, a deduction would be made from the price. Wainwright *v.* Read, 1 Desaus. (S. Car.) 573.

Answer of Purchaser.—The answer of a purchaser at a master's sale to a rule against him to show cause why he should not complete the purchase is evidence in his favor except where it states new facts. Gordon *v.* Saunders, 2 McCord Eq. (S. Car.) 151.

Deed Attached to Answer.—A deed is not made evidence by attaching to an answer in chancery what is alleged to be a copy of it; this only amplifies the pleading. Shepard *v.* Shepard, 36 Mich. 173. See also Stevens *v.* Gordy, 9 Gill (Md.) 405.

Answer of a Defendant Not a Party.—The answer of a defendant not a party to the issue to be tried is not evidence in the case. Welborn *v.* Rogers, 24 Ga. 558.

Answer Not Used as Evidence.—Where the answer to a bill of discovery is used, it is evidence for or against the party using it; but the bill may be dismissed and other evidence resorted to. If the party who asks for the discovery does not use the answer, it is not his evidence and he cannot be concluded by it; and he may use other evidence to establish the fact in reference to which a discovery was sought. Carson *v.* Flowers, 7 Smed. & M. (Miss.) 99.

One Answer Referring to Another.—The answer of a defendant A., so far as it states that he has seen the answer of another defendant, B., and that the same is true, is no evidence for A. when no answer of B. was on file at the time when that of A. was sworn to, and there is nothing to identify the paper afterwards sworn to and filed by B. with the paper sworn to by A. Carr. *v.* Weld, 19 N. J. Eq. 319.

Answer of Wife.—The answer of a wife cannot be read as evidence against her husband. City Bank *v.* Bangs, 3 Paige (N. Y.) 36.

Answer as Secondary Evidence.—The bill charged that an alleged deed, on which the defendant rested his defense, had no valid existence. The answer averred the existence and validity of the deed. *Held*, that this state of pleadings did not dispense with the necessity of defendant's proving affirmatively the existence and validity of such deed. Sims *v.* Sims, 5 Humph. (Tenn.) 370.

Answer Must be Designated as Testimony—Alabama.—The answer in equity cannot be used as evidence by the defendant unless at the hearing he designates it as part of the testimony on which he relies, the seventy-seventh Rule of Chancery Practice (Code Ala. 1876, p. 172) providing that "any testimony not offered in this way, and noted by the register on the minute," is not part of the record, and must not be considered by the chancellor. Goodloe *v.* Dean, 81 Ala. 479.

Arkansas.—Under the statutes of *Arkansas*, an answer denying the allegation of a cross-bill, that plaintiff was a tenant from year to year of certain premises, and averring that he

The defendant is bound to answer the charging part of the bill as well as the stating part, and his answer to the charging part and response thereto is evidence in his favor as much as his answer to the stating part.[1]

Answer Connected with Responsive Matter.—And it seems the answer of the defendant is evidence for him not only when it is responsive to the call of the bill for discovery, but also when it is necessarily connected with the responsive matter or explanatory of it.[2]

Rules of Evidence Apply.—But even an answer strictly responsive can be evidence for the defendant of no fact which he would not be permitted by the rules of law and of evidence to make out by indifferent testimony.[3]

Facts Not Stated in Bill.—An answer may sometimes be evidence of a fact not stated in the bill.[4]

Voluntary Answer.—But a voluntary answer has no effect as evidence.[5]

Reason for General Rule.—The reason for the rule that a responsive answer is evidence is that the complainant calls upon the respondent for an answer and therefore necessarily admits that answer to be evidence.[6]

went into possession under a parol contract for a lease for a term of years, setting it forth, was held evidence not only of the terms of the contract, but also of the fact that the plaintiff was admitted into possession under it, and with a view to its performance. Morrison *v.* Peay, 21 Ark. 110.

State Courts—Connecticut.—In the State Courts in *Connecticut* an answer stands on the same footing as a plea, and is not evidence unless the complainant seeks a disclosure by an appeal to the conscience of the defendant. Pomeroy *v.* Manin, 2 Paine (U. S.) 476.

1. Rich *v.* Austin, 40 Vt. 420; Smith *v.* Clark, 4 Paige (N. Y.) 368.

2. Shiels *v.* Stark, 14 Ga. 429.

Where a bill was filed, charging a partnership between the parties to the suit, and claiming a share of the profits, but not interrogating the defendant as to any payment by him, the answer, stating a payment to the plaintiff, was held to be evidence for the defendant. Jones *v.* Jones, 1 Ired. Eq. (N. Car.) 332.

Necessary Statement of Facts.—An answer is competent evidence of facts when a statement of such facts is necessary for a full reply to the bill. Allen *v.* Mower, 17 Vt. 61.

3. Stevens *v.* Post, 12 N. J. Eq. 421.

The answer, when responsive to the bill, though uncontradicted, cannot be taken to establish anything in bar of the relief prayed, which parol testimony would not be admitted to prove, for it is as evidence only that it is received. Winn *v.* Albert, 2 Md. Ch. 169; Jones *v.* Slubey, 5 Har. & J. (Md.) 372.

Not Evidence to Vary Written Agreement.—The answer of a defendant is evidence only as to facts to which other testimony could be received, and will not be admitted to show that the intent and meaning of the parties to a written agreement was contrary to what appears on the face of it. Carter *v.* Bennett, 6 Fla. 214.

4. **Answer Evidence of Facts Not Stated in Bill.**—Where the bill sets forth only part of the complainant's case, instead of the whole, and the part omitted and stated in the answer shows a different case from that stated in the bill, and is not in avoidance merely, the answer is evidence. Schwarz *v.* Wendell, Walk. (Mich.) 267.

5. **Voluntary Answer Not Evidence.**—A voluntary answer has no effect as evidence. As where a bill charged forgery, and the plaintiff could not call for an answer to this charge, since it would tend to criminate the defendant, the answer put in was voluntary, and not evidence. Kibby *v.* Kibby, Wright (Ohio) 607.

6. Gilman *v.* Libbey, 4 Cliff. (U. S.) 447.

b. SWORN BILL AND ANSWER.—When the complainant and defendant speak to the same transaction, the complainant, on oath, in a bill requiring an oath, directly affirming, and the defendant, on oath, in an answer where the oath is not waived by the bill, directly denying, the answer only raises an issue, and is not evidence.[1]

c. ANSWER CONCLUSIVE.—A statement in a sworn answer, responsive to a direct interrogatory in the bill, must be accepted as true until disproved.[2]

Reasons for the rule that the responsive answer is evidence given. Cannon *v.* Collins, 3 Del. Ch. 132.

"The object in calling for an answer is to serve the purposes of the plaintiff, not of the defendant. The plaintiff calls for it as evidence, and it is equivalent to parol evidence as to all matters where such testimony is available. But the necessary consequence of this position is, that, since the plaintiff has called on the defendant to testify by way of answer, it is, to the full extent of the call or so far as it is responsive to the bill, competent evidence which cannot be overturned by the testimony of one witness alone; and the answer so called for is evidence to this extent although it be made by a defendant deeply interested, or by one who is incompetent as a witness in ordinary cases, or by a corporation aggregate under its seal without oath." Bland, C., in Salmon *v.* Clagett, 3 Bland (Md.) 141.

"So far as the answer operates as evidence, its averments are regarded as the testimony of a witness called by the plaintiff. This is the foundation of the principle. The plaintiff calls upon the defendant to answer an allegation of fact which he makes, and thereby admits the answer to be evidence of that fact. If testimony, it is equal to the testimony of any other witness. This is the light in which it is constantly presented in the books." Per Chan. in Brown *v.* Bulkley, 14 N. J. Eq. 294, 301.

1. McLard *v.* Linnville, 10 Humph. (Tenn.) 163; Searcy *v.* Pannell, Cooke (Tenn.) 110; Deakins *v.* Alley, 9 Lea (Tenn.) 494; Williamson *v.* Williams, 11 Lea (Tenn.) 355.

2. *Mississippi.*—Fulton *v.* Woodman, 54 Miss. 158; Petrie *v.* Wright, 6 Smed. & M. (Miss.) 647.

Missouri.—Laberge *v.* Chauvin, 2 Mo. 179; Prior *v.* Matthews, 9 Mo. 267.

Virginia. — Maupin *v.* Whiting, 1 Call. (Va.) 224; Pryor *v.* Adams, 1 Call. (Va.) 382, 1 Am. Dec. 533; Buck *v.* Copland, 2 Call. (Va.) 218.

United States.—Lenox *v.* Prout, 3 Wheat. (U. S.) 520; American File Co. *v.* Garrett, 110 U. S. 228.

Alabama. — Paulling *v.* Sturgus, 3 Stew. (Ala.) 95; Henderson *v.* McVay, 32 Ala. 471.

Illinois.—O'Brian *v.* Fay, 82 Ill. 274; Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270; Duncan *v.* Wickliffe, 5 Ill. 452.

Maryland. — Neale *v.* Hagthrop, 3 Bland (Md.) 551; Cowman *v.* Hall, 3 Gill & J. (Md.) 398; Kent *v.* Carcaud, 17 Md. 291.

New York.—Becker *v.* Ten Eyck, 6 Paige (N. Y.) 68.

Pennsylvania. — Peacock *v.* Chambers, 3 Grant's Cas. (Pa.) 398.

New Jersey.—Neville *v.* Demeritt, 2 N. J. Eq. 321; Allen *v.* Cole, 9 N. J. Eq. 286; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Reed *v.* Reed, 16 N. J. Eq. 248; Petrick *v.* Ashcroft, 20 N. J. Eq. 198.

See Alford *v.* McNarrin, 44 Me. 90; McConnell *v.* Madisonville, 2 Humph. (Tenn.) 53; Coal River Nav. Co. *v.* Webb, 3 W. Va. 438; Cheuvete *v.* Mason, 4 Greene (Iowa) 231.

Connecticut. — Pollard *v.* Lyman, 1 Day (Conn.) 156.

Kentucky.—Shiddell *v.* Messick, 43 Ky. 157.

Where the answer is responsive to the allegations of the bill, sworn to, and uncontradicted, it must be taken as true; and contradictory evidence, to destroy its effect, must more than counterbalance the oath of the defendant. Nevitt *v.* McAroy, Wright (Ohio) 289.

Oath Waived.—Where an answer on oath is not waived, matters stated in the bill as being within the personal knowledge of the defendant are to be taken as true upon the hearing; but

d. ANSWER ENTITLING COMPLAINANT TO DECREE.—And where the answer of the defendants sets forth and shows a state of facts which entitles the complainant to a decree, the complainant is entitled to such a decree, though the bill may not by its allegations make out such a case.[1] And being conclusive for the complainant, the defendant is estopped from introducing evidence conflicting with its truth.[2]

not where the complainant, by waiving an answer on oath, elects to take upon himself the burden of sustaining the allegations in his bill without the aid of a discovery from defendant. Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 583.

Denial of Parol Agreement.—In equity, the denial by the answer of a parol agreement within the Statute of Frauds is conclusive; the court will not inquire into its truth. Cooth *v.* Jackson, 6 Ves. Jr. 12.

Sufficient Proof of Fact.—Where an answer, by its caption, purports to be the answer of the defendant to a bill exhibited against him "by the heirs of P.," such recognition, in the absence of express denial in the body of the answer, is sufficient to establish the fact that the complainants are the heirs of P. Owings *v.* Patterson, 1 A. K. Marsh. (Ky.) 620.

Denial of Fraud.—Where complainant seeks to avoid his bond upon the ground of fraud, and defendant positively denies the allegation of fraud, his answer is conclusive if uncontradicted by any witness in the case. Cummings *v.* Harrell, 6 Ark. 308. See also Prevo *v.* Walters, 5 Ill. 35; Monroe Cattle Co. *v.* Becker, 147 U. S. 47.

A responsive answer to a bill in chancery charging fraud, which denies the charge and is uncontradicted by evidence, rebuts the idea of fraud. Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; Cunningham *v.* Freeborn, 3 Paige (N. Y.) 557.

Bill to Obtain Dower.—In a bill filed to obtain dower, the answer, when responsive to the bill, will prevail unless countervailed by proof, as in any other case. Edmonson *v.* Montague, 14 Ala. 370.

Bill Dismissed.—Where a bill in chancery alleges that certain bonds were entered in the name of a third person, with a view to cover them from the creditors of the person who entered them, and this allegation is denied in the answer and not sustained by proof, the bill *pro tanto* must be dismissed. McCoy *v.* Rhodes, 11 How. (U. S.) 131. And see Berryman *v.* Sullivan, 13 Smed. & M. (Miss.) 65.

Answer Bar to Bill.—Where a bill in equity is brought for an account, and the answer sets up an account stated in writing, and settled and signed by the parties, and states on oath that such account is just and true, it is a bar to the bill, unless impeached for some fraud, omission, or mistake pointed out. Harrison *v.* Bradley, 5 Ired. Eq. (N. C.) 136.

Answer Insufficient.—That an answer is insufficient in some particulars does not destroy its effect upon the points upon which it answers directly. And where the complainant has accepted it, he is bound by it. Whitney *v.* Robbins, 17 N. J. Eq. 360.

Answer Not Conclusive.—A bill being filed to reach land, for which it was alleged the husband had paid, taking title jointly to himself and his wife to defraud his creditors, a sworn answer was filed alleging that title was so taken in order that the survivor should take and that the consideration was paid principally from the wife's money. It was held that although the answer was evidence it was not conclusive and was of little weight in view of the defendant's refusal to testify how much the wife paid. Newlove *v.* Callaghan, 86 Mich. 301. See also Morse *v.* Slason, 16 Vt. 319.

1. Jameson *v.* Shelby, 2 Humph. (Tenn.) 198.

2. McGehee *v.* Lehman, 65 Ala. 316; Fant *v.* Miller, 17 Gratt. (Va.) 187.

A defendant is required to abide by the case made in his answer and is not permitted to take advantage of another case made by the proofs. Mead *v.* Coombs, 26 N. J. Eq. 173.

Defendant Estopped from Showing Larger Sum than that Alleged.—By his answer defendant had alleged the consideration of a certain deed (decreed by the court to be a mortgage) to have

e. WHAT IS RESPONSIVE.—When the answer is confined to such facts as are necessarily required by the bill, and those that are inseparably connected with them forming a part of the same transaction, the answer is responsive.[1] Thus, if the de-

been a debt to a certain amount. The answer estops him from showing that a larger sum was due. Emerson *v.* Atwater, 12 Mich. 314.

But where a party in chancery shows himself entitled to property, and estimates its value in his answer at a certain sum, but states that he has no means of ascertaining the value, it is erroneous to restrict him to that estimate, but he should be allowed what the proof shows the property to be worth. Ward *v.* Grayson, 9 Dana (Ky.) 280.

—— **or from Prejudicing Purchaser's Title** —Where a defendant has filed an answer to a bill to foreclose, a purchaser at a sheriff's sale under the decree is presumed to have purchased upon the face of that answer, and in reliance upon the truth of its statements. Such defendant is estopped from denying the truth of the answer, to the prejudice of the purchaser's title. McGee *v.* Smith, 16 N. J. Eq. 462.

1. Green *v.* Vardiman, 2 Blackf. (Ind.) 330; Powell *v.* Powell, 7 Ala. 582; May *v.* Barnard, 20 Ala. 200; Jackson *v.* Hart, 11 Wend. (N. Y.) 343; Cresson's App., 91 Pa. St. 447.

The general rule in equity that where an allegation in the answer is responsive to the bill, if the plaintiff seek to impeach the answer, he must overcome it by something more than the testimony of a single witness, is not limited to matters in the answer which deny what is stated in the bill. There is no sound foundation for a distinction in this respect between matter of denial and matter of affirmance, if the latter be in relation to a particular point which the bill requires the defendant to answer. The true distinction is between allegations upon those subjects upon which the bill requires some answer and allegations of new matter not stated or inquired of in the bill, but introduced by the defendant in his defense. Bellows *v.* Stone, 18 N. H. 465.

Responsive Answers Illustrated. — A bill for specific performance called upon the defendant to answer as to the making of the contract, how it was disposed of, and when, where, and how the defendant got possession of the contract and under what pretenses. It was held that the allegations in the answer setting up an agreement to rescind the contract were responsive to the bill and were evidence for the defendant. Woodcock *v.* Bennett, 1 Cow. (N. Y.) 711.

Where a bill alleged that a defendant claimed some interest in certain lands, and an interrogatory required him to state the nature of his claim and the time and circumstances under which he acquired it, it was held that the interrogatory was authorized by the allegations, and that the defendant's answer that he purchased in good faith for valuable consideration was responsive to it and evidence for him. Fenno *v.* Sayre, 3 Ala. 458.

To a bill by a wife against her husband to receive a sum of money alleged to have been paid to her in building and furnishing their house, and for which defendant had given her no security, an answer that the money had been given him by complainant, and that there was no agreement, contract or understanding that he was to repay or in any way secure the money, is responsive. Gleghorne *v.* Gleghorne, 118 Pa. St. 383.

A bill to foreclose a mortgage alleged it to have been given for an actual indebtedness to an amount named which still remained unpaid, and the answer on oath stated the circumstances under which the mortgage was given, showing it to have been in part for money advanced and in part for property at a valuation which the party had failed to convey according to agreement; it was held that the answer was responsive to the bill and was evidence. Robinson *v.* Cromelein, 15 Mich. 316. See also Blaisdell *v.* Bowers, 40 Vt. 126; Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697.

In a bill filed, charging a sale of goods as in fraud of creditors, there were special interrogatories, as follows: What amount of goods was received? whether anything was paid for the goods; and if so, when, where, and in what manner? An answer, stating that the vendor was indebted to the vendee, on account of payments

fendant denies the allegations in the bill or affirms matter immediately connected with the original liability charged by way of defense, the answer is responsive.[1]

Material Facts.—So if a fact stated in the bill and answered by

made on debts of a previous partnership between them; that he proposed to the vendee to transfer, and the vendee agreed to receive, the goods in payment of the amount due and justly owing to him; that about the first day of October he sent the goods—held responsive to the interrogatories. Walter *v.* McNabb, 1 Heisk. (Tenn.) 703.

In a suit to enforce the lien of a mortgage against a husband and wife, the wife answered admitting that she signed the instrument, but only upon the force and fraudulent representation of the complainant's agent who obtained her signature and acknowledgment, and that she was ignorant and unable to read. A general replication was filed and the cause was heard on the pleadings alone. It was held that the allegations of fraud were not new matter in avoidance, but were responsive to the bill and were sufficient to prove that the wife did not execute the mortgage. Reid *v.* Mc Callister, 49 Fed. Rep. 16.

Where the bill alleges that one of the defendants had sold a portion of the property sought to be condemned to the payment of the complainant's debts, under a pretended mortgage or lien given by the debtor to secure a fictitious debt; and that the secured debt, if any part of it was just, was fully discharged by the proceeds of sale, leaving a balance in the defendant's hands subject to the complainant's claims, an answer asserting the *bona fides* of the secured debt, the validity of the mortgage (which is made an exhibit, and which contains a power of sale), and that the entire proceeds of the sale were not sufficient to satisfy the secured debt, is responsive. England *v.* Reynolds, 38 Ala. 370.

An answer not stating particulars of a transaction charged and inquired into by the bill is responsive. It was so held by Vroom, Ch., in Youle *v.* Richards, Saxt. 539; and in this case the details are expressly in answer to the interrogatory which asks "for what purpose and consideration the said stock was assigned?" and the defendants could not refuse to answer this without bringing themselves into contempt. Merritt *v.* Brown, 19 N. J. Eq. 289.

1. Gleghorne *v.* Gleghorne, 118 Pa. St. 383; Hand *v.* Weidner, 151 Pa. St. 362.

A bill alleged that the first of three notes was paid. The answer denied that it was paid, and alleged that it had been assigned. The denial of payment was responsive and evidence. The allegation as to the assignment was new matter and had to be sustained by proof. Rodd *v.* Durbridge, 53 Miss. 694.

Where a bill alleged that the release of a bond conditioned for the support of the orator was obtained by the defendant for a grossly inadequate consideration, and the answer denied the inadequacy and set forth the previous arrangement which led to the execution of the bond, the maintenance of the orator from that time to the cancelling of the bond, and the amount paid for the release, the court was inclined to think that the answer was responsive and was evidence. Mann *v.* Betterly, 21 Vt. 326.

Answer Responsive where Substance of Bill Denied.—Where the substance of a bill is denied, this being what is required in an answer, the answer will be responsive. Thus, if a contract be set forth and the defendant be called on to answer it, a denial that it exists *modo et forma* would not be good according to chancery practice, for this is subject to the implication that it existed in some other form. To avoid this, the defendant should state how it existed and wherein it had no existence. Pusey *v.* Wright, 31 Pa. St. 395; Bell *v.* Farmers' D.-N. Bank, 131 Pa. St. 318.

Statements of Party under Oath.—The statements of a party under oath, upon the taking of an account, cannot have the character or effect of matter in an answer responsive to a bill, except perhaps so far as they are answers to the interrogatories of the other party, or explanations of such answers. Hollister *v.* Barkley, 11 N. H. 501.

defendant is material to complainant's case or is a circumstance from which a material fact may be inferred, the answer in such case is responsive to the bill and is evidence in the cause.[1]

Answer to Premises of Bill.—If the respondent answers in relation to the premises of the bill what the complainant could have required him to answer by an interrogatory, the answer must necessarily be regarded as responsive to the bill.[2]

Test.—It is considered a test of responsiveness whether, as a witness upon cross-examination, the defendant could be cross-examined as to the matter which he states in anticipation of his defense on a trial at law.[3]

Setting Forth All the Facts.—A responsive denial of the averments of the bill is not made any less so by setting forth all the facts, though some new matter may be incidentally introduced thereby.[4]

f. WHAT IS NOT RESPONSIVE.—An answer which affirm-

1. Schwarz *v.* Wendell, Walk. (Mich.) 267.

How Far Responsive.—An answer is only so far responsive as it answers to a material statement or charge in the bill as to which a disclosure is sought; and which is a subject of parol proof but no further. Neale *v.* Hagthrop, 3 Bland (Md.) 567.

Material Facts.—The plaintiff in his bill against a corporation and its stockholders denying his right alleged that he was an original subscriber for stock in the corporation; that he tendered the company the amount due on his stock, which was refused and his right as stockholder denied. The answer admitted his subscription for said stock, but alleged that it was accompanied with an agreement that the subscription was wholly for the use of one of the defendant stockholders. It was held that the allegation in the answer was not subsequent matter alleged in avoidance, but a material portion of the facts in the case, and that the answer was responsive to the bill. Rowley's Appeal, 115 Pa. St. 150.

Answer Averring Dormant Partnership.—Where a bill charges a partnership, an answer that the partnership is dormant and unknown to the defendants is responsive to the charge and need not be sustained by proof. Cammack *v.* Johnson, 2 N. J. Eq. 163.

As to Consideration of Mortgage.—Upon a bill to set aside a mortgage as fraudulent, the answers as to the consideration are responsive and therefore evidence. Walthall *v.* Rives, 34 Ala. 91.

Averring Title.—Where an interrogatory in the bill calls on the defendant to show by what pretended claim he refuses to deliver possession of the property, the answer setting forth the defendant's title is responsive and is evidence for him. Smith *v.* Atwood, 14 Ga. 402.

2. Dunham *v.* Jackson, 6 Wend. (N. Y.) 30.

3. Eaton's Appeal, 66 Pa. St. 483.

"It appears to me that the true test of the inquiry upon the force of an answer is to suppose the case was upon a trial before a jury. The propriety of a particular question addressed to a witness is to be determined by its relevancy to the issue by the fact whether the witness can be compelled to answer it, and by the fact whether the answer will furnish legal testimony. Now, bring the present interrogatory to the trial of these decisions. The issue is whether the mortgage was not fraudulent and to defeat the judgment. The reply being in the negative, a question, *what was* the object in giving it, is plainly relevant. The witness could certainly be compelled to answer it, and upon an issue of fraud the reply of a witness present when it was executed would be legal evidence, and I look upon the answer, therefore, as evidence and the matters averred." Assistant Vice-Chancellor in Dunham *v.* Gates, 1 Hoffm. Ch. (N. Y.) 189.

4. Seybert *v.* Robinson, 13 Pa. Co. Ct. Rep. 198.

atively asserts a right in opposition to the complainant's demand, or insists upon a distinct fact in avoidance, is not responsive to the bill.[1]

Facts in Answer Distinct from Those in Bill.—So where the facts averred in the answer are distinct from those charged in the bill, even if part of same transaction, they will not be deemed responsive.[2]

1. Stevens *v.* Post, 12 N. J. Eq. 408; Parkes *v.* Gorton, 3 R. I. 27.

Asserting a Right Not Responsive.—In seeking affirmatively to assert a right, the enforcement of which is insisted upon as a condition precedent or concurrent with the relief asked for by the complainant, the answer alleges a distinct fact in no wise responsive to the bill and which must be established by evidence. Ingersoll *v.* Stiger, 46 N. J. Eq. 511, *citing* Roberts *v.* Birgess, 20 N. J. Eq. 139; Fey *v.* Fey, 27 N. J. Eq. 213; Brown *v.* Kahnweiler, 28 N. J. Eq. 311.

What is Matter in Avoidance.—Matter in avoidance is something subsequent to and distinct from or *dehors* the fact admitted; but if the admission and avoidance constitute one single fact or transaction, the answer is evidence of both. Reid *v.* McCallister, 49 Fed. Rep. 16; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 87.

Answers Not Responsive Illustrated.—If a bill alleges that the defendant falsely and fraudulently represented that he was able to make a title, and the defendant, without denying the charge, asserts his ability to make the title, his answer is not responsive and the burden of proof is upon him. Wellborn *v.* Tiller, 10 Ala. 306.

Where the bill set out the making of a contract, alleged its loss, and treated it as a contract in force, it was held that this did not permit that an averment of its cancellation by the respondents, in their answer, should be considered as evidence. Sheldon *v.* Sheldon, 3 Wis. 699.

Where a bill alleges the confession of a judgment by one defendant to another to have been made for the purpose of hindering, delaying, and defrauding the creditors of the former, but makes no change and asks no discovery touching the consideration of the judgment, an allegation in the answer that the judgment was confessed for a pre-existing, *bona-fide* debt is not responsive to the bill. Ware *v.* Jordan, 21 Ala. 837.

Where a bill alleged that a note was placed in the hands of the defendant to collect without investing him with any interest in it, and the defendant answered that the note was left with him to collect and pay himself debts which the plaintiff owed him and to secure subsequent advances which he agreed to make for the complainant, it was held that the answer was not responsive. Dunn *v.* Dunn, 8 Ala. 784.

Where a bill alleged that the holder of a note knew at the time it was assigned to him that it was made upon a gaming consideration and called upon him to state under what circumstances it was assigned, an answer that before the note was assigned the complainant informed the defendant it was good, and he had no set-offs against it, was held not to be responsive. Manning *v.* Manning, 8 Ala. 138.

Where the allegations of a bill are that the parties entered into a written agreement and that the defendant violated the same, and defendant answers that she has the right to do so by virtue of a parol agreement entered into at the same time, such answer is not responsive, and the burden of proving the parol agreement is upon the defendant. Kenny's Appeal (Pa., 1888), 12 Atl. Rep. 589.

2. Parkes *v.* Gorton, 3 R. I. 27.

Answer Neither Admitting Nor Denying Allegations.—An answer neither admitting nor denying an alleged agreement, but averring that the plaintiff had done nothing by himself or attorney to induce the defendants not to make their defense at law, is not responsive to the bill. Pelham *v.* Moreland, 11 Ark. 442.

Answer Alleging Settlement.—Where a bill brought to procure settlement of a partnership account did not allege any settlement, but the answer set forth a full accounting and settlement, it was held that this was not responsive to the bill and could not be considered as evidence, but that, coming

Statement Not Called For.—And it seems that a statement of the answer expressly waived or not called for is not responsive and therefore not evidence.[1] Nor will it be so if the whole allegation in the answer might have been left out.[2]

Answer Not Stating All Material Facts.—If the answer does not state all the material facts, it will be held not to be responsive.[3]

2. Answer Containing New Matter.—As before stated, the answer, when responsive to the allegation of the bill, is evidence for defendant. But if the answer is not responsive, or sets up affirmative allegations of new matter not stated or inquired of in the bill in opposition to or in avoidance of complainant's demand, and is replied to, the answer is of no avail in respect to such allegations, and the defendant is bound to establish them by evidence *aliunde*.[4]

in by way of defense, it must be regarded in the nature of a plea. Spaulding *v.* Holmes, 25 Vt. 491.

Claim of Homestead in Foreclosure Suit.—In a suit to foreclose a mortgage not acknowledged as required to alienate a homestead, a claim of the homestead exemption in the answer is not responsive to the bill and cannot be proved by the answer itself without other testimony. Goodloe *v.* Dean, 81 Ala. 479.

1. Jones *v.* Belt, 2 Gill (Md.) 106.

2. Eaton's Appeal, 66 Pa. St. 483.

"If the whole subject-matter of the statements or allegations in the answer might have been left out, then the allegations in the answer upon that subject are in no sense responsive to the bill, the bill requiring no statement upon that point; but if the omission of some statement upon that subject would furnish just ground of exception to the answer, then the statement to the extent to which it is required and whatever its character, whether affirmative or negative, is but a response to the inquisition of the plaintiff." Parker, C.J., in Bellows *v.* Stone, 18 N. H. 475.

3. Neale *v.* Hagthrop, 3 Bland (Md.) 567. In this case the bill called for the production of evidence which, from the nature of the plaintiff's case, he had a right to claim and which might be necessary and useful to him in other cases. It was held that the answer merely asserting the fact, without saying anything of the evidence, of its existence or the means of obtaining it, was not responsive.

4. *Alabama.*—Forest *v.* Robinson, 2 Ala. 215; Buchanan *v.* Buchanan, 72 Ala. 55; Brandon *v.* Cabiness, 10 Ala. 155; Royall *v.* McKenzie, 25 Ala. 363; Keiffer *v.* Barney, 31 Ala. 192; Hanson *v.* Patterson, 17 Ala. 738; McGowen *v.* Young, 2 Stew. & P. (Ala.) 160; Walker *v.* Palmer, 24 Ala. 358; Walker *v.* Miller, 11 Ala. 1067; Gordon *v.* Bell, 50 Ala. 213; Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Dunn *v.* Dunn, 8 Ala. 784; Huntsville Branch Bank *v.* Marshall, 4 Ala. 60; Barton *v.* Barton, 75 Ala. 400; Frazer *v.* Lee, 42 Ala. 25; Webb *v.* Webb, 29 Ala. 588; Powell *v.* Powell, 10 Ala. 900.

Arkansas.—Stillwell *v.* Badgett, 22 Ark. 163; Shields *v.* Trammell, 19 Ark. 51; Pelham *v.* Floyd, 9 Ark. 530; Patton *v.* Ashley, 8 Ark. 290; Walker *v.* Scott, 13 Ark. 644; Byers *v.* Fowler, 12 Ark. 286, 54 Am. Dec. 287; Roberts *v.* Totten, 13 Ark. 609; Pelham *v.* Moreland, 11 Ark. 442; Scott *v.* Henry, 13 Ark. 112; Wheat *v.* Moss, 16 Ark. 243; Whiting *v.* Beebe, 12 Ark. 588; Magniss *v.* Arnold, 31 Ark. 103.

Connecticut.—Marion *v.* Faxon, 20 Conn. 486.

Delaware.—Merriken *v.* Godwin, 2 Del. Ch. 236.

Florida.—Simpson *v.* Barnard, 5 Fla. 528.

Kentucky.—Thurstall *v.* McClelland, 3 Ky. 528; Vance *v.* Vance, 5 T. B. Mon. (Ky.) 521; Prior *v.* Richards, 4 Bibb (Ky.) 356; Lampton *v.* Lampton, 6 T. B. Mon. (Ky.) 620; Carter *v.* Leeper, 5 Dana (Ky.) 263; Atwood *v.* Harrison, 5 J. J. Marsh. (Ky.) 329; Todd *v.* Sterrett, 6 J. J. Marsh. (Ky.) 425; Lyon *v.* Respass, 1 Litt. (Ky.) 133; Chinowith *v.* Williamson, 2 Bibb (Ky.) 38; Ballinger *v.* Worley, 1 Bibb (Ky.) 195; Reading *v.* Ford, 1 Bibb (Ky.) 338.

Georgia.—Cartledge *v.* Cutliff, 29 Ga.

Illustrations.—Thus where the answer alleges payment of a demand sought to be enforced by bill, the answer is of no effect as

758; Neal *v.* Patten, 40 Ga. 363; Lee *v.* Baldwin, 10 Ga. 208. But see Laughlin *v.* Greene, 13 Ga. 359.

Illinois.—Cooper *v.* Tiler, 46 Ill. 462; Chambers *v.* Warren, 13 Ill. 318; Roberts *v.* Stigleman, 78 Ill. 130; O'Brian *v.* Fry, 82 Ill. 274; Lynn *v.* Lynn, 10 Ill. 602; Walton *v.* Walton, 70 Ill. 142; Cole *v.* Shetterly, 13 Ill. App. 420; Cummins *v.* Cummins, 15 Ill. 33; Brown *v.* Welch, 18 Ill. 343, 68 Am. Dec. 549; Mahoney *v.* Mahoney, 65 Ill. 406; Harding *v.* Hawkins, 141 Ill. 572; Stark *v.* Hillibert, 19 Ill. 343.

Indiana.—Clark *v.* Spears, 7 Blackf. (Ind.) 96; Pierce *v.* Gates, 7 Blackf. (Ind.) 162; Green *v.* Vardiman, 2 Blackf. (Ind.) 324; Wasson *v.* Gould, 3 Blackf. (Ind.) 18.

Iowa.—Gilbert *v.* Mosier, 11 Iowa 498; Schaffner *v.* Grutzmacher, 6 Iowa 137.

Maine.—Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681; Bradley *v.* Webb, 53 Me. 462; O'Brien *v.* Elliot, 15 Me. 125, 32 Am. Dec. 137; Gould *v.* Williamson, 21 Me. 273; Peaks *v.* McAvey (Me., 1886), 7 Atl. Rep. 270; Gilmore *v.* Patterson, 36 Me. 544.

Massachusetts.—New England Bank *v.* Lewis, 8 Pick. (Mass.) 113; Leach *v.* Fobes, 11 Gray (Mass.) 509, 71 Am. Dec. 732.

Maryland.—Ringgold *v.* Ringgold, 1 Har. & J. (Md.) 29, 18 Am. Dec. 250; Maccubbin *v.* Cromwell, 7 Gill & J. (Md.) 157; Alexander *v.* Ghiselin, 5 Gill (Md.) 138; Hagthorp *v.* Hook, 1 Gill & J. (Md.) 272; Fitzhugh *v.* Mc Pherson, 3 Gill (Md.) 408; Gardiner *v.* Hardey, 12 Gill & J. (Md.) 365; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Salmon *v.* Clagett, 3 Bland (Md.) 162; McNeal *v.* Glenn, 4 Md. 87; Jones *v.* Belt, 2 Gill (Md.) 106.

Mississippi.—Mitchell *v.* Tishomingo Saving Inst., 53 Miss. 613; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508; Dease *v.* Moody, 31 Miss. 617; Brooks *v.* Gillis, 12 Smed. & M. (Miss.) 538; Planters' Bank *v.* Stockman, Freem. Ch. (Miss.) 502; Wofford *v.* Ashcraft, 47 Miss. 645; Parmele *v.* McGinty, 52 Miss. 483; Park *v.* Bamberger, 52 Miss. 569; Miller *v.* Lamar, 43 Miss. 383; Liddell *v.* Sims, 9 Smed. & M. (Miss.) 596; Planters' Bank *v.* Courtney, 1 Smed. & M. Ch. (Miss.) 40; Greenleaf *v.* Highland, 1 Walk. (Miss.) 375; Jack *v.* State, 14 Miss. 494.

Michigan.—Hart *v.* Carpenter, 36 Mich. 402; Schwarz *v.* Wendell, Walk. (Mich.) 267; Hunt *v.* Thorn, 2 Mich. 213; Atty. Gen'l *v.* Oakland County Bank, Walk. (Mich.) 90; Millerd *v.* Ramsdell, Harr. Ch. (Mich.) 373; Van Dyke *v.* Davis, 2 Mich. 144; Newlove *v.* Callaghan, 86 Mich. 301.

New Jersey.—Hutchinson *v.* Tindall, 3 N. J. Eq. 357; Beckhaus *v.* Ladner (N. J.), 21 Atl. Rep. 724; Lovett *v.* Demarest, 5 N. J. Eq. 113; Roberts *v.* Birgess, 20 N. J. Eq. 139; Dickey *v.* Allen, 2 N. J. Eq. 40; Winans *v.* Winans, 19 N. J. Eq. 220; Fisler *v.* Porch, 10 N. J. Eq. 243; Voorhees *v.* Voorhees, 18 N. J. Eq. 223; Miller *v.* Wack, 1 N. J. Eq. 204; Neville *v.* Demeritt, 2 N. J. Eq. 321; Bray *v.* Hartough, 4 N. J. Eq. 46; Vanderhoof *v.* Clayton, 6 N. J. Eq. 192; Stevens *v.* Post, 12 N. J. Eq. 408; Miller *v.* Gregory, 16 N. J. Eq. 274; Huffman *v.* Hummer, 17 N. J. Eq. 263; Van Dyke *v.* Van Dyke, 26 N. J. Eq. 180; Ingersoll *v.* Stiger, 46 N. J. Eq. 511; Brown *v.* Kahweiler, 28 N. J. Eq. 311; Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 228; Green *v.* Pallas, 12 N. J. Eq. 267; Butler *v.* Society, etc., 12 N. J. Eq. 264; Fey *v.* Fey, 27 N. J. Eq. 213.

North Carolina.—Woodall *v.* Prevatt, 1 Busb. Eq. (N. Car.) 199; Jones *v.* Jones, 1 Ired. Eq. (N. Car.) 332; Johnson *v.* Person, 1 Dev. Eq. (N. Car.) 368; Salter *v.* Spier, 1 Tayl. (N. Car.) 318; Lyerly *v.* Wheeler, 3 Ired. Eq. (N. Car.) 599; Fleming *v.* Murph, 6 Jo. Eq. (N. Car.) 59.

New York.—Simpson *v.* Hart, 14 Johns. (N. Y.) 63; Wakeman *v.* Grover, 4 Paige (N. Y.) 23; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 89; Atwater *v.* Fowler, 1 Edw. Ch. (N. Y.) 417; Green *v.* Hart, 1 Johns. (N. Y.) 480; Dunham *v.* Jackson, 6 Wend. (N. Y.) 30; Bush *v.* Livingston, 2 Cai. Cas. (N. Y.) 66, 2 Am. Dec. 316; Minturn *v.* Seymour, 4 Johns. Ch. (N. Y.) 499; Anderson *v.* Roberts, 18 Johns. (N. Y.) 543, 9 Am. Dec. 235.

New Hampshire.—Bellows *v.* Stone, 18 N. H. 465; Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Busby *v.* Littlefield, 33 N. H. 76; Rogers *v.* Mitchell, 41 N. H. 154.

Ohio.—Harris *v.* Carlisle, 7 Ohio

evidence of such alleged payment which must be established by independent proof.[1] Usury set up by answer as a defense must

(Part II) 120; Methodist Episcopal Church *v.* Wood, 5 Ohio 283.

Pennsylvania.—Baker *v.* Williamson, 4 Pa. St. 467; Pusey *v.* Wright, 31 Pa. St. 387; Coleman *v.* Ross, 46 Pa. St. 180; Vollmer's Appeal, 61 Pa. St. 118; Kenney's Appeal (Pa., 1888), 12 Atl. Rep. 589; Luburg's Appeal (Pa., 1889), 17 Atl. Rep. 245; Com. *v.* Cullen, 13 Pa. St. 143, 53 Am. Dec. 450.

South Carolina.—Reeves *v.* Tucker, 5 Rich. Eq. (S. Car.) 150; Gordon *v.* Saunders, 2 McCord Eq. (S. Car.) 156; Cloud *v.* Calhoun, 2 Rich. Eq. (S. Car.) 358; Dyre *v.* Sturges, 3 Desaus. Eq. (S. Car.) 553; Walker *v.* Berry, 8 Rich. (S. Car.) 33; Ison *v.* Ison, 5 Rich. Eq. (S. Car.) 15.

Rhode Island.—Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500.

Tennessee.—Wolfe *v.* Cawood, 1 Heisk. (Tenn.) 597; Alexander *v.* Wallace, 10 Yerg. (Tenn.) 105; Cocke *v.* Trotter, 10 Yerg. (Tenn.) 213; Wallen *v.* Huff, 5 Humph. (Tenn.) 91; Beech *v.* Haynes, 1 Tenn. Ch. 569; Gass *v.* Simpson, 4 Coldw. (Tenn.) 288; Napier *v.* Elam, 6 Yerg. (Tenn.) 108; Davis *v.* Clayton, 5 Humph. (Tenn.) 446; Rollings *v.* Cate, 1 Heisk. (Tenn.) 97; Barker *v.* McAuley, 4 Heisk. (Tenn.) 424; Dodson *v.* Dodson, 6 Heisk. (Tenn.) 110; Gass *v.* Arnold, 6 Baxt. (Tenn.) 329; Humphreys County *v.* McAdoo, 7 Heisk. (Tenn.) 586.

Texas.—Jouett *v.* Jouett, 3 Tex. 150; Chassaign *v.* Helzel, 3 Tex. 57.

Vermont.—Allen *v.* Mower, 17 Vt. 61; Mott *v.* Harrington, 12 Vt. 199; Pierson *v.* Clayes, 15 Vt. 93; Wells *v.* Houston, 37 Vt. 245; McDaniels *v.* Barnum, 5 Vt. 279; McDonald *v.* McDonald, 16 Vt. 630; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Cannon *v.* Norton, 14 Vt. 178; Lane *v.* Marshall, 15 Vt. 85; Adams *v.* Adams, 22 Vt. 50; Spaulding *v.* Holmes, 25 Vt. 491.

Virginia.—Purcell *v.* Purcell, 4 Hen. & M. (Va.) 511; Beckwith *v.* Butler, 1 Wash. (Va.) 224; Kerr *v.* Love, 1 Wash. (Va.) 172; Paynes *v.* Coles, 1 Munf. (Va.) 373; Leas *v.* Eidson, 9 Gratt. (Va.) 277; Lewis *v.* Mason, 84 Va. 731; Vathir *v.* Zane, 6 Gratt. (Va.) 246.

Wisconsin.—Parish *v.* Gear, 1 Pin. (Wis.) 261; Garlick *v.* M'Arthur, 6 Wis. 450; Sheldon *v.* Sheldon, 3 Wis. 699; Remington *v.* Willard, 15 Wis. 583; Smith *v.* Potter, 3 Wis. 432; Walton *v.* Cody, 1 Wis. 420; Williams *v.* Starr, 5 Wis. 534.

West Virginia.—Jones *v.* Cunningham, 7 W. Va. 707; Fluharty *v.* Beatty, 4 W. Va. 525.

United States.—Hughes *v.* Blake, 6 Wheat. (U. S.) 464; Clements *v.* Moore, 6 Wall. (U. S.) 315; Seitz *v.* Mitchell, 94 U. S. 580; Tobin *v.* Walkinshaw, 1 McAll (U. S.) 26; Randall *v.* Phillips, 3 Mason (U. S.) 378; Flagg *v.* Mann, 2 Sumn. (U. S.) 487; Reid *v.* McCallister, 49 Fed. Rep. 16; Clarke *v.* White, 12 Pet. (U. S.) 190; U. S. Bank *v.* Beverley, 1 How. (U. S.) 134; Gaines *v.* Hennen, 24 How. (U. S.) 559; McCoy *v.* Rhodes, 11 How. (U. S.) 141; Howe *v.* Williams, 2 Cliff. (U. S.) 261; U. S. *v.* Parrott, 1 McAll (U. S.) 271; Robinson *v.* Cathcart, 3 Cranch (C. C.) 379; Tilghman *v.* Tilghman, Baldw. (U. S.) 464.

England.—Thompson *v.* Lambe, 7 Ves. 587; Boardman *v.* Jackson, 2 B. & B. 382; Ormond *v.* Hutchinson, 13 Ves. 47.

1. Defendant in summary process, served with interrogatories to answer "whether he had purchased the goods charged in the account sued on, on credit, and at the prices charged," answered that he had, but had paid the account. *Held*, that the plaintiff was entitled to a decree, the defendant's answer as to payment not being evidence for him. Walker *v.* Berry, 8 Rich. (S. Car.) 33.

If a bill charge that defendant executed a bond and the answer sets up payment, that allegation must be proven. Nichols *v.* Daniels, Walk. (Miss.) 224.

Where a bill was brought to procure a settlement of a partnership account, and the answer, admitting the partnership, averred a settlement of the partnership accounts, *held*, that such averment was by way of defense and in the nature of a plea, and was not responsive, and so was not evidence, but must be proved by evidence *aliunde*. Spaulding *v.* Holmes, 25 Vt. 491.

Where an answer alleges payment and set-off to the plaintiff's demand, proof thereof should be required, especially where the answer is in no part taken for confessed. Hickman *v.* Painter, 11 W. Va. 386.

be proved.[1] And an answer alleging cancellation or agreement to cancel the instrument in suit sets up new matter which must be proved.[2]

Qualifications of Rule.—This rule is in some jurisdictions, at least, qualified to the extent that if the facts alleged in avoidance or discharge are responsive to a direct charge or interrogatory in the bill the answer is evidence of such fact.[3] So, also, it seems that,

Where plaintiff's claim as set forth in the bill rests upon a written contract and the right of action is not barred by lapse of time, the admission of the contract in the answer, and the allegation of payment or of any other matter merely in discharge, are to be treated as distinct, and the answer is not evidence of the latter, but must be proved otherwise. Adams *v.* Adams, 22 Vt. 50.

Under a Bill for Settlement and Account of an assignment for the benefit of creditors, where the trustee alleges in his answer that the assignor, with full knowledge of all the facts, assented to a settlement of a debt by receiving lands in payment, this is matter in avoidance and requires evidence *aliunde* to sustain it. Royal *v.* McKenzie, 25 Ala. 363.

A Bill for the Settlement of an Intestate's Estate sought to charge the defendant with a stallion as an advancement; the defendant's answer admitted the gift, and alleged that he had paid his father for it. *Held*, that the defendant's answer, being in avoidance, was not evidence for him. Ison *v.* Ison, 5 Rich. Eq. (S. Car.) 15.

1. To a bill of foreclosure, the answer of the defendant setting forth usury in the mortgage as a defense is not to be taken as evidence for him, unless complainant asks for a disclosure on that subject, but it is only equivalent to a plea of the statute of usury. McDaniels *v.* Barnum, 5 Vt. 279.

Where complainant, in his bill, inquired as to the consideration of a note, but asked nothing as to usury, and defendant in his answer alleged usury, complainant's note was held *prima-facie* evidence of a full and adequate consideration, and the answer was held not to be evidence of the usury which ought to be proved. Green *v.* Hart, 1 Johns. (N. Y.) 480.

2. Where an answer acknowledges an assignment set up in the bill, but alleges that it has been cancelled, the answer is not evidence of the cancellation, but it must be proved. Wasson *v.* Gould, 3 Blackf. (Ind.) 18.

Where defendant in a bill to foreclose a mortgage answer under oath, admitting the execution of the mortgage, but alleging that it was given in lieu of another mortgage, that complainant agreed to cancel and return to defendant, which he failed to do, and praying that he may be compelled to so cancel and return it before the relief sought is granted, the answer is evidence only so far as it is responsive to the bill, and the burden is upon defendant to establish the alleged agreement which is new matter by other evidence. Ingersoll *v.* Stiger, 46 N. J. Eq. 511.

Discharge of Lien Sought to be Enforced.—On a bill to enforce a vendor's lien, it appeared by the answer that the original notes given for the purchase-money had been taken up, and new ones given in satisfaction and discharge of the vendor's lien. *Held*, that although the answer was only evidence of the complainant connecting the present notes with the deed under which the lien was claimed, the part of the answer alleging a discharge of the lien was not evidence. Planters' Bank *v.* Courtney, 1 Smed. & M. Ch. (Miss.) 40.

3. Shown *v.* McMackin, 9 Lea (Tenn.) 601, 42 Am. Rep. 680; Beech *v.* Haynes, 1 Tenn. Ch. 569; Hopkins *v.* Spurlock, 2 Heisk. (Tenn.) 152; Alexander *v.* Wallace, 10 Yerg. (Tenn.) 105; Walter *v.* McNabb, 1 Heisk. (Tenn.) 709; Gass *v.* Simpson, 4 Coldw. (Tenn.) 288; Pugh *v.* Pugh, 9 Ind. 132; Green *v.* Vardiman, 2 Blackf. (Ind.) 324; Nash *v.* Hall, 4 Ind. 449; Smith *v.* Clark, 4 Paige (N. Y.) 373; Woodcock *v.* Bennet, 1 Cow. (N. Y.) 744; Simpson *v.* Hart, 14 Johns. (N. Y.) 63; Lyons *v.* Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129; Fant *v.* Miller, 17 Gratt. (Va.) 187.

In *Alabama* it has been held that the answer of a defendant admitting the

where the answer admits facts which charge the defendant and in addition sets up matter which discharges him, the latter is evidence for defendant if the charge and discharge arise out of one transaction.[1] The early decisions even went so far as to hold that a discharge in the same sentence with the charge would be evidence when it would not have been if stated separately, on the ground that the whole context must be read.[2] This doctrine no longer obtains; and if the matter in avoidance has been interwoven into the sentence containing responsive admissions, it will be considered as stricken out.[3]

3. Hearing on Bill and Answer.—Where a suit in equity is set down for hearing on bill and answer alone, the general rule is that the answer is to be considered as true in all its allegations, whether responsive or not, on the ground that complainant's failure to put in issue by replication the facts alleged in the answer would preclude defendant from proving them.[4]

indebtedness originally charged in the bill, but alleging payment, if responsive to the allegations and interrogatories, is at least *prima-facie* evidence for the party making it, if not absolute proof of the facts stated, so as to require the usual countervailing proof in cases necessary to outweigh an answer in chancery. King *v.* Payan, 18 Ark. 583. See also Wheat *v.* Moss, 16 Ark. 241.

1. Cooper *v.* Tappan, 9 Wis. 364; Green *v.* Vardiman, 2 Blackf. (Ind.) 325; Beech *v.* Haynes, 1 Tenn. Ch. 569; Robinson *v.* Scotney, 19 Ves. 582; Ormond *v.* Hutchinson, 13 Ves, 47. See also Neal *v.* Robinson, 8 Humph. (Tenn.) 435; Bartlett *v.* Gillard, 3 Russ. 15; Thompson *v.* Lambe, 7 Ves. 588.

In Green *v.* Vardiman, 2 Blackf. (Ind.) 330, the court said: "Where an answer is confined to such facts as are necessarily required by the bill and those that are necessarily connected with them forming a part of the same transaction, the answer is to be taken as true when it discharges as well as where it charges defendant."

In Beech *v.* Haynes, 1 Tenn. Ch. 570, the court said "A qualification of the general rule is that when the transaction is a continuous one and the matters of charge and discharge occur at the same time, the whole statement must be taken together. See also Tighlman *v.* Tighlman, Baldw. (U. S.) 464.

2. Beech *v.* Haynes, 1 Tenn. Ch. 571, *citing* Ridgeway *v.* Darwin, 7 Ves. 404; Thompson *v.* Lambe, 7 Ves. 404.

3. Beech *v.* Haynes, 1 Tenn. Ch. 571, *citing* McCoy *v.* Rhodes, 11 How. (U. S.) 131; Baker *v.* Williamson, 4 Pa. St. 467.

4. *Alabama.*—Lampley *v.* Weed, 27 Ala. 621; Lowry *v.* Armstrong, 3 Stew. & P. (Ala.) 297; Cherry *v.* Belcher, 5 Stew. & P. (Ala.) 134; Pauling *v.* Sturgis, 3 Stew. & P. (Ala.) 95.

Arkansas.—Hannah *v.* Carrington, 18 Ark. 85.

Florida.—Carr *v.* Thomas, 18 Fla. 736; White *v.* Walker, 5 Fla. 478; Simpson *v.* Barnard, 5 Fla. 528; Stephens *v.* Orman, 10 Fla. 9.

District of Columbia. — Birdsall *v.* Welch, 6 D. C. 316.

Georgia.—Baldwin *v.* Lee, 7 Ga. 186.

Illinois.—Prettyman *v.* Barnard, 37 Ill. 105; Derby *v.* Gage, 38 Ill. 27; Trout *v.* Emmons, 29 Ill. 433; Buntain *v.* Wood, 29 Ill. 504; Mason *v.* McGirr, 28 Ill. 322; De Wolf *v.* Long, 7 Ill. 679; Fordyce *v.* Shriver, 115 Ill. 530; Cook County *v.* Great Western R. Co., 119 Ill. 218; Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270; Knapp *v.* Gass, 63 Ill. 492; Kitchell *v.* Burgwin, 21 Ill. 40; Paine *v.* Frazier, 5 Ill. 55.

Where no replication to a sworn answer is filed, and defendant treats the cause as at issue, and joins in taking the depositions of witnesses, and consents to set down the cause for hearing on the bill, answer, exhibits, and depositions, he cannot then, on error, invoke the statute in his favor, which provides that, in default of filing a replication, the cause may be set for hearing upon the bill and answer, in which case the answer

Even though Replication be Filed, if the cause is set down for hearing shall be taken as true; and no evidence shall be received unless it may be matter of record to which the answer refers. Marple *v.* Scott, 41 Ill. 50. See also Corbus *v.* Teed, 69 Ill. 206.

When new answers are filed after replication, without leave or order of the court, and the cause is heard without any replication to the new answers, they will not be taken as true, but will be disregarded. Roberts *v.* Stigleman, 78 Ill. 120.

Indiana.—Hale *v.* Plummer, 6 Ind. 121.

Iowa.—Childs *v.* Horr, 1 Iowa 432; Westfall *v.* Lee, 7 Iowa 12; Jones *v.* Jones, 13 Iowa 276.

Kentucky.—Scott *v.* Clarkson, 1 Bibb (Ky.) 277; Scott *v.* Cook, 4 T. B. Mon. (Ky.) 280; Myers *v.* Baker, Hardin (Ky.) 553.

Maine.—Dascomb *v.* Marston, 80 Me. 223.

Maryland.—Eversole *v.* Maull, 50 Md. 96; Warren *v.* Twilley, 10 Md. 39; Mickle *v.* Cross, 10 Md. 352; Estep *v.* Watkins, 1 Bland (Md.) 488; Salmon *v.* Clagett, 3 Bland (Md.) 141; Contee *v.* Dawson, 2 Bland (Md.) 264; Ware *v.* Richardson, 3 Md. 505; McKim *v.* Odom, 3 Bland (Md.) 407; Mason *v.* Martin, 4 Md. 124.

Massachusetts.—Copeland *v.* Crane, 9 Pick. (Mass.) 73; Tainter *v.* Clarke, 5 Allen (Mass.) 66; Perkins *v.* Nichols, 11 Allen (Mass.) 542.

New Hampshire.—Rogers *v.* Mitchell, 41 N. H. 154.

Mississippi.—Russell *v.* Moffitt, 6 How. (Miss.) 303.

New York.—Atkinson *v.* Manks, 1 Cow. (N. Y.) 703; Green *v.* Hart, 1 Johns. (N. Y.) 580; Dale *v.* M'Evers, 2 Cow. (N. Y.) 118; Brinckerhoff *v.* Brown, 7 Johns. Ch. (N. Y.) 217; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 88.

North Carolina.—White *v.* Green, 1 Ired. Eq. (N. Car.) 45.

Ohio.—Gwin *v.* Sedley, 5 Ohio St. 96; Richards *v.* Friedly, Wright (Ohio) 753.

Pennsylvania.—Naglee's Estate, 52 Pa. St. 154; Russell's Appeal, 34 Pa. St. 258; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98; Conrad's Estate, 36 Leg. Int. (Pa.) 84; Randolph's Appeal, 66 Pa. St. 178; Hengst's Appeal, 24 Pa. St. 413; Mazet *v.* Pittsburg, 137 Pa. St. 548.

Michigan.—Huyck *v.* Bailey (Mich., 1894), 58 N. W. Rep. 1002; Ruhlig *v.* Wiegert, 49 Mich. 399; Durfee *v.* McClurg, 6 Mich. 223; Davenport *v.* Auditor Gen'l, 70 Mich. 192.

New Jersey.—N. J. Ch. Act, § 38; McCully *v.* Peel, 42 N. J. Eq. 493; Reed *v.* Reed. 16 N. J. Eq. 248; Gaskill *v.* Sine, 13 N. J. Eq. 130; Cammann *v.* Traphagen, 1 N. J. Eq. 28; Taylor *v.* Thomas, 5 N. J. Eq. 331; Allen *v.* Cole, 9 N. J. Eq. 286; Fowler *v.* Roe, 11 N. J. Eq. 367; Force *v.* Dutcher, 17 N. J. Eq. 165; Graham *v.* Berryman, 19 N. J. Eq. 29, 574; Winslow *v.* Hudson, 21 N. J. Eq. 172; Hoff *v.* Burd, 17 N. J. Eq. 201; Booraem *v.* Wells, 19 N. J. Eq. 87; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Thomas *v.* DeBaum, 14 N. J. Eq. 37; Belford *v.* Crane, 16 N. J. Eq. 265. 84 Am. Dec. 155; Vanderveer *v.* Holcomb, 17 N. J. Eq. 547; Bunker *v.* Anderson, 32 N. J. Eq. 35; Doremus *v.* Cameron, 49 N. J. Eq. 1.

Vermont.—Doolittle *v.* Gookin, 10 Vt. 265; Slason *v.* Wright, 14 Vt. 218; Wright *v.* Bates, 13 Vt. 341; Gates *v.* Adams, 24 Vt. 70.

Virginia.—Jones *v.* Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761; Kennedy *v.* Baylor, 1 Wash. (Va.) 162; Pickett *v.* Chilton, 5 Munf. (Va.) 467, Findlay *v.* Smith, 6 Munf. (Va.) 142, 8 Am. Dec. 733; Blanton *v.* Brackett, 5 Call (Va.) 232.

West Virginia.—Copeland *v.* McCue, 5 W. Va. 264; Cleggett *v.* Kittle, 6 W. Va. 452; Bierne *v.* Ray, 37 W. Va. 571; Snyder *v.* Martin, 17 W. Va. 276; Martin *v.* Rellehan, 3 W. Va. 480.

Wisconsin.—Walton *v.* Cody, 1 Wis. 420.

United States.—U. S. *v.* Scott, 3 Woods (U. S.) 334; Woodruff *v.* Dubuque, etc., R. Co., 30 Fed. Rep. 91; U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. Rep. 58, 7 C. C. A. 15; Peirce *v.* West, 1 Pet. (C. C.) 355; Getting *v.* Burch, 9 Cranch (U. S.) 372; Leeds *v.* Marine Ins. Co., 2 Wheat. (U. S.) 380. *Contra*, Gunnell *v.* Bird, 10 Wall. (U. S.) 304, in which it was held that an allegation in a bill evidently impertinent to the bill cannot be used as evidence for defendant even though no replication be filed.

England.—Barker *v.* Wyld, 1 Vern. 140; Grosvenor *v.* Cartwright, 2 Ch. Cas. 21; Wrottesley *v.* Bendish. 3 P. Wms. 237, n.; Wright *v.* Nutt, 3 Bro. C. C. 339.

on bill and answer, the answer must be taken as true in all its parts, notwithstanding the replication.[1]

Statutory Change of Rule.—By statutory enactment in some jurisdictions, the general rule as above stated has been altered, and the answer will not be considered true when heard on bill and answer alone.[2]

4. Hearing on Bill, Answer, and Replication.—If a cause be set down for hearing on bill, answer, and replication, without proofs, the answer will be taken as true only so far as it is responsive to the allegations of the bill. If it set up matters by way of defense or avoidance of complainant's demand, such matters must be proved or they will not be considered.[3]

1. Moore *v.* Hylton, 1 Dev. Eq. (N. Car.) 433.

2. Thus in Alabama when the cause is heard on bill and answer without testimony, the answer must be taken to be true "so far as it is responsive to the allegations of the bill," except in those cases where the complainant has waived the oath of the defendant to the answer. Code Ala. 1886, § 3445; Bates *v.* Murphy, 2 Stew. & P. (Ala.) 165; Keiffer *v.* Barney, 31 Ala. 192; Frazer *v.* Lee, 42 Ala. 25; Marks *v.* Cowles, 61 Ala. 309; Wynn *v.* Rosette, 66 Ala. 517; Green *v.* Casey, 70 Ala. 417; Buchanan *v.* Buchanan, 72 Ala. 56; Foxworth *v.* White, 72 Ala. 231.

When a cause is heard upon the bill and exhibit to the bill, the answer and exhibits to the answer of one of the defendants, and a decree *pro confesso* against the other defendant, and the complainant has waived the oath of the defendants to the answer, and there is no testimony taken by any of the parties, "and the answer submitted on the hearing is a responsive denial of all the grounds of equity alleged in the bill," such an answer must prevail against the bill. Latham *v.* Staples, 46 Ala. 462.

Hearing on Bill and Answer by Consent.—Facts stated in an answer as a defense to the bill, which are not responsive to it, will not be taken as true, unless the cause is heard on bill and answer, by consent. Forrest *v.* Robinson, 2 Ala. 215.

The defendant having answered the bill, but no testimony being taken, the parties agreed in writing that the complainants were heirs as described in the bill, and to submit the cause to the chancellor, which was done. *Held*, that this was a hearing on bill and answer by consent, and that the answer must be taken as true in all respects. White *v.* Florence Bridge Co., 4 Ala. 464.

Cause Set for Hearing on Complainant's Motion.—Facts stated in an answer which are not responsive to the bill will not be taken as true on a hearing on bill and answer, unless the cause is set for a hearing on bill and answer upon complainant's motion without any indication of an intention to contest the facts. McGowen *v.* Young, 2 Stew. & P. (Ala.) 160; Lucas *v.* Bank of Darien, 2 Stew. (Ala.) 280.

In Kentucky an answer in chancery, when not responsive to the bill, is not to be taken as true, because no replication is filed to it, since the passage of the act of assembly dispensing with replications. 1815. Wells *v.* Query, Litt. Sel. Cas. (Ky.) 210.

In **Mississippi** the necessity of filing replications has been done away with by statute, Ann. Code 1892, § 540; and where a cause is brought to a hearing on bill and answer, without replication, this is not ground for taking the answer as true to its full extent, unless it appears to have been set down for hearing at the instance of the complainant. Carman *v.* Watson, 1 How. (Miss.) 333.

3. Voorhees *v.* Voorhees, 18 N. J. Eq. 223; Wilkinson *v.* Bauerle, 41 N. J. Eq. 635; Cooper *v.* Tappan, 9 Wis. 361; Coulson *v.* Coulson, 5 Wis. 79; Walton *v.* Cody, 1 Wis. 420; Parish *v.* Gear, 1 Pin. (Wis.) 261; Farmers', etc., Bank *v.* Griffith, 2 Wis. 443; Smith *v.* Patton, 12 W. Va. 541; Reece *v.* Darby, 5 Ill. 160; Edwards *v.* Beaird, 1 Ill. 70; Winkler *v.* Winkler, 40 Ill. 183; Cummins *v.* Cummins, 15 Ill. 33; Naglee's Estate, 52 Pa. St. 154; Patton *v.* Brunswick (Fla., 1887), 2 So. Rep. 366;

5. Admissions in Answer—*a.* IN GENERAL—Conclusive.—Where a fact is alleged in a bill and admitted in the answer, the admission is conclusive.[1] The facts admitted are not in issue, and so need

Sneed *v.* Town, 9 Ark. 535; U. S. *v.* Ferguson, 54 Fed. Rep. 28; Bartlett *v.* Gillard, 3 Russ. 149; Freeman *v.* Tatham, 5 Hare 329.

Illustrations of Rule.—In a proceeding against a testamentary guardian for an account, he answered admitting some assets, and then stated and set up an account for maintenance, education, and expenses exceeding the assets. The cause was heard on bill, answer and replication, and exhibits, without any proofs. *Held*, error to dismiss the bill, since the answer was not evidence of the matters set up in discharge. Cummins *v.* Cummins, 15 Ill. 33.

Where a suit in equity is heard on bill, answer, and replication, and the answer denies the material allegations of the bill, the answer will be taken as true and the bill dismissed. U. S. *v.* Ferguson, 54 Fed. Rep. 28; Patton *v.* Brunswick (Fla., 1887) 2 So. Rep. 366.

Where a *new defendant is brought in by supplemental bill* after issue joined and after the proofs are taken, and he answered both the original and supplemental bills, and complainant goes to hearing without further proof, the proofs previously taken cannot be used against the answer to the supplemental bill, and such answer must be taken to be true. Hopkins *v.* McLaren, 4 Cow. (N. Y.) 667.

Dismissal of Bill.—Where a cause is heard on bill, answer, and replication without proofs, the bill should be dismissed unless there is enough admitted in the answer to sustain it, because everything in the answer responsive to the bill is to be taken as true unless it defeats and destroys itself. Cooper *v.* Tappan, 9 Wis. 361.

When Answer Deemed Replied to.—Where a case was submitted by agreement, as upon bill, answer, and general replication, though no general replication be in fact filed, yet it should be heard and decided according to the terms of the agreement. The answer is considered as replied to. Glenn *v.* Hebb, 12 Gill & J. (Md.) 271.

1. Home Ins., etc., Co. *v.* Myer, 93 Ill. 271; Weider *v.* Clark, 27 Ill. 251.

When the answer admits a fact and is responsive to the bill, the answer must be disproved by the complainant, if he would avoid the effect of the admission; but if it be necessary for the defense to avoid it. and the answer sets up new matter in avoidance, such new matter must be proved *aliunde.* Harris *v.* Carlisle, 7 Ohio, pt. 2, 144; Brown *v.* Cutler, 8 Ohio 142.

If an answer positively admits a fact alleged in the bill, it cannot be disproved by the evidence of a witness. Toney *v.* Moore, 4 Stew. & P. (Ala.) 347.

Answer of Insurance Company.—The rule that an admission in defendant's answer is conclusive applied to the answer of an insurance company to a bill to reform a policy. Home Ins., etc., Co. *v.* Myer, 93 Ill. 271.

Admission Showing Right to Account.—An admission of facts, showing the plaintiff's right to an account, will prevail against a responsive denial of indebtedness. Koons *v.* Bute, 2 Phila. (Pa.) 170.

Admissions Unavailing where Bill is Without Merit.—Where an answer admits the allegations of the bill, a decree for the complainant may be reversed and the bill dismissed, upon appeal, notwithstanding the admissions, if the bill itself shows the complainant was not entitled to a decree. In such case the bill is not aided by the answer, nor are the defects in the case cured by the decree. Belew *v.* Jones, 56 Miss. 346.

All Admissions Evidence Against Defendants.—Where a case is heard on bill, answer, and replication, only those parts of the answer which are responsive to the bill can be evidence in favor of defendants, but all its admissions can be used as evidence against them. Att'y Gen'l *v.* Steward, 21 N. J. Eq. 340.

An answer in chancery admitting the correctness of a copy of a deed made by another person and to which there was no subscribing witness is evidence both of the contents and execution of the deed against the person making such an admission. Adams *v.* Shelby, 10 Ala. 478.

Complainant Entitled to Benefit of Admission.—Upon a bill to subject to

not be proved.[1] And the admissions cannot be questioned or denied by the proofs.[2]

payment of the husband's debts property alleged to have been fraudulently conveyed to the wife, the complainant is entitled to the benefit of an admission in the answer, tending to establish fraud, although in the face of the general denial. If she sets up, as the means of purchase, a sale of other property, such sale must be shown to be valid and *bona fide*, although the manner of acquisition was not attacked in the bill. Yost *v.* Hudiburg, 2 Lea (Tenn.) 627.

On the issue whether an alteration was made in the note sued on after delivery without defendant's consent, his answer, admitting execution of the note as set forth in the bill and setting up usury in the stipulation which had been added, is competent evidence and with complainant's testimony outweighs that of defendant. McNail *v.* Welch, 26 Ill. App. 482.

Answer Renouncing Benefit of Statute.—If the defendant admits, in his answer, the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute. Small *v.* Owings, 1 Md. Ch. 363.

Admissions in Answer Different from Allegations in Bill.—Where the answer admits a written contract which differs from that set out in the bill, the plaintiff cannot take advantage of this admission without amending his bill. Buck *v.* Dowley, 16 Gray (Mass.) 555.

Answer Must be Taken as a Whole.—The answer of a defendant is but an admission or confession; and if the complainant introduces the whole as evidence, it must be taken as a whole, as well its denials as its admissions. Crawford *v.* Kirksey, 50 Ala. 590.

2. Pike County *v.* Griffin, etc., Plank Road Co., 15 Ga. 39; Imboden *v.* Etowah, etc., Mining Co., 70 Ga. 87; Pugh *v.* Fairmount Gold, etc., Min. Co., 112 U. S. 238; Fergus *v.* Finkham, 38 Ill. 407. See also Pelham *v.* Floyd, 9 Ark. 530.

Admissions in Answer Need Not be Proved.—Where the answers of defendants to a bill to foreclose a mortgage admit the execution and assignment of the mortgage which is destroyed, they cannot be heard to complain that the contents of the mortgage and assignment are not sufficiently proved. Chickering *v.* Fullerton, 90 Ill. 520.

It is not required of a complainant that he should introduce evidence to prove that which is admitted or stated in the answer, even if the answer is not sworn to; being so stated, it is an admission of record. And in a case where an answer to a bill brought to set aside a conveyance from a husband to his wife set up certain considerations therefor, it was held that if these considerations were not sufficient in law to support the considerations passed as a matter of fact, then it sufficiently appeared from the record, in the absence of all evidence to the contrary, that the deed was made without any valid consideration. Miller *v.* Payne, 4 Ill. App. 112.

Interpleader Suit.—In an interpleader suit, where it appears by the answer of each defendant that he claimed the fund in dispute from the complainant, no other evidence of that need be produced to entitle the complainant to a decree. Balchen *v.* Crawford, 1 Sandf. Ch. (N. Y.) 380.

1. Lippincott *v.* Ridgway, 11 N. J. Eq. 527; Evans *v.* Hoffman, 5 N. J. Eq. 354; Van Hook *v.* Somerville Mfg. Co., 5 N. J. Eq. 633, 45 Am. Dec. 401; Knowles *v.* Knowles, 86 Ill. 1; Weider *v.* Clark, 27 Ill. 251; Robinson *v.* Philadelphia, etc., R. Co., 28 Fed. Rep. 577.

Evidence Varying from Admission Inadmissible.—If a defendant in his answer admit that a slave claimed by him as a gift was always in possession of the donor, he cannot be allowed to give evidence that he, the donee, had the possession, for such evidence varies from the admission. Shirley *v.* Long, 6 Rand. (Va.) 764.

Admission Not Precluding Inquiry.—Where a bill alleged that a deed was given merely to secure a debt, and the answers admitted that the grantors made a certain deed in writing, of such date and of such purport and effect as in the bill mentioned and set forth, *held*, not to be such an admission of the nature and effect of the deed as to preclude all inquiry on the subject. Brown *v.* Balen, 33 N. J. Eq. 469.

Relief from Improvident Admissions.—If an admission has been made in an answer improvidently and by mistake, the court will relieve the party making it from its effect by an order directing so much of the answer as contains the admission to be treated as no part of the record. But a mere retraction of such admission, in a supplemental answer, will not avail to relieve the party from its effect.[1]

What Admitted.—Nothing is regarded as admitted by an answer in chancery unless it is expressly admitted.[2] Thus an admission of

1. Maher *v.* Bull, 39 Ill. 531. See, however, Hollister *v.* Barkley, 11 N. H. 501.

2. Morris *v.* Morris, 5 Mich. 171; Morris *v.* Hoyt, 11 Mich. 9; Young *v.* McKee, 13 Mich. 552; Hardwick *v.* Bassett, 25 Mich. 149.

Rule to Be Interpreted Sensibly.—If the answer to a bill of complaint is so framed as by its omissions or otherwise to admit by implication an allegation contained in the bill, even if said answer is not upon oath, it should relieve complainants from the burden of proof. The rule that nothing is to be admitted unless expressly admitted is to be interpreted in the light of common sense, and not given a mere arbitrary force. Shook *v.* Proctor, 27 Mich. 377.

Admissions Must Be Full and Unequivocal.—The admissions of a party in a bill or answer in chancery, to be conclusive on the party, must be full and unequivocal. They must not be inferred from other admissions, unless the express admissions are so closely connected with those to be inferred that to disprove the latter would disprove the former. Schwarz *v.* Sears, Walk. (Mich.) 19.

Sufficiency of Assets Not Admitted.—Where an executrix alleges, in her answer, that she has received the assets of her testator, as shown by her return to the orphans' court, which she is prepared, when required, to produce, this is not an admission of the sufficiency of assets; and where such sufficiency was a material allegation in the bill, which the complainant failed to prove, the cause was remanded. Dugan *v.* Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306.

Facts Neither Admitted Nor Denied.—Independently of our statute, whenever the facts are charged in a bill in equity as being within the personal knowledge of the respondent, he must explicitly admit or deny them; and if he fail to do so, they will be taken as admitted. But if the allegations of the bill are not of that character, his failure to deny them is ground only of exception to his answer, and will not justify the complainant in treating them as admitted. Mead *v.* Day, 54 Miss. 58.

Sufficient Admission.—Where the bill alleges that the judgments on which the suit is founded were regularly enrolled, and the answer, while it styles it an alleged and pretended enrollment, intends to assail it only for assumed invalidities in the judgments, the enrollment is sufficiently admitted and need not be proved. Taylor *v.* Webb, 54 Miss. 36.

Where a bill avers that a pre-emption claim was cancelled by the proper department, and contains a copy of a letter from the assistant-secretary, notifying the claimant of the order of cancellation, the averment of the bill is admitted by an answer which nowhere denies it, but avers that "the claim was never legally cancelled," and "that if such cancellation was made, it was not only without sufficient authority, but on insufficient proof." Holmes *v.* State (Ala., 1893), 14 So. Rep. 51.

Where the nominal plaintiff in a judgment at law is joined with the defendant therein as a party to a bill in equity by the real owner of the judgment, the admission of the nominal plaintiff in his answer is sufficient to establish the ownership of the judgment. Nix *v.* Winter, 35 Ala. 229.

Where a bill in chancery charged that the defendant, as trustee, having become the owner of the debt secured, became the purchaser at his own sale, through a relative, and the answer, after denying any collusion, generally between the defendant and the immediate purchaser at the sale, admitted

an allegation in a bill cannot be implied from the insufficiency of the answer to it.[1]

Evasive Answer.—But an evasive and qualifying answer has been held to amount to an admission.[2]

Fact in Issue.—An admission will not avail the complainant, unless put in issue by the bill.[3]

Decree.—A decree may be based entirely on the admissions of the answer without other proof.[4]

b. FAILURE TO ANSWER FULLY.—The general trend of authority is to the effect that the mere failure of defendant to deny by his answer all the allegations of the bill will not operate as an admission of such allegations as are not denied, and that complainant is nevertheless bound to prove them.[5]

that such purchaser, soon after the sale, conveyed the property to the defendant, and did not set forth that the purchaser actually paid for the property at or subsequently to the sale, or that defendant paid him anything for the conveyance, *held*, that the answer was a virtual admission that the defendant was, in fact, a purchaser at his own sale. Higgins *v.* Curtiss, 82 Ill. 28.

On a bill to correct an alleged mistake in a lease, an averment in answer that, if applied to defendant, "would have corrected any mistake in said lease," was held not to amount to an admission of the specified mistake and an offer to correct it. Robbins *v.* Battle House Co., 74 Ala. 499.

Where an assignee of an insurance policy, claiming it under general assignment, and also under special assignment indorsed thereon, files a bill, making the policy a part thereof, and seeks to recover, after loss, against the insurance company, his title to the policy is sufficiently made out, if the company's answer, in its tenor, though not expressly, concede the assignment to him; and it is not necessary for him to produce the general assignment, or other proof of assignment. Lewis *v.* Knoxville Fire Ins. Co., 85 Tenn. 117.

1. White *v.* Wiggins, 32 Ala. 424; Savage *v.* Benham, 17 Ala. 119; Parkman *v.* Welch, 19 Pick. (Mass.) 231.

2. Price *v.* Boswell, 3 B. Mon. (Ky.) 17. But see Gamble *v.* Johnson, 9 Mo. 605, where it was hed lthat omissions and evasions in an answer, though calculated to weaken the force of the answer, were not admissions.

Evasive Answer to Charge of Usury.—An answer to a charge of usury, which is evasive and suspicious, and resorts to the usual device, that "he does not recollect," etc., is to be construed into an admission. Lewis *v.* Outton, 3 B. Mon. (Ky.) 459.

3. Hoff *v.* Burd, 17 N. J. Eq. 204, the court remarking that if an admission be not put in issue by the bill, advantage could be taken of it only by amending the bill. See also Small *v.* Owings, 1 Md. Ch. 363.

4. Cavender *v.* Cavender, 114 U. S. 471; Reynolds *v.* Crawfordsville Bank, 112 U. S. 405; Brinckerhoff *v.* Brown, 7 Johns. Ch. (N. Y.) 217; Grosvenor *v.* Cartwright, 2 Ch. Cas. 21; Perkins *v.* Nichols, 11 Allen (Mass.) 542; Kerr *v.* Love, 1 Wash. (Va.) 172; Padfield *v.* Padfield, 64 Ill. 166.

Decree upon Admissions.—A decree setting aside a conveyance as fraudulent may be made upon admissions in the answer, if of sufficient weight, notwithstanding the answer denies fraud. Tappan *v.* Evans, 11 N. H. 324.

5. Hardy *v.* Heard, 15 Ark. 195; Blakeney *v.* Ferguson, 14 Ark. 641; Bonnell *v.* Roane, 20 Ark. 114; Young *v.* Grundy, 6 Cranch (U. S.) 751; Brooks *v.* Byam, 1 Story (U. S.) 296; Brown *v.* Pierce, 7 Wall. (U. S.) 211; Webb *v.* Powers, 2 Woodb. & M. (U. S.) 479; De Wolf *v.* Long, 7 Ill. 679; Dooley *v.* Stipp, 26 Ill. 86; Thorn *v.* Adams, 59 Ill. 223; Morgan *v.* Herrick, 21 Ill. 481; Cushman *v.* Bonfield (Ill. Sup.), 28 N. E. Rep. 937; Trenchard *v.* Warner, 18 Ill. 144; Nelson *v.* Pinegar, 30 Ill. 473; Kitchell *v.* Burgwin, 21 Ill. 44; Holdridge *v.* Bailey, 5 Ill. 124; Wilson *v.* Kinney, 14 Il. 27; Stacey *v.* Randall, 17 Ill. 470; Cochran *v.* Evans, 1 Har. & J. (Md.) 202; Warfield *v.* Gambrill, 1 Gill & J.

Qualification of Rule.—But in some jurisdictions a well-established qualification obtains, namely, that if material facts are stated in

(Md.) 503; Joice *v.* Taylor, 6 Gill & J. (Md.) 54, 25 Am. Dec. 325; Dugan *v.* Gittings, 3 Gill (Md.) 164, 43 Am. Dec. 306; McDowell *v.* Goldsmith, 2 Md. Ch. 387; Briesch *v.* McCauley, 7 Gill (Md.) 196; Warner *v.* Dove, 33 Md. 579; Eyler *v.* Crabbs, 2 Md. 154; Dilly *v.* Barnard, 8 Gill & J. (Md.) 170; Keighler *v.* Savage Mfg. Co., 12 Md. 413, 71 Am. Dec. 600; West *v.* Williams, 1 Md. Ch. 360; Hopkins *v.* Stump, 2 Har. & J. (Md.) 301, note; Rider *v.* Riely, 22 Md. 543; Pharis *v.* Leachman, 20 Ala. 662; Keaton *v.* McGwier, 24 Ga. 217; Brockway *v.* Copp, 3 Paige (N. Y.) 539; Tiel *v.* Roberts, 3 Hayw. (Tenn.) 140; Wilson *v.* Carver, 4 Hayw. (Tenn.) 90; Phillips *v.* Overton, 4 Hayw. (Tenn.) 292; Hoyal *v.* Bryson, 6 Heisk. (Tenn.) 142; Frazer *v.* Sypert, 2 Heisk. (Tenn.) 340; Hill *v.* Walker, 6 Coldw. (Tenn.) 424, 98 Am. Dec. 465; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 603; Lunn *v.* Johnson, 3 Ired. Eq. (N. Car.) 70; Moffat *v.* McDowall, 1 Mc Cord Eq. (S. Car.) 434; Cropper *v.* Burton, 5 Leigh (Va.) 425; Coleman *v.* Lynes, 4 Rand. (Va.) 454, (*distinguishing* Page *v.* Winston, 2 Munf. (Va.) 298; Scott *v.* Gibbon, 5 Munf. (Va.) 86); Fleming *v.* Kenney, 4 J. J. Marsh. (Ky.) 155; Gamble *v.* Johnson, 9 Mo. 605; Oakey *v.* Rabb, Freem. Ch. (Miss.) 546; Bagshaw *v.* Batson, 1 Dick. 113; Hood *v.* Pym, 4 Sim. 101.

Where an answer omits to notice some allegations of the bill and replies to others, the allegations which are not noticed are not considered as admitted. "But a much broader doctrine was contended for, and one which seems to be pregnant with mischief, and calculated to entrap incautious defendants. It was insisted that all the allegations of the bill, not expressly denied by the answer, must be considered as admitted by the defendant to be true; and the counsel put it on this ground. A total failure to answer admits the whole bill to be true; *ergo*, a partial failure to answer admits the part unanswered to be true. But in the case of a total failure the party is in contempt; and yet such steps are taken as are calculated to warn him of the effects of contumacy. Whereas, when he answers, and no exception is taken to his answer as insufficient, he has no notice that hereafter, at the hearing, certain facts will be relied on as proved because he has not expressly noticed and negatived them in his answer." Coleman *v.* Lyne, 4 Rand (Va.) 454.

Illustrations.—Complainant in his bill alleged that he had tendered to the holder of the land the amount demanded by him, and that he offered to credit his judgment with the whole amount due thereon. The holder of the land admits in his answer, the tender as alleged in the bill, but makes no response to the allegation that the plaintiff had offered to credit his debtor with the entire amount of his judgment; and there is no proof as to his offer to credit the judgment with any amount. *Held*, that the allegation in the bill, not responded to in the answer, must be established by proof, otherwise it will not be taken as true. Hill *v.* Walker, 6 Coldw. (Tenn.) 424, 98 Am. Dec. 465.

Allegations not Responded to Treated as in Issue.—Allegations in a bill, to which the defendant does not respond, will be treated by the court as in issue, and a decree will be rendered according to the proof; but allegations to which there is no response, and not sustained by proof, are to be disregarded. Gartman *v.* Jones, 24 Miss. 234.

Answer not Full Entitled to Little Weight as Evidence. — Where a creditor's bill seeks to have a deed of trust, executed by a debtor for the security of a portion of his creditors, declared a general assignment, an answer by the preferred creditors which denies that the deed is a general assignment, or that it conveys all the grantor's property, but which is silent as to any other property then owned by him, is entitled to but little weight as evidence. Longmire *v.* Goode, 38 Ala. 577.

Contra. — Neale *v.* Hagthorp, 3 Bland (Md.) 569. (*citing* Brown *v.* Pitman, Gilb. Eq. Rep. 75; Abergavenny *v.* Abergavenny, 2 Eq. Ca. Abr. 17); Robinson *v.* Townshend, 3 Gill & J. (Md.) 413; Trapnall *v.* Hill, 31 Ark. 346.

Material and controlling facts clearly and fully averred by bill and not denied by answer must be taken as confessed. Lee *v.* Stiger, 30 N. J. Eq. 610; Jones *v.* Knauss, 31 N. J. Eq. 609;

the bill which are necessarily within defendant's knowledge, he must explicitly deny or admit them, and that if he fails to do so they will be taken as admitted.[1] Even in these jurisdictions, if such facts are not within defendant's knowledge or cannot fairly be presumed to be within his knowledge, complainant will not be justified in treating them as admitted.[2]

6. Overcoming Answers—*a.* BY WITNESSES AND CIRCUMSTANCES. —The rule in equity is that the responsive denial of an answer must be overcome by two witnesses, or by evidence equivalent thereto.[3] And the overwhelming weight of authority is that this

Pinnell *v.* Boyd, 33 N. J. Eq. 190. See also Mickle *v.* Maxfield, 42 Mich. 304.

Thus where a bill alleged that the grantee in a deed second in date took his conveyance with an express agreement to assume payment of the judgment in question, and that allegation is not denied in the answer, it must be taken as admitted against him and the premises conveyed to such grantee held primarily liable for the payment of such judgment. Sanborn *v.* Adair, 29 N. J. Eq. 338.

Rule in Mississippi.—In *Mississippi* the general rule has been changed by statute, Am. Code, § 433; and if the answer fail to deny a material allegation, such allegation will be taken at the hearing as admitted. McAllister *v.* Clopton, 51 Miss. 257. See also Colbert *v.* Henley, 64 Miss. 374.

1. Kirkman *v.* Vanlier, 7 Ala. 217; Clark *v.* Jones, 41 Ala. 349; Grady *v.* Robinson, 28 Ala. 289; Thorington *v.* Carson, 1 Port. (Ala.) 257; Lyon *v.* Bolling, 14 Ala. 754; Smilie *v.* Siler, 35 Ala. 88; Mobile Bank *v.* Planters', etc., Bank, 8 Ala. 772; Moore *v.* Lockett, 2 Bibb (Ky.), 69, 4 Am. Dec. 683; Mitchell *v.* Maupin, 3 T. B. Mon. (Ky.) 185; Kennedy *v.* Meredith, 3 Bibb (Ky.) 465; Cowan *v.* Price, 1 Bibb (Ky.) 173; Mosely *v.* Garrett, 1 J. J. Marsh. (Ky.) 212; Pierson *v.* Meaux, 3 A. K. Marsh. (Ky.) 4; Mead *v.* Day, 54 Miss. 58; McAllister *v.* Clopton, 51 Miss. 257; Ross *v.* Shurtleff, 55 Vt. 177. See Chancery Rules of Vermont, 1886.

Illustrations.—Where judgment creditors, who have exhausted their legal remedies, file a bill in equity to reach equitable assets of their debtor, the issue and returns of executions on their judgments, as alleged, is a matter which is presumed to be within the debtor's knowledge; consequently his failure to either admit or deny, in his answer, the allegations of the bill as to the matter, is an admission of their truth; and the issue and return of the executions, as alleged, being thus established as against him, his co-defendant, in whom is vested the legal title to the land sought to be condemned, and whose prior lien is allowed by the decree, cannot insist on other proof of those facts. Clark *v.* Jones, 41 Ala. 349.

Under a bill filed by the husband as administrator of his deceased wife, against her surviving brothers, the failure of the defendants to deny in their answers an allegation of the bill as to the time of the marriage between complainant and his said wife, or to express their information or belief as to its truth or falsity, is an implied admission of its truth, where it appears that all the parties resided in the State; that the wife prior to her marriage lived on the same plantation with two of the defendants, and that her marriage was known to all of them before her death. Smilie *v.* Siler, 35 Ala. 88.

2. Mobile Bank *v.* Planters', etc., Bank, 8 Ala. 772; Thorington *v.* Carson, 1 Port. (Ala.) 257; Kennedy *v.* Meredith, 3 Bibb (Ky.) 465; Cowan *v.* Price, 1 Bibb (Ky.) 173; Moore *v.* Lockett, 2 Bibb (Ky.) 69, 4 Am. Dec. 683; Owings *v.* Patterson, 1 A. K. Marsh. (Ky.) 325; Mead *v.* Day, 54 Miss. 58.

Illustrations.—Thus where the execution of specific articles is averred against parties who cannot be presumed to be privy to the time and mode of their execution, the execution of such articles, though not denied in the answer, must be proved. Thorington *v.* Carson, 1 Port. (Ala.) 257.

3. Vandegrift *v.* Herbert, 18 N. J. Eq. 466; Force *v.* Dutcher, 18 N. J. Eq. 401; Bird *v.* Styles, 18 N. J. Eq.

equivalent evidence must be one witness and corroborating circumstances.[1]

297; Central R. Co. *v.* Hetfield, 18 N. J. Eq. 323; Commercial Bank *v.* Reckless, 5 N. J. Eq. 650; Brown *v.* Bulkley, 14 N. J. Eq. 294; DeHart *v.* Baird, 19 N. J. Eq. 423; Zane *v.* Cawley, 21 N. J. Eq. 130; Stearns *v.* Stearns, 23 N. J. Eq. 167; Abbot *v.* Case, 26 N. J. Eq. 187; Frink *v.* Adams, 36 N. J. Eq. 485; Clason *v.* Morris, 10 Johns. (N. Y.) 542; Patterson *v.* Scott, 142 Ill. 138; Marple *v.* Scott, 41 Ill. 50; Wheeler *v.* Ryon, 1 Ct. of App. (D. C.) 142; Field *v.* Holland, 6 Cranch (U. S.) 8; Lehigh Valley R. Co. *v.* Mellon, 104 U. S. 112; Mortimer *v.* Orchard, 2 Ves. Jr. 243. See Pilling *v.* Armitage, 12 Ves. Jr. 78; Price *v.* Lytton, 3 Russ. 206.

1. *Alabama.*—Fenno *v.* Sayre, 3 Ala. 458; Bank of Huntsville *v.* Marshall, 4 Ala. 60; Cummings *v.* McCullough, 5 Ala. 324; Manning *v.* Manning, 8 Ala. 138; McMekin *v.* Bobo, 12 Ala. 268; May *v.* Barnard, 20 Ala. 200; Bryan *v.* Cowart, 21 Ala. 92; Beene *v.* Randall, 23 Ala. 514; Garrett *v.* Garrett, 29 Ala. 439; Marshall *v.* Howell, 46 Ala. 318; Marshall *v.* Croom, 52 Ala. 554; Camp *v.* Simon, 34 Ala. 126; Bryan *v.* Bryan, 34 Ala. 516; Easterwood *v.* Linton, 36 Ala. 175; Tompkins *v.* Nichols, 53 Ala. 197; Turner *v.* Flinn, 67 Ala. 529; Smith *v.* Rogers, 1 Stew. & P. (Ala.) 317; Lucas *v.* Bank of Darien, 2 Stew. (Ala.) 280; McGowen *v.* Young, 2 Stew. & P. (Ala.) 160.

Arkansas.—Cummings *v.* Harrell, 6 Ark. 308; Turner *v.* Miller, 6 Ark. 463; Menifee *v.* Menifee, 8 Ark. 10; Aiken *v.* Harrington, 12 Ark. 391; Jordan *v.* Fenno, 13 Ark. 593; Dyer *v.* Bean, 15 Ark. 519; Dunn *v.* Graham, 17 Ark. 60; Byrd *v.* Belding, 18 Ark. 118; Spence *v.* Dodd, 19 Ark. 166; Hill *v.* Bush, 19 Ark. 522.

Delaware.—McDowell *v.* Wilmington Bank, 1 Harr. (Del.) 369; Pickering *v.* Day, 2 Del. Ch. 333; Davidson *v.* Wilson, 3 Del. Ch. 307; Horsey *v.* Stockley, 4 Del. Ch. 536; Brooks *v.* Silver, 5 Del. Ch. 7; Small *v.* Collins, 6 Houst. (Del.) 273; Stockley *v.* Horsey, 4 Houst. (Del.) 603.

Florida.—White *v.* Walker, 5 Fla. 478; Stephens *v.* Orman, 10 Fla. 9; Foster *v.* Ambler, 24 Fla. 519.

Georgia.—Eastman *v.* McAlpin, 1 Ga. 157; Galt *v.* Jackson, 9 Ga. 151; Williams *v.* Philpot, 19 Ga. 567; Harris *v.* Collins, 75 Ga. 97.

Illinois.—Swift *v.* School Trustees, 14 Ill. 493; Stouffer *v.* Machen, 16 Ill. 553; Phelps *v.* White, 18 Ill. 41; Wynkoop *v.* Cowing, 21 Ill. 570; Panton *v.* Tefft, 22 Ill. 367; Gregg *v.* Renfrews, 24 Ill. 620; Myers *v.* Kinzie, 26 Ill. 36; Trout *v.* Emmons, 29 Ill. 433; Buntain *v.* Wood, 29 Ill. 504; Dunlap *v.* Wilson, 32 Ill. 517; Barton *v.* Moss, 32 Ill. 50; Martin *v.* Eversal, 36 Ill. 222; Wightman *v.* Hart, 37 Ill. 123; Marple *v.* Scott, 41 Ill. 50; Willdey *v.* Webster, 42 Ill. 108; Blow *v.* Gage, 44 Ill. 208; Russell *v.* Russell, 54 Ill. 250; Fish *v.* Stubbings, 65 Ill. 492; Stevenson *v.* Mathers, 67 Ill. 123; O'Brian *v.* Fry, 82 Ill. 274; Mey *v.* Gulliman, 105 Ill. 272; Martin *v.* Dryden, 6 Ill. 187; Rector *v.* Rector, 8 Ill. 105; Richeson *v.* Richeson, 8 Ill. App. 204.

Indiana. — Jenison *v.* Graves, 2 Blackf. (Ind.) 440; Coles *v.* Raymond, 5 Blackf. (Ind.) 435; Green *v.* Vardiman, 2 Blackf. (Ind.) 324; McCormick *v.* Malin, 5 Blackf. (Ind.) 509; Pierce *v.* Gates, 7 Blackf. (Ind.) 162; Achey *v.* Stephens, 8 Ind. 411; Calkins *v.* Evans, 5 Ind. 441.

Iowa.—Pierce *v.* Wilson, 2 Iowa 20; Clark *v.* Langworthy, 3 Iowa 563; Davis *v.* Stevens, 3 Iowa 158; Bacon *v.* Lee, 4 Iowa 490; State *v.* Tilghman, 6 Iowa 496; White *v.* Hampton, 10 Iowa 238; Culbertson *v.* Luckey, 13 Iowa 12.

This rule does not obtain, however, under the present code practice. Smith *v.* Phelps, 32 Iowa 537; Graves *v.* Alden, 13 Iowa 573.

Kentucky.—Hudson *v.* Cheatham, 5 J. J. Marsh. (Ky.) 50; Patrick *v.* Langston, 5 J. J. Marsh. (Ky.) 653; McCrum *v.* Preston, 5 J. J. Marsh. (Ky.) 332; Mason *v.* Peck, 7 J. J. Marsh. (Ky.) 300; Sullivan *v.* Bates, 1 Litt. (Ky.) 41; Pringle *v.* Samuel, 1 Litt. (Ky.) 43, 3 Am, Dec. 214; Patterson *v.* Hobbs, 1 Litt. (Ky.) 274; Littell *v.* M'Iver, 1 Bibb (Ky.) 203; Lee *v.* Vaughn, 1 Bibb (Ky.) 235; Bright *v.* Haggin, Hardin (Ky.) 546; Myers *v.* Baker, 1 Hardin (Ky.) 553; Bibb *v.* Smith, 1 Dana (Ky.) 580; Vance *v.* Vance, 5 T. B. Mon. (Ky.) 521.

Maine.—Gould *v.* Williamson, 21 Me. 273; Appleton *v.* Horton, 25 Me. 23.

Thus, the allegations of a bill charging a parol agreement to which there was no witness, being positively denied by the an-

Maryland.—Glenn *v.* Grover, 3 Md. 229; West *v.* Flannagan, 4 Md. 36; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Brooks *v.* Thomas, 8 Md. 367; Gelston *v.* Rullman, 15 Md. 260; Rider *v.* Rieley, 22 Md. 540; Turner *v.* Knell, 24 Md. 55; Neale *v.* Hagthrop, 3 Bland (Md.) 551; Ing *v.* Brown, 3 Md. Ch. 521; Beatty *v.* Davis, 9 Gill (Md.) 211; Hagthorp *v.* Hook, 1 Gill & J. (Md.) 280; Roberts *v.* Salisbury, 3 Gill & J. (Md.) 425; Hopkins *v.* Stump, 2 Har. & J. (Md.) 301; Watkins *v.* Stockett, 6 Har. & J. (Md.) 435.

Mississippi.—Lee *v.* Montgomery, Walk. (Miss.) 109; Johnson *v.* Crippen, 62 Miss. 597; M'Gehee *v.* White, 31 Miss. 41.

Missouri.—Laberge *v.* Chauoin, 2 Mo. 179; Bartlett *v.* Glasscock, 4 Mo. 62; Roundtree *v.* Gordon, 8 Mo. 19; Gamble *v.* Johnston, 9 Mo. 605; Martin *v.* Greene, 10 Mo. 652; Hewes *v.* Musick, 13 Mo. 395; French *v.* Campbell, 13 Mo. 285; Johnson *v.* McGruder, 15 Mo. 365.

New Hampshire.—Page *v.* Page, 8 N. H. 187; Hollister *v.* Barkley, 11 N. H. 501; Lawton *v.* Kittredge, 30 N. H. 500; Warren *v.* Swett, 31 N. H. 332; Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Dodge *v.* Dodge, 33 N. H. 487; Busby *v.* Littlefield, 33 N. H. 76; Johnson *v.* Richardson, 38 N. H. 353.

New Jersey.—Chance *v.* Teeple, 4 N. J. Eq. 173; Brown *v.* Bulkley, 14 N. J. Eq. 294; Bird *v.* Styles, 18 N. J. Eq. 297; Calkins *v.* Landis, 21 N. J. Eq. 133; Bent *v.* Smith, 22 N. J. Eq. 560; Wilson *v.* Cobb, 28 N. J. Eq. 177.

New York.—Atkinson *v.* Manks, 1 Cow. (N. Y.) 703; Smith *v.* Brush, 1 Johns. Ch. (N. Y.) 459; Mason *v.* Roosevelt, 5 Johns. Ch. (N. Y.) 534; Swift *v.* Dean, 6 Johns. (N. Y.) 523; Clason *v.* Morris, 10 Johns. (N. Y.) 524; Stafford *v.* Bryan, 1 Paige (N. Y.) 239; Dunham *v.* Jackson, 6 Wend. (N. Y.) 29; Cushman *v.* Shepard, 4 Barb. (N. Y.) 113; Sturtevant *v.* Waterbury, 1 Edw. Ch. (N. Y.) 442.

North Carolina.—Alley *v.* Ledbetter, 1 Dev. Eq. (N. Car.) 453; Martin *v.* Browning, 2 Hawks. (N. Car.) 644; Bruce *v.* Child, 4 Hawks. (N. Car.) 372; Lewis *v.* Owen, 1 Ired. Eq. (N. Car.) 290; Averitt *v.* Foy, 2 Ired. Eq. (N. Car.) 224; Hill *v.* Williams, 6 Jones. Eq. (N. Car.) 242.

Pennsylvania.—Baker *v.* Williamson, 4 Pa. St. 468; Horton's Appeal, 13 Pa. St. 67; Eberly *v.* Groff, 21 Pa. St. 251; Greenlee *v.* Greenlee, 22 Pa. St. 225; Paul *v.* Carver, 24 Pa. St. 207, 64 Am. Dec. 649; Pusey *v.* Wright, 31 Pa. St. 387; Slemner's Appeal, 58 Pa. St. 155, 98 Am. Dec. 248; Campbell *v.* Patterson, 95 Pa. St. 447; Hassler *v.* Bitting, 40 Pa. St. 68; Nulton's Appeal, 103 Pa. St. 286; Rowley's Appeal, 115 Pa. St. 150; Painter *v.* Harding, 3 Phila. (Pa.) 449; Reed's Appeal (Pa., 1886), 7 Atl. Rep. 174; Sylvius *v.* Kosek, 117 Pa. St. 67, 2 Am. St. Rep. 645.

South Carolina.—Martin *v.* Sale, 1 Bailey Eq. (S. Car.) 1; Slawson *v.* Johnson, Bailey Eq. (S. Car.) 463; Sams *v.* Mathews, 1 Desaus. (S. Car.) 134; McDowell *v.* Teasdale, 1 Desaus. (S. Car.) 459; Denton *v.* McKenzie, 1 Desaus. (S. Car.) 289, 1 Am. Dec. 664; Neilson *v.* Dickenson, 1 Desaus. (S. Car.) 133; Dyre *v.* Sturges, 3 Desaus. (S. Car.) 553; Clark *v.* Bailey, 2 Strobh. Eq. (S. Car.) 143; Moffat *v.* M'Dowall, 1 McCord Eq. (S. Car.) 434; McCaw *v.* Blewit, 2 McCord Eq. (S. Car.) 90.

Tennessee.—Beech *v.* Haynes, 1 Tenn. Ch. 569; Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 192; Baker *v.* Barfield, 4 Humph. (Tenn.) 514; Raines *v.* Jones, 4 Humph. (Tenn.) 490; Trabue *v.* Turner, 10 Heisk. (Tenn.) 447; English *v.* King, 10 Heisk. (Tenn.) 666; Tansel *v.* Pepin, 5 Yerg. (Tenn.) 452; Gray *v.* Farris, 7 Yerg. (Tenn.) 155; Spurlock *v.* Fulks, 1 Swan (Tenn.) 289; Pearce *v.* Suggs, 85 Tenn. 724; Williamson *v.* Williams, 11 Lea (Tenn.) 365; Copeland *v.* Murphy, 2 Coldw. (Tenn.) 64.

Vermont.—Pierson *v.* Catlin, 3 Vt. 372.

Virginia.—Pryor *v.* Adams, 1 Call (Va.) 382, 1 Am. Dec. 533; Chapman *v.* Turner, 1 Call (Va.) 280, 1 Am. Dec. 514; Maupin *v.* Whiting, 1 Call (Va.) 224; Buck *v.* Copland, 2 Call (Va.) 218; Bullock *v.* Goodall, 3 Call (Va.) 49; Love *v.* Braxton, 5 Call (Va.) 537; Wise *v.* Lamb, 9 Gratt. (Va.) 294; Smith *v.* Betty, 11 Gratt. (Va.) 752; Fant *v.* Miller, 17 Gratt. (Va.) 207; Auditor *v.* Johnson, 1 Hen. & M. (Va.) 536; Beatty *v.* Thompson, 2 Hen. & M. (Va.) 395; Beatty *v.* Smith, 2 Hen. & M. (Va.) 395; Heffner *v.* Miller, 2

swer, and there being no proof thereof except vague declarations, testified to by witnesses, after the lapse of a number of

Munf. (Va.) 43; Roberts *v.* Kelly, 2 Patt. & H. (Va.) 396; Thornton *v.* Gordon, 2 Rob. (Va.) 719; Jones *v.* Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761; Hoomes *v.* Smock, 1 Wash. (Va.) 389; Kennedy *v.* Baylor, 1 Wash. (Va.) 162.

West Virginia—Statutory Provision.—"When a defendant in equity shall, in his answer, deny any material allegation of the bill, the effect of such denial shall only be to put the plaintiff on satisfactory proof of the truth of such allegation, and any evidence which satisfies the court or jury of the truth thereof shall be sufficient to establish the same." Code West Virginia (1887), ch. 125, sec. 59. See also Lowry *v.* Buffington, 6 W. Va. 249; Brown *v.* Knapp, 7 W. Va. 678; Nichols *v.* Nichols, 8 W. Va. 174; Jarrett *v.* Jarrett, 11 W. Va. 584; Pithole Creek, etc., Co. *v.* Rittenhouse, 12 W. Va. 313; Neely *v.* Jones, 16 W. Va. 625; Core *v.* Bell, 20 W. Va. 169.

Wisconsin.—Smith *v.* Potter, 3 Wis. 432.

District of Columbia.—Rick *v.* Neltzy, 1 Mackey (D. C.) 21.

United States.—Seitz *v.* Mitchell, 94 U. S. 580; Vigel *v.* Hopp, 104 U. S. 441; Morrison *v.* Durr, 122 U. S. 518; Southern Development Co. *v.* Silva, 125 U. S. 247; Carpenter *v.* Providence, etc., Ins. Co., 4 How. (U. S.) 185; Hughes *v.* Blake, 6 Wheat. (U. S.) 453, 1 Mason (U. S.) 515; Parker *v.* Phettleplace, 1 Wall. (U. S.) 684; Tobey *v.* Leonard, 2 Wall. (U. S.) 423, 2 Cliff. (U. S.) 51; Voorhees *v.* Bonesteel, 16 Wall. (U. S.) 16; Clark *v.* Hackett, 1 Cliff. (U. S.) 269; Delano *v.* Winsor, 1 Cliff. (U. S.) 501; Badger *v.* Badger, 2 Cliff. (U. S.) 146; Parker *v.* Phettleplace, 2 Cliff. (U. S.) 79; Scammon *v.* Cole, 3 Cliff. (U. S.) 473; Gilman *v.* Libbey, 4 Cliff. (U. S.) 447; Daniel *v.* Mitchell, 1 Story (U. S.) 188; Hough *v.* Richardson, 3 Story (U. S.) 659; Gould *v.* Gould, 3 Story (U. S.) 516; Cushing *v.* Smith, 3 Story (U. S.) 556; Morgan *v.* Tipton, 3 McLean (U. S.) 339; Towne *v.* Smith, 1 Woodb. & M. (U. S.) 115; West *v.* Randall, 2 Mason (U. S.) 205; McNeil *v.* Magee, 5 Mason (U. S.) 244; Slessinger *v.* Buckingham, 8 Sawy. (U. S.) 469, 17 Fed. Rep. 454; Union Bank *v.* Geary, 5 Pet. (U. S.) 99; Walcott *v.* Watson, 53 Fed. Rep. 429.

England.—Pemby *v.* Mathers, 1 Bro. C. C. 52; Walton *v.* Hobbs, 2 Atk. 19; Janson *v.* Rany, 2 Atk. 140; Evans *v.* Bicknell, 6 Ves. Jr. 174; Cooth *v.* Jackson, 6 Ves. Jr. 40; East India Co. *v.* Donald, 9 Ves. Jr. 275; Cooke *v.* Clayworth, 18 Ves. Jr. 17; Savage *v.* Brocksopp, 18 Ves. Jr. 335.

Responsive Answer Equal to One Witness.—A responsive answer under oath is equal to the testimony of one witness in conflict with it, unless one or the other is unreasonable or evasive. Jacks *v.* Nichols, 5 N. Y. 178. See also McLane *v.* Johnson, 59 Vt. 239.

Equivalent to Disposition.—A defendant's answer to plain interrogatories has the force of a deposition. Short *v.* Tinsley, 1 Metc. (Ky.) 397, 71 Am. Dec. 482.

In a suit by the next of kin of a testator, claiming certain property as not included in the residuary bequest, the answer of the administrator *cum test. an.*, admitting the facts charged in the bill, was allowed the effect of a deposition only. Reeves *v.* Reeves, 1 Dev. Eq. (N. Car.) 390.

Answer Treated as Affidavit.—An answer to a judgment creditor's bill, used in opposition to a motion for the appointment of a receiver before the time for replying has expired, can only be treated as an affidavit. Rankin *v.* Rothschild, 78 Mich. 10. See also Shreve *v.* Black, 4 N. J. Eq. 177.

Full Proof.—Sworn answers responsive to the bill must be overcome by full proof. Taintor *v.* Keys, 43 Ill. 332; Wynkoop *v.* Cowing, 21 Ill. 570; See also Bragg *v.* Geddes, 93 Ill. 39; Cissna *v.* Walters, 100 Ill. 623. Auditor *v.* Johnson, 1 Hen. & M. (Va.) 542; Barton *v.* Rushton, 4 Desaus. (S. Car.) 373; Darling *v.* Hurst, 39 Mich. 765; Clark *v.* Oakley, 4 Ark. 236; Day *v.* Potter, 9 Paige (N. Y.) 645; Campbell *v.* Brackenbridge, 8 Blackf. (Ind.) 471; Wilson *v.* Delarack, 3 Ohio 291.

Charge Repeated in Bill Taken Pro Confesso.—When a charge in a bill is once denied by answer, it must be proved, though it is repeated in an amended bill that is taken for confessed. Greenwade *v.* Greenwade, 3 Dana (Ky.) 495.

Proof Need Not be Direct and Positive.—Though the proof to overcome an answer in chancery must be equivalent to the testimony of two credible wit-

years after they were made, such proof is not sufficient to overturn the denial of the answer as to the existence of such agreenesses, yet it need not be direct and positive. Farley *v.* Bryant, 32 Me. 474.

Uncertain Admissions.—Proof of indefinite and uncertain admissions will not overcome the positive denials of an answer. Conner *v.* Tuck, 11 Ala. 794; Garrett *v.* Garrett, 29 Ala. 439.

Evidence Unsatisfactory.—Relief will not be granted upon a bill where the answer denies the allegation of the bill, if the evidence is loose and unsatisfactory. Selby *v.* Geines, 12 Ill. 69.

Evidence of Loose Conversations or Conjectures.—If the answer deny imposition, and be supported by a commissioner's report, and acknowledgments by the plaintiff, it will not be set aside by evidence of loose conversations of parties, and conjectures of witnesses. Harris *v.* Magee, 3 Call (Va.) 502.

Suit upon Lost Bond—Proof Requisite.—In a suit in equity to recover upon a lost bond, when the answer denies that there was a bond, the same degree of proof is requisite which a court of law would call for, to be laid before the jury upon *non est factum* pleaded to a declaration on a lost bond. Morrison *v.* Meacham, 4 Ired. Eq. (N. Car.) 381.

Proof of General Derangement.—An averment in the answer responsive to the bill that the party was sane at the time an act was performed is evidence of that fact, against which proof of general derangement will not avail. Achey *v.* Stephens, 8 Ind. 411.

Answers Not Within Rule.—A formal answer, putting in issue the allegations of the bill, is not within the rule requiring proof of the allegations by two witnesses. Reynolds *v.* Pharr, 9 Ala. 560.

Execution of Note.—The fact of the execution of a note has nothing peculiar about it to save it from the operation of the general rule in equity that the answer when responsive to the bill can be overcome only by two witnesses, or one witness aided by corroborating circumstances. Low *v.* Argrove, 30 Ga. 129.

Answer Denying Mistake.—Plaintiff sought the reformation of a mortgage on the ground of mistake; *held*, that relief was not to be refused merely because defendant in his answer denied that there was a mistake. Manatt *v.* Starr, 72 Iowa 677.

Stale Claim.—Where a principal witness has promoted a stale claim (eleven years old) and his hostility to the defendant is apparent, his testimony will be far outweighed by an answer fairly responsive to the bill. Plet *v.* Bouchaud, 4 Edw. Ch. (N. Y.) 30.

Suspicious Case.—An answer in equity, responsive to the bill, and positively denying the facts charged, is entitled to so great weight that, when confirmed by testimony, even of a kind not the most satisfactory, it will countervail a case which on its face is a suspicious one. Parker *v.* Phetteplace, 1 Wall. (U. S.) 684.

Facts Not Irreconcilable with Answer.—Positive answers responsive to the bill are not outweighed by proof of facts which are not irreconcilable with the truth of the answers and the fairness of the matters they state, especially when each material fact is related only by a single witness. Huntsville Branch Bank *v.* Marshall, 4 Ala. 60.

Evidence Not in Conflict with Answer.—The evidence of a single witness will sustain an allegation of a bill against the denial of an answer, when the answer, taken in a literal, restricted sense, may be true, although the evidence establishes the allegation in substance, though not in form, and is, therefore, not in direct conflict with the strict literal import of the answer. Amos *v.* Heatherby, 7 Dana (Ky.) 45.

Technical Phrases, etc.—Sworn answers to a bill in chancery cannot be overcome by resort to technical phrases or words in letters used by unprofessional persons. Wynkoop *v.* Cowing, 21 Ill. 570.

Answer to Garnishment at Law.—An answer to a garnishment at law is not sufficient to overcome the positive denials of the garnishee's answer in chancery, when responsive to the bill, which is filed by another person than the plaintiff in the action at law. Holley *v.* Wilkinson, 31 Ala. 196.

Not Showing Invalidity of Deed.—When a defendant by his answer asserts that a deed set out by the complainant was not recorded or proved, as prescribed by the law of the state where executed, without showing that for these reasons it was invalid there,

ment. But inadequacy of price was held a corroborating circumstance to sustain such allegation where it had been proved by one witness, and, with other corroborating circumstances, would then have been sufficient to cause the oath of the witness to countervail the denials of the answer.[1]

Dismissal of Bill.—Whatever may be the impressions of the court

no consequence flows from the assertion. Catterlin *v.* Hardy, 10 Ala. 511.

Statement of Complainant on Information.—Where the complainant, in his bill, swore that he was informed that there was usury in the transaction impeached, and that the defendant denied the charge, and the complainant proved it by one witness, *held*, that this was not sufficient; that the statement of the complainant, made on information, amounted to nothing, and therefore there was only one witness against the defendant's oath. Carrick *v.* Prater, 10 Humph. (Tenn.) 270.

Defendant Enjoined.—A bill in chancery having been filed by E. against A. to set aside the judgment, execution, and sale, as fraudulent, on the ground that the judgment was entered without any warrant or authority from B., partner to A., it was held that, the allegations of the bill being denied by the answer, and there being but one witness to support the bill, the judgment could not be set aside, but that A. appearing to be the only person interested in the judgment and having received property with which to pay a debt due to C., he ought to be enjoined from proceeding under the judgment or from bringing any action of ejectment in his own name or the name of C. until he fully accounted for the disposition of the property he had received. Swift *v.* Dean, 6 Johns. (N. Y.) 523.

Additional Testimony.—After the final hearing of a cause, and the reversal of the chancellor's decree on error, leave to take additional testimony to contradict the answer should not be granted to the complainant because he was informed by his solicitor that such proof was unnecessary. Lainer *v.* Hill, 30 Ala. 111.

Husband and Wife—Ejectment.— The testimony of a husband and wife is deemed but that of a single witness, in opposition to a responsive answer; and the same rule is applied to an equitable ejectment at law. Sower *v.* Weaver, 78 Pa. St. 443.

Defendants Not Required to Prove Responsive Answer.—Where it was urged that the defendant to a bill in equity should be required to offer proof in support of some of the statements of the answer, though responsive to the bill, because such proof was within his reach, whilst it was inaccessible to the complainant's—*held*, that the rule, that the answer, when responsive to the averments of the bill, shall be taken as true, unless discredited by two witnesses, or one witness with pregnant circumstances, is not subject to the modification which the introduction of such a principle would involve. Thompson *v.* Diffenderfer, 1 Md. Ch. 489.

Answer Not Overcome.—The complainant pledged certain stock to a bank as collateral for a loan. The debt not being paid, the stock was sold. The complainant alleged that the sale was made without notice to him, and without opportunity on his part to redeem. His allegations were sustained by his own evidence, which was contradicted by one of the bank officers. The answer was responsive and denied the allegations of the bill. *Held*, that the bill should be dismissed, as complainant did not overcome the force of the allegations of the answer. Hayward *v.* Eliot Bank, 4 Cliff. (U. S.) 294.

Written Contract, Complete, Not Impeached by Answer.—A written contract that is complete in itself being set up in a bill in equity and produced in proof, it was held that it was not impeached by an averment in the sworn answer that it constituted but part of the entire contract of which the residue was reduced to writing and in complainant's possession, nor by contradictory and unsatisfactory parol proofs of an agreement not supplementary to the writing produced and proved. Rogers *v.* Odell, 36 Mich, 411.

1. Brittin *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497.

as to the merits of the case, if the answer is only contradicted by one witness, the bill must be dismissed.[1]

Two Defendants Denying Same Fact.—It is said that, according to the sense and spirit of this rule, if there are two defendants, each denying the same fact, it requires four witnesses to countervail their answers.[2]

When Answer Overthrown.—As a consequence of the aforesaid rule, where there is the testimony of two witnesses,[3] or of one witness with corroborating circumstances opposing it, the answer will be overthrown.[4]

1. Counts *v.* Clarke, 3 Rich. Eq. (S. Car.) 418.

Directing Issue.—No issue should be directed if the answer is not overthrown by two witnesses or by one with circumstances. Carter *v.* Carter, 82 Va. 624; Beverley *v.* Walden, 20 Gratt. (Va.) 149; Audenreid *v.* Walker, 33 Leg. Int. (Pa.) 82; Barclay's Appeal, 38 Leg. Int. (Pa.) 440. See also Pryor *v.* Adams, 1 Call (Va.) 382, 1 Am. Dec. 533.

2. Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 132, *referring to* Mortimer *v.* Orchard, 2 Ves. Jr. 243.

Testimony of Two Defendants.—Where a responsive answer is denied by two witnesses, but is sustained by the testimony of the defendant answering and another defendant, they all being equally credible, the answer cannot be considered overcome. Hurd *v.* Aschermen, 117 Ill. 501.

3. Martin *v.* Eversal, 36 Ill. 222; Morrison *v.* Stewart, 24 Ill. 24; Dodge *v.* Griswold, 12 N. H. 573.

It Is Enough to Satisfy the Rule of chancery, that the testimony of two witnesses is required to overturn the denial of the answer; that two witnesses should testify to a fact or facts to be established, whether their knowledge of such fact or facts be acquired at the same time or at different times. Bogart *v.* McClung, 11 Heisk. (Tenn.) 105, 27 Am. Rep. 737.

Admissions of Defendant.—The statements of two witnesses as to alleged admissions of the defendant will not prevail against the positive denial of an answer unless it appears that the admissions were deliberately made and repeated. Petty *v.* Taylor, 5 Dana (Ky.) 598. See Hope *v.* Evans, 1 Smed. & M. Ch. (Miss.) 195.

Defendant's sworn answer in equity may be rebutted by the evidence of three witnesses swearing to the admissions of the defendant contrary to his statements in his answer, though such admissions be made at different times and under different circumstances. Gillett *v.* Robbins, 12 Wis. 319.

Examination of Defendant Before Master.—The examination of a defendant under oath before a master, with reference to the appointment of a receiver, may be used by the adverse party at the hearing, to contradict the answer; and it makes no difference in this particular whether the questions put on such examination were proper or not. Gihon *v.* Albert, 7 Paige (N. Y.) 278.

Proof by Subscribing Witnesses.—If a bill alleges the execution of a writing, and the answer denies it, proof of the execution of the writing by the subscribing witness is sufficient to countervail the denial. Thomason *v.* Smithson, 7 Port. (Ala.) 144.

Chancellor Judge of Evidence—Decision Final.—It is for the chancellor to judge of the weight of the evidence; and his decision against the evidence to contradict the answer will not be interfered with, especially where the same facts are sworn to by two defendants in their several answers. Magwood *v.* Lubbock, Bailey Eq. (S. Car.) 382.

4. Martin *v.* Sale, Bailey Eq. (S. Car.) 1; Rowe *v.* Cockrell, Bailey Eq. (S. Car.) 126; Johnson *v.* Slawson, Bailey Eq. (S. Car.) 463; Wilkins *v.* Woodfin, 5 Munf. (Va.) 183; Bullock *v.* Goodall, 3 Call, (Va.) 44; Chance *v.* Teeple, 4 N. J. Eq. 173; Keeney *v.* Carillo, 2 N. Mex. 480; Tobey *v.* Leonards, 2 Wall. (U. S.) 423. (In this case, seven witnesses having testified contrary to the answer, the answer was disregarded.) See also Union Bank *v.* Geary, 5 Pet. (U. S.) 99.

Witnesses.—But the witnesses must be competent and credible, and their testimony must be as positive as the allegations in the answer.[1]

Corroborating Circumstances.—And in order to overthrow the answer, the circumstances in connection with the testimony of one witness must be sufficient to give a clear preponderance against the answer.[2] Thus the fact that a liability as surety for the grantor

1. Pickering *v.* Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291.

And they must have had ample opportunities of knowing the facts to which they testify. Bryan *v.* Cowart, 21 Ala. 92.

Case Continued for Further Testimony.—When it appears that better evidence can be produced, the chancellor will continue the case, with leave to take further testimony. Washburn *v.* Holmes, Wright (Ohio) 67.

Complainant as Witness.—Where two complainants are, by statute, made competent witnesses for themselves, the question of credibility is left to be judged of as affected by their interest. Their oaths are not legally entitled to be considered as destroying the effect of the answer, unless they seem to the court to be entitled to the weight of the oaths of two credible witnesses; and in considering their weight, the fact of the interest of these witnesses, as parties to the suit, must be taken into consideration, while the effect given to a responsive answer is arbitrarily fixed, without reference to the interest of the defendant. Vandegrift *v.* Herbert, 18 N. J. Eq. 468.

When the only witness for the complainant is himself, his testimony, in order to meet the positive and absolute denial of the defendant, should be vigorous, strong, and clear. Rick *v.* Neitzy, 1 Mackey (D. C.) 21.

Defendant as a Witness.—The defendant's testimony as a witness in his own behalf adds no weight to his answer as evidence, and it may still be overcome by the testimony of two witnesses or equivalent evidence. Catlett *v.* Dougherty, 114 Ill. 568.

Answer Conflicting with Defendant's Testimony.—If the defendant's testimony is in conflict with his answer, the latter will not prevail. Spencer's Appeal, 80 Pa. St. 317.

Answer in Conflict with Defendant's Witness.—If the answer of a defendant responsive to the bill and the testimony of a witness called by the defendant are in conflict, they balance each other, unless, from the circumstances of the case as detailed, the unreasonable or evasive statements of the one give a preponderance to those of the other. Jacks *v.* Nichols, 5 N. Y. 178.

2. Dunham *v.* Taylor, 29 Ga. 166.

Strong Circumstances.—In French *v.* Campbell, 13 Mo. 485, it was held there must be a preponderance of strong circumstances.

In Maddox *v.* Sullivan, 2 Rich. Eq. (S. Car.) 4, it was said that the circumstances, it seems, must be such that, standing alone, a reasonable conclusion as to the truth of the fact might be deduced from them. See also Beene *v.* Randall, 23 Ala. 514.

One Strong Circumstance.—The testimony of one witness, supported by one strongly corroborating circumstance, was held sufficient to overcome the weight of the answer. Brittin *v.* Crabtree, 20 Ark. 309.

Charge of Court.—The court charged that the sworn answer could be overcome by one witness only when there were *strong* corroborating circumstances. *Held*, that the word "strong" should have been omitted, as it is enough if the circumstances give a clear preponderance against the answer. Durham *v.* Taylor, 29 Ga. 166.

Modification of Rule.—Although the general rule is, that the answer, responsive to the bill, is evidence of the facts therein asserted, and cannot be overcome by the testimony of one witness, yet, when the orator seeks to charge a banking corporation with notice of a trust, and the corporation answers by one of its officers, fully denying such notice, and the orator introduces the deposition of another officer of the corporation, showing such notice to him, some modification of the general rule is required, inasmuch as notice given to one officer may not have been communicated to another officer, and therefore the answer and testimony would not necessarily conflict with each other. Porter *v.* Rutland Bank, 19 Vt. 410.

was incurred on the same day that an absolute deed was delivered was held not such a corroborating circumstance to show that the conveyance was a mortgage as would make the oath of one witness overcome the denial in a sworn answer.[1].

Bill Sworn to.—Where the bill as well as the answer is sworn to, the rule requiring two witnesses, etc., does not apply, and, therefore, in such case, one witness will be sufficient to overthrow the answer.[2]

1. Gelston *v.* Rullman, 15 Md. 260.

Corroborating Circumstances Illustrated.— Where a bill alleged that a note was made payable to C. for the benefit of the complainant, under a contract to the effect expressed in the note, and the answer denied the allegation, it was held that the denial was countervailed by the production of the note and the positive testimony of one witness. Eldridge *v.* Turner, 11 Ala. 1049.

The declaration of a testator that he never intended to give A. (who in the absence of a will would have succeeded to his property) anything, that he was dissipated and worthless, together with an extreme dislike to A. and a solicitude to execute his will, and its actual execution, a few days before his death, in favor of his grandchildren, were held to be such circumstances as, with the positive swearing of one witness, were sufficient to outweigh the answer of A. denying all knowledge of the will. Brown *v.* Brown, 10 Yerg. (Tenn.) 84.

The issue in this case being whether the *feme covert* defendant executed the promissory note which was sought to be charged upon her separate estate, and which purported to be signed by her jointly with her husband, one witness expressing the conviction that her signature was genuine, while four other witnesses testified that the handwriting, though closely resembling the defendant's, was not hers, and the evidence showing that when the note was handed to the husband, and he was required to procure his wife's signature, he went with it towards the room occupied by himself and wife, and returned with her name signed to it—*held*, that the evidence was not sufficient to overcome the sworn denial of the answer. Starke *v.* Blackwell, 36 Ala. 154.

An answer under oath was filed to a bill to redeem, denying the transaction to be a mortgage. *Held*, that the testimony of a single witness, that the money was advanced by the grantee in the deed to relieve the grantor in his embarrassments, taken in connection with the facts that the bond to reconvey was executed at the same time that the deed was passed, and that it stipulated that the grantee should not pay rent, the grantor not paying interest on the sum advanced, was sufficient to overcome the sworn answer, and establish a mortgage. Preschbaker *v.* Feaman, 32 Ill. 475.

An averment in an answer in equity that plaintiff is not the real owner of corporation stock subscribed in his name is overcome, even under the strictest rules of equity practice, by plaintiff's denial, corroborated by defendant's affidavit annexed to the charter of the corporation, in pursuance of the requirements of law, showing plaintiff to be a subscriber and director. Rowley's Appeal, 115 Pa. St. 150.

In a suit for the foreclosure of a mortgage, the recital in the mortgage deed of the existence and contents of the note which it was given to secure was held not sufficient to overcome a sworn denial, in the answer, of the existence of such note. O'Bannon *v.* Myer, 36 Ala. 551, 76 Am. Dec. 335.

To a bill in equity to avoid a settlement for rents collected by defendant as agent, on the ground of false representations by defendant that he had not collected any rents from certain property, defendant answered under oath, as required by the bill, denying fully and specifically any false representations. *Held*, that such answer was not overcome by the testimony of plaintiff's solicitor, corroborated only by a letter by him sent to defendant, which defendant did not answer, it apparently requiring no answer. Peeler *v.* Lathrop, 48 Fed. Rep. 780.

2. Searcy *v.* Pannell, Cooke (Tenn.) 110.

Injunction Bills.—In cases of injunc-

b. BY CIRCUMSTANCES ALONE.—It has been held in some cases that circumstances, standing alone, without the aid of the positive testimony of a witness, may be sufficient to overcome an answer.[1]

tions, where the bill must be sworn to, the rule that an answer responsive to the bill and denying the allegations must be taken as true unless contradicted by two positive witnesses, or by one witness and corroborating circumstances, does not apply; in such case one witness is sufficient. Searcy *v.* Pannell, Cooke (Tenn.) 110.

Bill Sworn to By Only One of Two Complainants.—Where two complainants sign a bill in equity, but only one of them swears to its contents, and the respondent answers its allegations directly, under oath, the court will make no decree for the complainants without another witness, or corroborating circumstances, to overbear the respondent's answer. Horton's Appeal, 13 Pa. St. 67.

1. Long *v.* White, 5 J. J. Marsh. (Ky.) 226; White *v.* Crew, 16 Ga. 416; Robinson *v.* Harden, 26 Ga. 344; Commercial Bank *v.* Reckless, 5 N. J. Eq. 650; Jones *v.* Abraham, 75 Va. 466; Bowdin *v.* Johnson, 107 U. S. 251. In this case the omission of the defendant to testify for himself was given great weight. See also Morris *v.* White, 36 N. J. Eq. 324; Field *v.* Wilbur, 49 Vt. 157; Deimel *v.* Brown, 35 Ill. App. 303.

Presumption Arising from Receipt.—The answer of one of two guardians to a bill by his wards, that the other guardian received money as administrator, is not sufficient to rebut the presumption arising from a receipt for the money, signed by them both jointly as guardians. Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298.

Presumption Arising from Cancellation of Mortgage.—The answer of a defendant, on oath, that a mortgage under which he claims has been fraudulently cancelled, is not evidence to repel the presumption of satisfaction arising from its cancellation. Miller *v.* Wack, 1 N. J. Eq. 204.

——— from Possession of Mortgage.—The answer of a mortgagor to a bill of foreclosure, denying the delivery of the mortgage, is not in itself sufficient to overcome the presumption of delivery arising from the possession of the mortgage, duly executed, acknowledged, and recorded. Commercial Bank *v.* Reckless, 5 N. J. Eq. 650; Long *v.* Kinkel, 36 N. J. Eq. 359.

Deed Not Overthrown by Uncorroborated Answer.—An answer alleging the recitals in a deed to be false and fraudulent, but uncorroborated by evidence of fraud or mistake, will not suffice to overcome the express language of the deed. Forrest *v.* Frazier, 2 Md. Ch. 147.

What is Sufficient Evidence.—A sworn answer, responsive to the bill, stands as the deposition of one witness, and is subject to the same proper criticism as is other evidence—as that it is the testimony of an interested witness, or, perhaps, that it is evasive or equivocating. Any evidence in the cause, no matter what, that is sufficient to outweigh the answer satisfies the rule, as commonly expressed, that such answer "must be overcome by the testimony of two witnesses, or at least by one witness and attendant circumstances." All that the orator is bound to do is to meet and overcome the answer by competent proof. This proof may require one or twenty witnesses; it may be made without any. Veile *v.* Blodgett, 49 Vt. 270.

Reason of Rule.—"The general rule that either two witnesses or one witness, with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands is this: the plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof is not in his favor, he must have circumstances in addition to his single witness in order to turn the balance. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness." Marshall, Ch. J., in Clark *v.* Van Riemsdyk, 9 Cranch (U. S.) 160.

Maryland.—In *Maryland* it has been expressly ruled that "pregnant circumstances" standing alone are insufficient to overthrow an answer. Roberts *v.* Salisbury, 3 Gill & J. (Md.)

Cases of Fraud.—Circumstances are said to be sometimes more convincing than direct testimony, and, in the development of fraud, to furnish almost the only source to be relied upon.[1]

c. ANSWER INCONSISTENT OR CONTRADICTORY.—The rule which makes responsive answers evidence for defendant *ex necessitate* applies only to fair answers and not to those which upon their face are incredible.[2] An answer may be within itself so inconsistent and contradictory as to deprive it of all efficacy.[3]

d. IMPEACHING CREDIBILITY OF DEFENDANT.—The admission of extrinsic evidence to discredit an answer in chancery by impeaching the credibility of the defendant is not allowed. It would be a subversion of the established rule requiring two witnesses, or one witness with corroborating circumstances, to overcome an answer.[4]

425; Glenn *v.* Grover, 3 Md. 229; Ing *v.* Brown, 3 Md. Ch. 521.

1. Gould *v.* Williamson, 21 Me. 273; Farley *v.* Bryant, 32 Me. 474. See Wheat *v.* Moss, 16 Ark. 243.

The denial of fraud in an answer under oath is not conclusive on the court if the facts and circumstances of the case are such as irrresistibly to lead the mind to a different conclusion. How *v.* Camp, Walk. (Mich.) 427; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

2. Stevens *v.* Post, 12 N. J. Eq. 408.

3. Brown *v.* Bulkley, 14 N. J. Eq. 294; Dunham *v.* Gates, Hoffm. Ch. (N. Y.) 185. See Morris *v.* White, 36 N. J. Eq. 324.

"The answer itself may be so obviously contradictory, inconsistent, and incredible; may contain within itself such circumstances, as will alone suffice to deprive it of all efficacy and vitality. The rule (two witnesses, etc.) obviously, *ex necessitate*, applies only to a fair and untainted answer, not to an answer in itself inconsistent, contradictory, and incredible." Greene, Ch. J., in Commercial Bank *v.* Reckless, 5 N. J. Eq. 650.

A denial by the answer of the existence of fraud will not avail to disprove it, where the answer admits facts from which fraud follows as a natural and legal, if not a necessary and unavoidable, conclusion. Sayre *v.* Fredericks, 16 N. J. Eq. 205; Hoboken Sav. Bank *v.* Becham, 33 N. J. Eq. 53.

One Witness Sufficient.—Where the answer positively denies a fact charged in the bill, but proceeds to give a circumstantial account of the transaction inconsistent with the truth of the denial, a single witness, without corroborating circumstances, is sufficient to prove the facts charged. Barraque *v.* Siter, 9 Ark. 545.

No Oral Testimony Necessary.—Where two papers were exhibited in the cause, admitted in the defendant's answer, and declared by the court to be the agreement of the parties, they are sufficient to control the answer denying the agreement, without the aid of any oral testimony in their support. Jones *v.* Belt, 2 Gill (Md.) 106. See also Trump *v.* Baltzell, 3 Md. 295.

Admissions Received Without Explanations.—Where an answer, though responsive to the charges of the bill, is contradictory in itself, or absurd in its explanation of the admissions of the defendant, and is disproved by one witness, the court may take the admissions in the answer without the explanations. Brown *v.* Brown, 10 Yerg. (Tenn.) 84.

Improbability of Allegations.—The inherent improbability of the allegations of an answer to a bill in equity is insufficient of itself to overcome its responsive character, and the complainant must establish his case by other evidence. Hartley's Appeal, 13 W. N. Cas. (Pa.) 407, 40 Pa. L. J. 326, 103 Pa. St. 23.

4. Brown *v.* Bulkley, 14 N. J. Eq. 294; Clark *v.* Bailey, 2 Strobh. Eq. (S. Car.) 143; Butler *v.* Catling, 1 Root (Conn.) 310.

Contra. Miller *v.* Tollison, Harp. Eq. (S. Car.) 145, 14 Am. Dec. 712, held that evidence to impeach the credibility of the answering defendant was admissible. But see the opinion

e. ANSWER CONTRADICTED ON MATERIAL POINT.—Where an answer is disproved or contradicted on one or more material points, it loses its weight as evidence, and stands only as a pleading necessary to form the issue.[1]

7. Answer Not Direct and Positive—*a.* IN GENERAL.—The rule that a fact denied by answer can only be established by the testimony of more than one witness is inapplicable if the answer does not contain a direct and positive denial of such fact.[2]

in this case *reviewed* and *criticised* in Brown *v.* Bulkley, 14 N. J. Eq. 315.

No Proof to Contradict Answer.—A., having failed to prove, in a trial at law, that B. was an agent of C., brought his bill in equity to be relieved against the judgment obtained by C., C. having denied the agency. *Held*, that A. could not go into proof to contradict C.'s answer. Lemon *v.* Cherry, 1 Bibb (Ky.) 253.

Effect of Evidence Tending to Discredit Answer.—A plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit, nor can he incidentally do so by proving that the answer is false in one respect or several respects, the only effect of such proof being to destroy the weight of the answer, to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery. Fant *v.* Miller, 17 Gratt. (Va.) 187.

Discrediting Testimony by Introduction of Independent Evidence.—"It is true that, after reading the answer to the jury, the appellants were not at liberty to discredit it by impeaching the general reputation of the appellee for truth, for the reason that a party is not permitted to show that his own witness is unworthy of belief; but he may always controvert the correctness of the statements made by his own witness by the introduction of other evidence, and in that way discredit his testimony. An answer to a bill of discovery is entitled to no higher consideration than the answers of a party's own witnesses upon the stand, and may be controverted in the same way." Trumbull, J., in Chambers *v.* Warren, 13 Ill. 322, *citing* Nourse *v.* Gregory, 3 Litt. (Ky.) 379; McNutt *v.* Dare, 8 Blackf. (Ind.) 35; Williams *v.* Wann, 8 Blackf. (Ind.) 477; March *v.* Davison, 9 Paige (N. Y.) 580. And *approved* in Curtiss *v.* Martin, 20 Ill. 574; Williams *v.* Jayne, 55 Ill. 181.

1. Prout *v.* Roberts 32 Ala. 427; Pharis *v.* Leachman, 20 Ala. 662; Gunn *v.* Brantley, 21 Ala. 633; Countz *v.* Geiger, 1 Call (Va.) 191; Fay *v.* Oatley, 6 Wis. 42; Gamble *v.* Johnson, 9 Mo. 605.

Falsum in Uno, Falsum in Omnibus.—Where an answer is contradicted in any one or more important particulars by sufficient evidence, that is, by two witnesses, or by one witness with corroborating circumstances, it is deprived in all other respects of that weight which is allowed to answers by the rules of a court of equity; for, being falsified in one thing, no confidence can be placed in it as to others, according to the maxim *falsum in uno, falsum in omnibus.* Roundtree *v.* Gordon, 8 Mo. 25.

One Witness Sufficient.—Where the answer is discredited on other points, one witness will prevail against it. Young *v.* Hopkins, 6 T. B. Mon. (Ky.) 23.

Entitled Only to Diminished Credit.—An answer, as evidence, ought, like every other species of evidence, to be liable to be impeached and overthrown. But, if impeached in material parts by the proofs in the case, it is entitled to only diminished credit. Forsyth *v.* Clark, 3 Wend. (N. Y.) 637. See Fant *v.* Miller, 17 Gratt. (Va.) 187.

2. Wetmore *v.* White, 2 Cai. Cas. (N. Y.) 87, 2 Am. Dec. 323, Bellows *v.* Stone, 18 N. H. 465; Rogers *v.* French, 19 Ga. 316; Whittington *v.* Roberts, 4 T. B. Mon. (Ky.) 173; Bobe *v.* Stickney, 36 Ala. 482; Ressler *v.* Witmer, 1 Pa. St. 174; Remington *v.* Willard, 15 Wis. 583; McLard *v.* Linnville, 10 Humph. (Tenn.) 163; McGuffie *v.* Planters' Bank, Freem. Ch. (Miss.) 383; Rector *v.* Rector, 8 Ill. 105; Toulme *v.* Clark, 64 Miss. 471; Atkinson *v.* Foster, 134 Ill. 472; Barraque *v.* Siter, 9 Ark. 546; Copeland *v.* Crane, 9 Pick. (Mass.) 73; Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Veile *v.* Blodgett, 49 Vt. 270; Harrison *v.* Gardner, 2 Madd. 455.

Illustrations.—Sworn averments in

b. EVASIVE ANSWERS.—If facts alleged in the bill are denied equivocally or evasively, one credible witness who swears postively will be sufficient to establish them.[1]

c. ANSWERS ON INFORMATION AND BELIEF.—If an answer states the facts on information and belief instead of positively upon defendant's own knowledge, even though it be responsive, the general rule as to the effect of responsive answers as evidence

the answer to a creditor's bill, which sets up the confession by defendant of a judgment on a note, that the note, "as defendant is advised," was paid before the judgment was confessed; that "on an accounting" between the parties "it will appear that there is nothing due from defendant on said note or judgment;" and that defendant is not indebted in any amount on said note "because he says" that said note had been fully paid by a third person, "as will be shown on an accounting" between such third person and the payee,—are not direct and positive denials of an allegation in the bill that the judgment remains unpaid, and hence they need not be overcome by the evidence of two witnesses, or its equivalent. Atkinson *v.* Foster, 134 Ill. 472.

A statement, in an answer, to the effect that "respondent does not admit the statement of moneys paid, as charged in the bill, to be correct, but avers that the aggregate of said payments but little (if any) exceeded the amount of principal and interest due on the first of said notes," does not so negative the payments claimed in the bill as to require the testimony of two witnesses, or of one witness with corroborating circumstances, to overturn it. Bobe *v.* Stikney, 36 Ala. 482.

Where complainants allege that a certain pier and its appurtenances are essential to the enjoyment of their canal, and the answer alleges that they are useful but not essential, such denial is not so direct and positive as to entitle the answer to outweigh the allegation of the bill. Morris Canal, etc., Co. *v.* Jersey City, 11 N. J. Eq. 13.

In a suit in equity to open a settlement of accounts, where the suit was barred unless there was a sufficient acknowledgment or promise to take it out of the statute, one witness testified that the witness said: "I am willing to pay all errors and interest on them, and you are authorized to say as much." In his answer the defendant denied "that he ever made such a promise as he is falsely stated in the bill to have made, within two years last past. * * * He might have stated that if any important, palpable errors, of a nature to affect the character of said settlement, should be found, they ought and should be corrected; but that unimportant differences between an exact account and the abstract used should not be permitted by the defendant, at this period, to operate on or affect such settlement." He denied that any admission, of other or different meaning from this, was ever made by him. *Held*, that this was not such a direct, positive, and unequivocal denial of the acknowledgment that it required two witnesses to overcome the answer at this point. Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

1. Slater *v.* Maxwell, 6 Wall. (U. S.) 268; Phillips *v.* Richardson, 4 J. J. Marsh. (Ky.) 212; Combs *v.* Boswell, 1 Dana (Ky.) 475; Lawrence *v.* Lawrence, 4 Bibb (Ky.) 358. See also Rembert *v.* Brown, 17 Ala. 667.

Evasive Answer Merely a Pleading.—An answer filed in response to a call for an answer under oath, where evasive and responsive to the interrogatory, is to be treated only as a pleading, and not as evidence. Deimel *v.* Brown, 35 Ill. App. 303.

Evasive Answer of Little Force.—A grossly evasive answer cannot have the force of one that shows apparent good faith. Fairbairn *v.* Middlemiss, 47 Mich. 372.

Partial Evasiveness Does Not Vitiate Entire Answer.—Where, in the defendant's answer, there is a general denial, which is clear and distinct, any ambiguity or apparent evasion in a particular part will not vitiate or destroy other parts. The whole answer is to be taken together, and if any particular part is ambiguous, it ought to be so construed as to comport with the general denial. Clason *v.* Morris, 10 Johns. (N. Y.) 524.

is inapplicable, and at most the answer can only be regarded as a pleading putting in issue the allegations of the bill and putting the complainant to proof.[1] In such case a single witness in sup-

1. *Alabama.*—Newman *v.* James, 12 Ala. 29; Paulding *v.* Watson, 21 Ala. 279; Waters *v.* Creagh, 4 Stew. & P. (Ala.) 410; Pearce *v.* Nix, 34 Ala. 183.

Arkansas. — Watson *v.* Palmer, 5 Ark. 501; Fairhurst *v.* Lewis, 23 Ark. 435; Biscoe *v.* Coulter, 18 Ark. 423; Wheat *v.* Moss, 16 Ark. 250; Barraque *v.* Siter, 9 Ark. 545; Burr *v.* Burton, 18 Ark. 228.

District of Columbia.—Miller *v.* District of Columbia, 5 Mackey (D. C.) 291; Noyes *v.* Inland, etc., Coasting Co., 4 McArth. (D. C.) 1.

Indiana. — State *v.* Holloway, 8 Blackf. (Ind.) 45.

Illinois.—Cunningham *v.* Ferry, 74 Ill. 426.

Georgia.—Rogers *v.* French, 19 Ga. 316.

Maryland. — Philadelphia Trust, etc., Co. *v.* Scott, 45 Md. 451; Drury *v.* Conners, 6 Har. & J. (Md.) 289; Dugan *v.* Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Dorsey *v.* Gassaway, 2 Har. & J. (Md.) 402.

Massachusetts.—Copeland *v.* Crane, 9 Pick. (Mass.) 73; Parkman *v.* Welch, 19 Pick. (Mass.) 231; Buttrick *v.* Holden, 13 Met. (Mass.) 355.

Mississippi.—Carpenter *v.* Edwards, 64 Miss. 595; Snell *v.* Fewell, 64 Miss. 655; Toulme *v.* Clarke, 64 Miss. 471; McGuffie *v.* Planters' Bank, Freem. Ch. (Miss.) 383; Hanover Nat. Bank *v.* Klein, 64 Miss. 150, 60 Am. Rep. 47.

New York.—Hutchinson *v.* Smith, 7 Paige (N. Y.) 26; Town *v.* Needham, 3 Paige (N. Y.) 546; Dunham *v.* Gates, Hoffm. Ch. (N. Y.) 185.

Rhode Island.—Atlantic, etc., Ins. Co. *v.* Wilson, 5 R. I. 479.

Tennessee.—McKissick *v.* Martin, 12 Heisk. (Tenn.) 311; Wilkins *v.* May, 3 Head (Tenn.) 173; McLard *v.* Linnville, 10 Humph. (Tenn.) 163.

Vermont.—Veile *v.* Blodgett, 49 Vt. 270; Loomis *v.* Fay, 24 Vt. 240; Wooley *v.* Chamberlain, 24 Vt. 270.

Wisconsin.—Remington *v.* Willard, 15 Wis. 583.

United States.—Berry *v.* Sawyer, 19 Fed. Rep. 286; Allen *v.* O'Donald, 28 Fed. Rep. 17; Slater *v.* Maxwell, 6 Wall. (U. S.) 268; Robinson *v.* Mandell, 3 Cliff. (U. S.) 169.

England.—Hughes *v.* Garner, 2 Y. & C. 127.

Illustrations. — In a proceeding to avoid a deed on the ground that it was never delivered to the grantee, but was fraudulently taken from his possession, when the defendants, heirs of the grantee, have no personal knowledge of the delivery of the deed, and can only answer as to their information and belief, and the answer contains no positive denial of the fact which is distinctly alleged in this bill, it is not evidence in defendant's favor upon that point, and complainant is not required to increase the weight of his evidence to overcome it. Benson *v.* Woolverton, 15 N. J. Eq. 158.

Where an answer to a bill to foreclose a mortgage set up a mortgage made but not recorded prior to that of plaintiff, and alleged upon information and belief that the plaintiff had notice of the existence of defendant's mortgage at the time he took his, the answer was held not to be evidence for defendant, because not positive in form. Remington *v.* Willard, 15 Wis. 583.

Two foreclosure suits pending in the same court were consolidated by consent of counsel, and it was agreed that the second bill should be taken as an answer and cross-bill to the first. The complainant in the first bill admitted the validity of the other's mortgage, while the latter alleged on information and belief that the former's mortgage was intended to hinder and delay creditors, and that the debts secured by it were fictitious. *Held*, that it was incumbent on the first complainant as against the second to prove the existence and *bona fides* of the debt which constituted the consideration of his mortgage. De Vendal *v.* Malone, 25 Ala. 272.

Answer on Information and Belief Not Aided by Codefendant's Answer on Knowledge.—Two defendants united in an answer. The one, an assignor, met the allegations of the bill on his own knowledge, and the other, an assignee, on information and belief. The answer of the latter does not fall within the rule requiring two witnesses to prevail against it; nor can it be aided by the answer of the other. Dunham *v.* Gates, Hoffm. Ch. (N. Y.) 185.

Where a material allegation of the

port of such allegations will be sufficient to authorize a decree for complainant.[1]

Answers on Opinion and Belief.—An answer which negatives a positive allegation by way of opinion and belief may be overbalanced by proof less stringent and conclusive than if the defendant's denial had been made upon his own knowledge.[2]

Answers on Knowledge and Belief.—A denial according to the best of defendant's knowledge and belief, or, in other words, saying he has no recollection of facts alleged, merely throws the proof upon the other party, and a single witness is sufficient to establish the fact.[3]

bill is denied, on information and belief merely, by all the defendants except one, as to whom an answer made under oath was waived, and by whom the allegation is denied from knowledge, it is not incumbent on the plaintiff to establish the fact by two witnesses, or by one witness with corroborating circumstances. Pearce *v.* Nix, 34 Ala. 183.

Answer on Information and Belief Not Aided by Ex Parte Affidavit.—An answer on information and belief has no probative force to negative the testimony of one or more witnesses in support of the bill. Nor can such an answer be aided by the *ex parte* affidavit of a deceased witness. Miller *v.* District of Columbia, 5 Mackey (D. C.) 291.

An Averment of Belief from Information Received, even if responsive to the bill, is not evidence. Luburg's Appeal, 23 W. N. C. (Pa.) 454.

An Answer to a Bill, from Information, Hearsay, or Belief (except, perhaps, when the facts answered by a defendant on information are *against his interest*, and he states, additionally, that he believes them to be true) is not responsive to a bill so as to make it evidence in the case. Arline *v.* Miller, 22 Ga. 330.

In Mississippi a denial in an answer upon information is a denial otherwise than by the general traverse, within the meaning of Ann. Code 1892, § 533, providing that allegations of fact alleged in the bill and not denied by the answer otherwise than by the general traverse may be taken at the hearing as admitted, and is sufficient to prevent facts averred in the bill from being taken at the hearing as admitted. Carpenter *v.* Edwards, 64 Miss. 595.

1. Fairhurst *v.* Lewis, 22 Ark. 435; Biscoe *v.* Coulter, 18 Ark. 423; Watson *v.* Palmer, 5 Ark. 501; Atlantic, etc., Ins. Co. *v.* Wilson, 5 R. I. 479; Pearce *v.* Nix, 34 Ala. 183; Newman *v.* James, 12 Ala. 29; Waters *v.* Creagh, 4 Stew. & P. (Ala.) 410; Paulding *v.* Watson, 21 Ala. 279; State *v.* Holloway, 8 Blackf. (Ind.) 45; Dunham *v.* Gates, Hoffm. Ch. (N. Y.) 185; Town *v.* Needham, 3 Paige (N. Y.) 546; Slater *v.* Maxwell, 6 Wall. (U. S.) 268; Toulme *v.* Clarke, 64 Miss. 471.

2. Givens *v.* Tidmore, 8 Ala. 745.

3. Knickerbacker *v.* Harris, 1 Paige (N. Y.) 209; Town *v.* Needham, 3 Paige (N. Y.) 546.

Where the bill alleges that an original paper, a copy of which is appended to an exhibit to the bill, is in the defendant's possession, and specially interrogates him as to the correctness of the alleged copy, and requires him to point out the differences (if any) between it and the original; and the defendant specifies in his answer two particulars in which the alleged copy differs from the original, and avers that there are other differences which he cannot recollect, this does not impose upon the complainant the onus of proving the correctness of the alleged copy. Hartwell *v.* Whitman, 36 Ala. 712.

Contra.—A policy of insurance contained a stipulation that if the assured then had, or thereafter should have, any other insurance upon the same property, notice thereof should be given to the insurance company, and the same be indorsed upon the policy, or otherwise acknowledged by the company, in default of which the policy should cease. A loss of the property accruing, the assured filed a bill against the company, alleging notice of a subsequent insurance upon the same property to the defendant, and praying that the company might

Answer Denying Knowledge, Information, and Belief.—An answer that defendant has no knowledge, information, and belief concerning the allegation of the bill leave such allegations to be proven by complainant, but such answer is not equivalent as evidence to a denial of the facts alleged.[1]

Answer Showing Lack of Personal Knowledge.—Where a defendant in his answer swears positively to facts as to which the answer shows he could have no personal knowledge, evidence equivalent to two witnesses is not necessary to overcome the answers in relation to such facts.[2]

Answer of Defendant Who Has No Personal Knowledge.—The answer of a defendant who has no personal knowledge of the facts he alleges is not evidence though responsive to the bill, and the only effect of such an answer is to make an issue and put complainant to the proof of his allegations. In such case the testimony of one witness for complainant will warrant a decree in his favor.[3]

d. ANSWERS ON HEARSAY.—Where the answer states facts acquired through hearsay merely, it is not evidence.[4]

e. ANSWER ALLEGING IGNORANCE.—And the same is the case where defendant by his answer professes complete ignorance of the facts stated in the bill.[5]

be compelled to indorse the notice upon the policy, or otherwise acknowledge it in writing. The answer of the company, sworn to by the then president, denied the notice, to the best of his knowledge and belief. *Held*, that the answer being responsive to the bill, and denying the allegation under oath, the general rule applied, and that the allegation of the bill must be proved by two witnesses, or one witness and other evidence. Carpenter *v.* Providence Washington Ins. Co., 4 How. (U. S.) 185.

1. The Holladay Case, 27 Fed. Rep. 830.

2. Fryrear *v.* Lawrence, 10 Ill. 325; Garron *v.* Carpenter, 1 Port. (Ala.) 359; Lawrence *v.* Lawrence, 21 N. J. Eq. 317.

3. *United States.*—Dutilh *v.* Coursault, 5 Cranch (C. C.) 349.

Kentucky.—Harlan *v.* Wingate, 2 J. J. Marsh. (Ky.) 138; Combs *v.* Boswell, 1 Dana (Ky.) 473; Williamson *v.* McConnell, 4 Dana (Ky.) 454.

Arkansas.—Watson *v.* Palmer, 5 Ark. 501; Wheat *v.* Moss, 16 Ark. 250; Barraque *v.* Siter, 9 Ark. 550; Biscoe *v.* Coulter, 18 Ark. 423; Burr *v.* Burton, 18 Ark. 228.

Alabama.—Gibbs *v.* Frost, 4 Ala. 721; Garrow *v.* Carpenter, 1 Port. (Ala.) 359; Waters *v.* Creagh, 4 Stew. & P. (Ala.) 410.

Illinois.—Deimel *v.* Brown, 136 Ill. 586.

Virginia.—Tabb *v.* Cabell, 17 Gratt. (Va.) 160.

New Jersey.—Lawrence *v.* Lawrence, 21 N. J. Eq. 317; Kinna *v.* Smith, 3 N. J. Eq. 14.

Indiana.—Townsend *v.* McIntosh, 14 Ind. 57.

Vermont.—Loomis *v.* Fay, 24 Vt. 240; Wooley *v.* Chamberlain, 24 Vt. 270.

Delaware.—Lattomus *v.* Garman, 3 Del. Ch. 232.

Maryland.—Pennington *v.* Gittings, 2 Gill & J. (Md.) 215; Drury *v.* Conner, 6 Har. & J. (Md.) 288.

Thus, where A. brought his bill to enjoin a judgment recovered against him by default, averring that from sickness he had been unable to attend the trial at law, and the answer denied the fact and put A. to the proof, it was held that the testimony of one witness was sufficient to establish the charge, as the defendant could have no personal knowledge of the fact. Watson *v.* Palmer, 5 Ark. 501.

4. Stevens *v.* Post, 12 N. J. Eq. 408; Doub *v.* Barnes, 1 Md. Ch. 130.

5. Couthway *v.* Berghaus, 25 Ala. 393; Drury *v.* Conner, 6 Har. & J. (Md.) 288; Harlan *v.* Wingate, 2 J. J. Marsh. (Ky.) 138; Neale *v.* Hagthrop, 3 Bland (Md.) 578 (*citing* Hagthorp *v.*

8. Unsworn Answer.—Where an answer without oath is filed, it is not evidence in favor of defendant for any purpose.[1] But, on

Hook, 1 Gill & J. (Md.) 273; Potter *v.* Potter, 1 Ves. 274; Amhurst *v.* King, 1 Cond. Ch. Rep. 407); Harrison *v.* Annapolis, etc., R. Co., 50 Md. 513; Philadelphia Trust, etc., Co. *v.* Scott, 45 Md. 453; Williamson *v.* McConnell, 4 Dana (Ky.) 454; Young *v.* Hopkins, 16 T. B. Mon. (Ky.) 18; Brown *v.* Pierce, 7 Wall. (U. S.) 212.

In Neale *v.* Hagthrop, 3 Bland (Md.) 551, the court said: "Where an answer in the body of it purports to be an answer to the whole bill, but the respondent declares that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or any language to that effect, and the plaintiff files a general replication, all the allegations of the bill are thus denied and put in issue, and consequently all of them must be proved at the hearing against a defendant who had thus answered."

Illustration.—Where a bill is filed by a married woman against her trustee and certain judgment creditors of her husband, seeking the reformation of a deed on the ground of mistake, an injunction of the judgment, and the appointment of another trustee; and decrees *pro confesso* are entered against all the defendants except the trustee, who avers his ignorance of the alleged mistake, the clear and direct testimony of one witness is sufficient to authorize the reformation of the deed. Godwin *v.* Yonge, 22 Ala. 553.

1. *Alabama.*—Guthrie *v.* Quinn, 43 Ala. 561; Lockhart *v.* Troy, 48 Ala. 579; Marshall *v.* Croom, 52 Ala. 554; Griffin *v.* State Bank, 17 Ala. 258; Wilkinson *v.* Bradley, 54 Ala. 677; Zelnicker *v.* Brigham, 74 Ala. 598; Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; White *v.* Wiggins, 32 Ala. 424; Rainey *v.* Rainey, 35 Ala. 282; Keiffer *v.* Barney, 31 Ala. 192; Frazer *v.* Lee, 42 Ala. 25.

Georgia.—Vanderzer *v.* McMillan, 28 Ga. 339.

Illinois.—Wallwork *v.* Derby, 40 Ill. 527; Hopkins *v.* Granger, 52 Ill. 504; Willenborg *v.* Murphy, 36 Ill. 344; Moore *v.* Hunter, 6 Ill. 317; Adlard *v.* Adlard, 65 Ill. 217; Chambers *v.* Rowe, 36 Ill. 171; Jones *v.* Neely, 72 Ill. 449; Ferguson *v.* Sutphen, 8 Ill. 572.

Indiana.—Peck *v.* Hunter, 7 Ind. 295; Larsh *v.* Brown, 3 Ind. 234; Moore *v.* McClintock, 6 Ind. 209.

Iowa.—Armstrong *v.* Scott, 3 Greene (Iowa) 433; White *v.* Hampton, 10 Iowa 238.

Maine.—Clay *v.* Towle, 78 Me. 86.

Maryland.—Stockett *v.* Holliday, 9 Md. 480; Taggart *v.* Boldin, 10 Md. 104; Dorn *v.* Bayer, 16 Md. 144.

Massachusetts.—Gerrish *v.* Towne, 3 Gray (Mass.) 82.

Michigan.—Morris *v.* Hoyt, 11 Mich. 9; Adair *v.* Cummin, 48 Mich. 375.

New Hampshire.—Winsor *v.* Bailey, 55 N. H. 223; Ayer *v.* Messer, 59 N. H. 279; Hall *v.* Congdon, 55 N. H. 105; Wilson *v.* Towle, 36 N. H. 129.

New Jersey.—Hyer *v.* Little, 20 N. J. Eq. 443; Walker *v.* Hill, 21 N. J. Eq. 191; Stevens *v.* Post, 12 N. J. Eq. 408; Sweet *v.* Parker, 22 N. J. Eq. 452.

New York.—Bartlett *v.* Gale, 4 Paige (N. Y.) 503; Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307; Fishell *v.* Bell, Clarke Ch. (N. Y.) 37; Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582; Hatch *v.* Eustaphieve, Clarke Ch. (N. Y.) 63.

Ohio.—Miami Exporting Co. *v.* U. S. Bank, Wright (Ohio) 249.

Tennessee.—Lindsley *v.* James, 3 Coldw. (Tenn.) 477; Murray *v.* Johnson, 1 Head (Tenn.) 353; Van Wyck *v.* Norvel, 2 Humph. (Tenn.) 196; Dunlap *v.* Haynes, 4 Heisk. (Tenn.) 476.

Wisconsin.—Smith *v.* Potter, 3 Wis. 432; Flint *v.* Jones, 5 Wis. 424.

United States.—Union Bank *v.* Geary, 5 Pet. (U. S.) 99; Patterson *v.* Gaines, 6 How. (U. S.) 550.

Answer Sworn before Party Unauthorized to Administer Oath.—A paper writing, purporting to be the answer of a defendant, filed after his death, and certified as sworn to by him, but the person so certifying not appearing in the certificate, nor by evidence, to have been a magistrate of any kind, is not the answer of the party, nor evidence in the cause. Sitlingtons *v.* Brown, 7 Leigh. (Va.) 271.

An answer, though responsive on the point in controversy, sworn to before an officer in another state, not authorized by the statutes of this state or the rules of this court to take such oaths, has no weight as evidence; it must be treated as a pleading only. Freytag *v.* Hoeland, 23 N. J. Eq. 36.

the other hand, the admissions and allegations which tend to support the case made by the bill are evidence against him.[1] An answer filed without being sworn to may nevertheless be treated as a valid answer by the complainant, and in such a case will have the same effect as evidence in favor of the defendant as if sworn to.[2]

9. Answer Where Oath is Waived.—It may be stated as a well-settled rule that, in the absence of statutory regulation or rule of court, a mere waiver in the bill by complainant of the requirement that defendant shall make oath to his answer will not deprive him of the right to make oath thereto if he sees fit, and thereby make his answer evidence in his favor.[3]

Statutory Changes of Rule.—In many jurisdictions, however, this rule has been modified or abolished altogether by statutes and rules of court.[4] But even in jurisdictions where a waiver of oath by

Answer Not Evidence Unless Duly Sworn.—A paper purporting to be an answer to a bill of discovery, and to have been sworn to before a magis trate in another state, is not admissible in evidence as such, without proof of its having been filed as such, of the signature of the party, and of the attestation of the officer. Doughton *v.* Tillay, 4 Blackf. (Ind.) 433.

1. Curling *v.* Townshend, 19 Ves. 628; Bartlett *v.* Gale, 4 Paige (N. Y.) 503; Durfee *v.* McClurg, 6 Mich 223; Morris *v.* Hoyt, 11 Mich. 9: Sims *v.* Ferrill, 45 Ga. 585; Smith *v.* Potter, 3 Wis. 432; Hyer *v.* Little, 20 N. J. Eq. 443; Symmes *v.* Strong, 28 N. J. Eq. 131.

But no part of an unsworn answer, which has been withdrawn by consent of the court upon the ground that it was written by the solicitor and did not state the facts of the case, can be read as evidence against the defendant on the hearing of the case. Hurst *v.* Jones, 10 Lea (Tenn.) 8.

2. Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307.

3. Jewett *v.* Cunard, 3 Woodb. & W. (U. S.) 277; Clements *v.* Moore, 6 Wall. (U. S.) 299; Conley *v.* Nailor, 118 U. S. 127; Amory *v.* Lawrence, 3 Cliff. (U. S.) 523; Woodruff *v.* Dubuque, etc., R. Co., 30 Fed. Rep. 91; Vanderzer *v.* McMillan, 28 Ga. 339: Armstrong *v.* Scott, 3 Greene (Iowa) 434; White *v.* Hampton, 9 Iowa 182, 10 Iowa 238; Brown *v.* Bulkley, 14 N. J. Eq. 294.

Laches in Swearing to Answer.—Where petitioners did not call for an answer under oath, and defendants made answer, which remained on file but not sworn to for a year—*held*, that defendants, having so long omitted to make oath to their answer, could not, by incorporating a little new matter, under a special leave given to file an amended answer in the nature of a plea, into their old answer, and making affidavit to it, give the force of a sworn answer to the original one. De France *v.* Howard, 4 Iowa 524.

4. **Alabama.**—Thus, in *Alabama*, where the bill is filed for any other purpose than discovery only, plaintiff may waive oath, and in such case the answer is entitled to no more weight as evidence from the bill. Civil Code 1886, § 3422. See also Guthrie *v.* Quinn, 43 Ala. 561; Latham *v.* Staples, 46 Ala. 462; Lockhart *v.* Troy, 48 Ala. 579; Marshall *v.* Croom, 52 Ala. 554; Mosser *v.* Mosser, 29 Ala. 313; Griffin *v.* State Bank, 17 Ala. 258; Wilkinson *v.* Bradley, 54 Ala. 677; Zelnicker *v.* Brigham, 74 Ala. 598; Watts *v.* Eufaula Nat. Bank, 76 Ala. 474.

Illinois.—Where a bill shall be filed for any purpose other than discovery only, complainant may waive oath, and the answer may be made without oath, and shall have no greater effect as evidence than the bill. Rev. Sts. 1893, p. 219, § 20. Moore *v.* Hunter, 6 Ill. 317; Adlard *v.* Adlard, 65 Ill. 212; Willenborg *v.* Murphy, 36 Ill. 344; Harris *v.* Reece, 10 Ill. 212; Wallwork *v.* Derby, 40 Ill. 527; Tracy *v.* Rogers, 69 Ill. 662; Hopkins *v.* Granger, 52 Ill. 504; Ferguson *v.* Sutphen, 8 Ill. 547; Willis *v.* Henderson, 5 Ill. 13; Chambers *v.* Rowe, 36 Ill. 171.

Where answer under oath is not waived in suit to set aside a gambling contract, a sworn answer is evidence. Patterson *v.* Scott, 37 Ill. App. 520, *affirmed* 142 Ill. 138.

bill destroys the effect of the answer as evidence, a defendant cannot be deprived of the benefit of his answer under oath as

Georgia.—If complainant waives an answer under oath, the answer filed is not evidence. It may be used, however, as an admission of record, and complainant is not bound to prove any fact admitted. But when so used the admission must be taken, together with any qualifications or explanations accompanying it. Woodward *v.* Gates, 38 Ga. 205.

Maine.—All answers shall be signed by respondent and sworn to by him if complainant in his bill asks for answer upon oath. Otherwise it may be signed by respondent, his agent or attorney; but in such case it has no effect as evidence, except to cast the burden of proof upon plaintiff. Rev. Sts. c. 77, § 15. See also Clay *v.* Towle, 78 Me. 86; Peaks *v.* McAvey (Me., 1886) 7 Atl. Rep. 270.

Indiana.—Acts 1847, p. 60, providing that where the bill prays for answer without oath, answer shall operate only as a denial of the allegations and charges in the bill, and in such case complainant shall not be required to substantiate such charges and allegations by more than one witness. Under this statute an answer put into a bill requiring answer without oath is not evidence for defendant. Larsh *v.* Brown, 3 Ind. 234; Moore *v.* McClintock, 6 Ind. 209; Peck *v.* Hunter, 7 Ind. 295.

Maryland.—Chancery Rule 146 provides that it shall not be necessary for any defendant to make oath to his answer unless required by the plaintiff, nor shall any answer, whether sworn to or not, be evidence against the plaintiff at the hearing of the cause, unless the plaintiff shall read such answer as evidence against the defendant making the same; but this section shall not apply to motions to dissolve an injunction or to discharge a receiver. See also Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Stockett *v.* Holliday, 9 Md. 486; Warren *v.* Twilley, 10 Md. 39; Taggart *v.* Boldin, 10 Md. 114; Mickle *v.* Cross, 10 Md. 360; Hamilton *v.* Whitridge, 11 Md. 144, 69 Am. Dec. 184; Gelston *v.* Rullman, 15 Md. 267; Mahaney *v.* Lazier, 16 Md. 69; Rich *v.* Levy, 16 Md. 74; Dorn *v.* Bayer, 16 Md. 145; Dorsey *v.* Hagerstown Bank, 17 Md. 412; Colvin *v.* Warford, 17 Md. 433; State *v.* Northern Cent. R. Co., 18 Md. 194; Hubbard *v.* Mobray, 20 Md. 165; Huston *v.* Ditto, 20 Md. 306; Watson *v.* Watson, 58 Md. 442; Diffenbach *v.* Vogeler, 61 Md. 378.

Massachusetts.—When a bill shall be filed other than for discovery only, complainant may waive the necessity of an oath to the answer, and the answer may be made without oath and shall have no other or greater effect as evidence than the bill. Rule 5, Ch. Pr., 24 Pick. (Mass.) 411. See also Babcock *v.* Smith, 22 Pick. (Mass.) 61; Bingham *v.* Yeomans, 10 Cush. (Mass.) 58.

Michigan.—When a bill shall be filed in chancery other than for discovery, complainant may waive the answer being made on oath, in which case the answer shall have no other or greater force as evidence than the bill. How. Sts. of Mich. § 6621. See also Morris *v.* Hoyt, 11 Mich. 9; Van Inwagen *v.* Van Inwagen, 86 Mich. 333; Roberts *v.* Miles, 12 Mich. 297.

Mississippi.—In *Mississippi*, if the rule be waived, the answer, whether sworn to or not, shall not be evidence for defendant. Ann. Code 1892, § 534.

New Hampshire.—In *New Hampshire*, Rule 9 of Chancery Practice provides that answers, unless required by bill to be under oath, need not be sworn to, in which case they will be regarded only as pleadings. If the bill does not call for a sworn answer, the answer, though under oath, is pleading and not evidence. See Ayer *v.* Messer, 59 N. H. 279; Hall *v.* Congdon, 55 N. H. 105; Winsor *v.* Bailey, 55 N. H. 223; Wilson *v.* Towle, 36 N. H. 129.

New Jersey.—In *New Jersey* complainant may pray for defendant's answer without oath. The answer need not be sworn to, and the allegation therein, whether responsive to the bill or not, shall not be evidence except on motion to grant or dissolve an injunction. Ch. Acts N. J. (Ridley Comp.) 21, § 23. See also Stevens *v.* Post, 12 N. J. Eq. 408; Hyer *v.* Little, 20 N. J. Eq. 443; Sweet *v.* Parker, 22 N. J. Eq. 453; Walker *v.* Hill, 21 N. J. Eq. 191.

New York.—In *New York*, under the old chancery practice, 2 Rev. Sts. 175, § 44, authorized complainant to waive the necessity of an answer on oath from defendant, and in construing

evidence by a waiver of oath in an amended bill filed subsequently to the answer, and substantially the same as the original bill wherein an answer under oath was not waived.[1]

10. Answer of Codefendant—*a.* AS EVIDENCE AGAINST CODEFENDANT.—Generally the answer of one defendant is not evidence against his codefendant, for the obvious reason that the defendant against whom the answer is proposed to be used as evidence would be deprived of the benefit of a cross-examination.[2]

this statute it has been held that where oath to answer has been so waived, the answer is not evidence for defendant for any purpose. Bartlett *v.* Gale, 4 Paige (N. Y.) 503. See also Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582; Fishell *v.* Bell, Clarke Ch. (N.Y.) 37; Hatch *v.* Eustaphieve, Clarke Ch. (N. Y.) 63.

Tennessee.—In *Tennessee* plaintiff may waive answer under oath, and the answer will not be entitled to more weight in evidence than the bill. M. & V. Code of Tenn. § 5060; Ch. Rule 6; Lindsley *v.* James, 3 Coldw. (Tenn.) 477; Murray *v.* Johnson, 1 Head (Tenn.) 353; Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 196.

United States.—By amendment to 41st Eq. Rule, if the complainant waive answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer, though under oath, except such part as shall be directly responsive to such interrogatories, shall not be evidence unless the cause be set down for hearing on bill and answer only, but may nevertheless be used as an affidavit with the same effect as heretofore on a motion to grant or dissolve an injunction, or any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his now behalf under Act of Congress 1864, § 3. See also Conley *v.* Nailor, 118 U. S. 127; U. S. *v.* Workingmen's Amalgamated Council, 54 Fed. Rep. 994; Dravo *v.* Fabel, 132 U. S. 487; Treadwell *v.* Lennig, 50 Fed. Rep. 872.

Virginia.—The provisions of the *Virginia* Statute (Code Va. 1887, § 3281) are the same as amendment to 41st Eq. Rule (U. S.), *supra*. See also Pettit *v.* Jennings, 2 Rob. (Va.) 676; Jones *v.* Abraham, 75 Va. 466.

1. Throckmorton *v.* Throckmorton, 86 Va. 768; Walker *v.* Campbell, 5 Lea (Tenn.) 354; Burras *v.* Looker, 4 Paige (N. Y.) 227; Bingham *v.* Yeomans, 10 Cush. (Mass.) 58; Wylder *v.* Crane, 53 Ill. 490.

Illustration.—Where the original bill required an answer under oath, which was filed, and afterwards the complainant filed an amended bill, setting up new matter and dispensing with a sworn answer—*held*, that such waiver would not affect the answer under oath already filed, and extended only to the new matter set up in the amended bill. Jefferson *v.* Kennard, 77 Ill. 246.

2. *Alabama.*—Chambliss *v.* Smith, 30 Ala. 366; May *v.* Barnard, 20 Ala. 200; Julian *v.* Reynolds, 8 Ala. 680; Moore *v.* Hubbard, 4 Ala. 187; Taylor *v.* Roberts, 3 Ala. 83; Singleton *v.* Gayle, 8 Port. (Ala.) 270; Collier *v.* Chapman, 2 Stew. (Ala.) 163; Cockerham *v.* Davis, 5 Port. (Ala.) 220; Damer Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

Arkansas.—Whiting *v.* Beebe, 12 Ark. 421; Barraque *v.* Siter, 9 Ark. 545; Dunn *v.* Graham, 17 Ark. 60; Blakeney *v.* Ferguson, 14 Ark. 640; Folsom *v.* Fowler, 15 Ark. 282;

Delaware.—Pleasanton *v.* Raughley, 3 Del. Ch. 124.

Georgia.—Adkins *v.* Paul, 32 Ga. 219; Allen *v.* Holden, 32 Ga. 418; Morris *v.* Foote, 2 Ga. Dec. 119; Ligon *v.* Rogers, 12 Ga. 281; Clayton *v.* Thompson, 13 Ga. 206; Carithers *v.* Jarrell, 20 Ga. 843; Hickson *v.* Bryan, 75 Ga. 392.

Illinois.—Martin *v.* Dryden, 6 Ill. 187; Rector *v.* Rector, 8 Ill. 105; Rust *v.* Mansfield, 25 Ill. 336.

Indiana.—Thomasson *v.* Tucker, 2 Blackf. (Ind.) 172; M'Clure *v.* M'Cormick, 5 Blackf. (Ind.) 129.

Iowa.—Jones *v.* Jones, 13 Iowa 276; Williamson *v.* Haycock, 11 Iowa 40; Mobley *v.* Dubuque Gas Light, etc., Co., 11 Iowa 71.

Kentucky.—Daniel *v.* Ballard, 2 Dana (Ky.) 296; Moseley *v.* Armstrong, 3 T. B. Mon. (Ky.) 287; Harrison *v.* Johnson, 3 Litt. (Ky.) 286; Harrison *v.* Edwards, 3 Litt. (Ky.) 340;

Nominal Defendant.—So also the answer of one nominally a defendant though substantially a complainant, and who has the same

Timberlake *v.* Cobbs, 2 J. J. Marsh. (Ky.) 136; Winters *v.* January, Litt. Sel. Cas. (Ky.) 13; Turner *v.* Holman, 5 T. B. Mon. (Ky.) 411; Jones *v.* Bullock, 3 Bibb (Ky.) 467; Hardin *v.* Baird, Litt. Sel. Cas. (Ky.) 340; Fanning *v.* Pritchett, 6 T. B. Mon. (Ky.) 79; Blight *v.* Bank, 6 T. B. Mon, (Ky.) 192, 17 Am. Dec. 136; White *v.* Robinson, 1 A. K. Marsh. (Ky.) 569; Hunt *v.* Stephenson, 1 A. K. Marsh. (Ky.) 570; Davis *v.* Harrison, 2 J. J. Marsh. (Ky.) 189; Graham *v.* Sublett, 6 J. J. Marsh. (Ky.) 44; Bartlett *v.* Marshall, 2 Bibb (Ky.) 467.

Maine.—Rundlet *v.* Jordan, 3 Me. 47; Robinson *v.* Sampson, 23 Me. 388; Felch *v.* Hooper, 20 Me. 159; Gilmore *v.* Patterson, 36 Me. 544.

Maryland.—Winn *v.* Albert, 2 Md. Ch. 169; Hayward *v.* Carroll, 4 Har. & J. (Md.) 518; Stewart *v.* Stone, 3 Gill & J. (Md.) 510; Calwell *v.* Boyer, 8 Gill & J. (Md.) 136; Jones *v.* Harwood, 10 Gill & J. (Md.) 404; McKim *v.* Thompson, 1 Bland (Md.) 150; Briesch *v.* McCauley, 7 Gill (Md.) 189; Lingan *v.* Henderson, 1 Bland (Md.) 236; Glenn *v.* Grover, 3 Md. 212; Powles *v.* Dilley, 9 Gill (Md.) 222; Bevans *v.* Sullivan, 4 Gill (Md.) 383; Reese *v.* Reese, 41 Md. 554; Glenn *v.* Baker, 1 Md. Ch. 73.

Massachusetts.—Mills *v.* Gore, 20 Pick. (Mass.) 34; Chapin *v.* Coleman, 11 Pick. (Mass.) 331.

Mississippi.—Holloway *v.* Moore, 4 Smed. & M. (Miss.) 594; Salmon *v.* Smith, 58 Miss. 399; Hanover Nat. Bank *v.* Klein, 64 Miss. 141, 60 Am. Rep. 47.

North Carolina.—Ellis *v.* Amason, 2 Dev. Eq. (N. Car.) 273.

New York.—Webb *v.* Pell, 3 Paige (N. Y.) 368; DeForest *v.* Parsons, 2 Hall (N. Y.) 130; Phœnix *v.* Ingraham, 5 Johns. (N. Y.) 412; Grant *v.* Bissett, 1 Cai. Cas. (N. Y.) 112; Grant *v.* U. S. Bank, 1 Cai. Cas. (N. Y.) 112; Dykers *v.* Wilder, 3 Edw. Ch. (N. Y.) 496; Beekman *v.* Gibbs, 8 Paige (N. Y.) 511; Judd *v.* Seaver, 8 Paige (N. Y.) 548.

New Jersey.—Vanderveer *v.* Holcomb, 17 N. J. Eq. 547; Hoff *v.* Burd, 17 N. J. Eq. 201. See also McElroy *v.* Ludlum, 32 N. J. Eq. 828.

Pennsylvania.—Eckman *v.* Eckman, 55 Pa. St. 269.

Tennessee.—Davis *v.* Clayton, 5 Humph. (Tenn.) 446; Wells *v.* Stratton, 1 Tenn. Ch. 328; McDaniel *v.* Goodall, 2 Coldw. (Tenn.) 391; Turner *v.* Collier 4 Heisk. (Tenn.) 89.

Vermont.—Cannon *v.* Norton, 14 Vt. 178; Conner *v.* Chase, 15 Vt. 764; Blodgett *v.* Hobart, 18 Vt. 414; Porter *v.* Rutland Bank, 19 Vt. 410.

Virginia.—Dade *v.* Madison, 5 Leigh (Va.) 401; Hoomes *v.* Smock, 1 Wash. (Va.) 389; Pettit *v.* Jennings, 2 Rob. (Va.) 676.

United States.—Clark *v.* Reimsdyk, 9 Cranch (U. S.) 153; Field *v.* Holland, 6 Cranch (U. S.) 8; Van Reimsdyk *v.* Kane, 1 Gall. (U. S.) 386; Dexter *v.* Arnold, 3 Sumn. (U. S.) 152; Lenox *v.* Notrebe, Hempst. (U. S.) 251; Leeds *v.* Marine Ins. Co., 2 Wheat. (U. S.) 380; West *v.* Randall, 2 Mason (U. S.) 205.

England.—Green *v.* Pledger, 3 Hare 165; Anonymous, 1 P. Wms. 301; Jones *v.* Tuberville, 2 Ves. Jr. 11; Morse *v.* Royal, 12 Ves. 355; Parker *v.* Morrell, 12 Jur. 253; Hoare *v.* Johnstone, 2 Keen 553; Wych *v.* Meal, 3 P. Wms. 311; Wrottesley *v.* Bendish, 3 P. Wms. 235; Leigh *v.* Ward, 2 Vent. 72; Chervet *v.* Jones, 6 Madd. 166.

Illustrations and Applications of Rule.—The answer of the assignor and obligee of a bond that it was founded on a gaming consideration is not evidence against the assignee. Pettit *v.* Jennings, 2 Rob. (Va.) 676.

In a suit to foreclose a mortgage the answer of a junior mortgagee is not evidence of the existence of such junior mortgage as against a defendant who has suffered the bill to be taken as confessed. Beekman *v.* Gibbs, 8 Paige (N. Y.) 511.

In a suit by a wife to compel the appropriation to her benefit of bank stock alleged to have been purchased with funds in the hands of her husband as her trustee, but which had always stood in the name of her husband, the husband was made a defendant to the suit. *Held*, that his answer that the property was purchased with the trust funds was not evidence against his codefendants to charge them with notice of trust. Porter *v.* The Bank of Rutland, 19 Vt. 410.

A. and others of the first part, B. of the second part, and C. of the third

interest and object, is not evidence against a codefendant. It is not in the power of the plaintiff, in such a case, to avail himself of the answer of a party who is, in reality, though not in form, a plaintiff.[1]

Harmless Error.—It seems, though, that the erroneous admission of the answer of one defendant as evidence against another is no ground for the reversal of a decree, where the rights of the latter could not have been predjudiced thereby.[2]

part entered into a partnership for the purchase and sale of land. A. filed a bill in his own name against B. and C. for an account and settlement of the partnership, alleging that he had purchased the interest of his associates and making them defendants. B. and C. denied all knowledge of the purchase, and required proof. *Held*, that the answer of such associates cannot be read in evidence against B. and C. to prove the right of A. to sue in his own name. Moore *v.* Hubbard, 4 Ala. 187.

The answer of an administrator in a suit against him and others is not evidence of correctness of an item in his account in a hearing before a special register as against his codefendants who are interested as to such item adversely. Pearson *v.* Darrington, 32 Ala. 227.

A. executed several notes for the accommodation of B., who assigned them to C. as security for an alleged usurious loan. A. brought suit to enjoin judgment which C. had obtained on the notes. *Held*, that B. was not a competent witness for A., and that the answer for B., who was a defendant, was not evidence against C., and that they could have no decree against B. until he had paid the amount of the judgments. Moseley *v.* Armstrong, 3 T. B. Mon. (Ky.) 287.

Fraudulent Combination, Absence of.—The answer of one defendant, a copartner with complainant in the principal matter of litigation, is not evidence against a codefendant where it is not alleged or proved that defendants were fraudulently combined so as to create a unity of interest between them. Winters *v.* January, Litt. Sel. Cas. (Ky.) 13.

Answer of One Partner as Evidence Against Another.—In an action between partners to settle partnership accounts *inter se*, the answer of one partner cannot be used to charge another. Chapin *v.* Coleman, 11 Pick. (Mass.) 331; Bevans *v.* Sullivan, 4 Gill (Md.) 383.

Husband and Wife Codefendants.—Where husband and wife file a joint answer, such answer cannot be read in evidence against the wife where the subject-matter relates to her estate of inheritance. Lewis *v.* Yale, 4 Fla. 418. *Contra*, Dyett *v.* North American Coal Co., 20 Wend. (N. Y.) 570, 32 Am. Dec. 598.

Principal and Agent as Codefendants.—Where principal and agent are defendants in a bill, the admissions in the answer of the agent cannot be taken as evidence against the principal. Clark *v.* Van. Riemsdyk, 9 Cranch. (U. S.) 153; Leeds *v.* Marine Ins. Co., 2 Wheat. (U. S.) 380. *Contra*, Rector *v.* Rector, 8 Ill. 105.

Failure of One Defendant to Answer.—The answer of one defendant is no evidence against his codefendant, and hence the failure of one defendant to answer cannot be used as evidence against his codefendant Timberlake *v.* Cobbs, 2 J. J. Marsh. (Ky.) 136; Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; Harrison *v.* Johnson, 3 Litt. (Ky.) 286; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390; Holloway *v.* Moore, 4 Smed. & M. (Miss.) 594. See also Jordan *v.* Brunough, 11 Ark. 702.

1. Field *v.* Holland, 6 Cranch (U. S.) 8.

2. Thus the Supreme Court on appeal will not reverse the decree of the lower court for error in refusing to exclude from consideration the answer of one defendant as evidence against his codefendant, when the other evidence in the cause is sufficient to substantiate the decree. Barraque *v.* Siter, 9 Ark, 545.

So also it has been held that he answer of one defendant cannot be used as evidence against the others in stating an account before the master, but if the other answers, and proofs in the

Qualifications of Rule.—The general rule is subject to the qualification that the answer of one defendant may be used as evidence against a codefendant where they are privies in estate, where the latter claims through the former, where their interests are joint, and where there is a fraudulent combination between them.[1] So also the rule is not applicable where one defendant in his own answer refers to that of his codefendant for further information.[2] And it has been held that in cases where the rights of the complainant as against one defendant are only prevented from being complete by some question between the complainant and a second defendant, the complainant should be permitted to read the answer of such second defendant for the purpose of completing his claim against the first.[3]

b. AS EVIDENCE FOR CODEFENDANT.—It has been laid down as a general rule in equity practice that the answer of one defendant cannot be read as evidence for his codefendant.[4]

cause show a greater balance against them than the account as stated on the basis furnished by the answer, it is error without injury. Halstead *v.* Shepard, 23 Ala. 558.

1. *Alabama.*—Julian *v.* Reynolds, 8 Ala. 680.

Arkansas.—Dunn *v.* Graham, 17 Ark. 60; Barraque *v.* Siter, 9 Ark. 545; Whiting *v.* Beebe, 12 Ark. 421; Blakeney *v.* Ferguson, 14 Ark. 640.

Georgia.—Morris *v.* Foote, 2 Ga. Dec. 119; Adkins *v.* Paul, 32 Ga. 219; Allen *v.* Holden, 32 Ga. 418; Hickson *v.* Bryan, 75 Ga. 392.

Illinois.—Rector *v.* Rector, 8 Ill. 105; Rust *v.* Mansfield, 25 Ill. 336; Pensonneau *v.* Pulliam, 47 Ill. 58.

Indiana.—Townsend *v.* McIntosh, 14 Ind. 57.

Iowa.—Williamson *v.* Haycock, 11 Iowa 40; Morbley *v.* Dubuque Gas Light, etc., Co., 11 Iowa 71.

Kentucky.—Winters *v.* January, Litt. Sel. Cas. (Ky.) 13.

Maine.—Gilmore *v.* Patterson, 36 Me. 544.

Maryland.—Lingan *v.* Henderson, 1 Bland (Md.) 267; Powles *v.* Dilley, 9 Gill (Md.) 222; Williams *v.* Hodgson, 2 Har. & J. (Md.) 477, 3 Am. Dec. 563.

Massachusetts.—Chapin *v.* Coleman, 11 Pick. (Mass.) 331.

Mississippi.—Fitch *v.* Stamps, 6 How. (Miss.) 487.

New York.—Judd *v.* Seaver, 8 Paige (N. Y.) 548; Dunham *v.* Gates, 3 Barb. Ch. (N. Y.) 196; Christie *v.* Bishop, 1 Barb. Ch. (N. Y.) 105.

North Carolina.—Griffin *v.* Pleasant, 1 Ired. Eq. (N. Car.) 152.

Pennsylvania.—Eckman *v.* Eckman, 55 Pa. St. 269.

United States.—Field *v.* Holland, 6 Cranch (U. S.) 8; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738; Clark *v.* Van Riemsdyk, 9 Cranch (U. S.) 156.

Illustration.—The admissions of one copartner with reference to the legitimate business of other copartners are deemed to be the admissions of each and all of its members, even when found in an answer to the bill under consideration by the court. Gilmore *v.* Patterson, 36 Me. 544.

Contra.—The answer of one defendant in chancery is not evidence against a codefendant, claiming title under the former, because the party against whom the answer is proposed to be read would be deprived of the benefit of a cross-examination. Winn *v.* Albert, 2 Md. Ch. 169; Harwood *v.* Jones, 10 Gill & J. (Md.) 404.

Where two defendants who are neither partners nor privies are charged to be jointly combined in the perpetration of a fraud, the answer of one cannot be read as evidence against the other. May *v.* Barnard, 20 Ala. 200.

2. Chase *v.* Manhardt, 1 Bland (Md.) 333; Anonymous, 1 P. Wms. 301; Blakeney *v.* Ferguson, 14 Ark. 640.

3. Whiting *v.* Beebe, 12 Ark. 421.

4. Chambliss *v.* Smith, 30 Ala. 366; May *v.* Barnard, 20 Ala. 200; Julian *v.* Reynolds, 8 Ala. 680; Moore *v.* Hubbard, 4 Ala. 187; Taylor *v.* Roberts, 3 Ala. 83; Singleton *v.* Gayle, 8 Port. (Ala.) 270; Collier *v.* Chapman, 2 Stew. (Ala.) 163; Gilmore *v.* Patter-

Qualification of Rule.—But this rule is subject to the qualification that the answer, when responsive to the bill, is admissible in favor of a codefendant.[1]

11. Answer of Infants.—The answer of an infant defendant by his guardian is not evidence against him; material allegations in the bill must be proved by other means.[2] It may, however, be

son, 36 Me. 544; Blodgett *v.* Hobart, 18 Vt. 414; Cannon *v.* Norton, 14 Vt. 178; Lenox *v.* Notrebe, Hempst. (U. S.) 251; Carithers *v.* Jarrell, 20 Ga. 843; Davis *v.* Clayton, 5 Humph. (Tenn.) 446; Salmon *v.* Smith, 58 Miss. 399.

Separate Answer of Defendant as to Whom Bill has been Dismissed is not evidence for a codefendant. Larkin's Appeal, 38 Pa. St., 457.

Answer Referring to Answer of Codefendant Not Filed.—The answer of a defendant that he has seen the answer of another defendant in the cause, and that the same is true, cannot avail to make such answer evidence for himself when the answer referred to was not then filed and there is nothing to identify it with that afterward filed by such codefendant. Carr *v.* Weld, 19 N. J. Eq. 319.

1. Mills *v.* Gore, 20 Pick. (Mass.) 28; Morris *v.* Nixon, 1 How. (U. S.) 119; Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Powles *v.* Dilley, 9 Gill (Md.) 222; Pleasanton *v.* Raughley, 3 Del. Ch. 124.

Illustrations.—Though the answer of one defendant be not evidence against a codefendant, yet, where it is responsive to the bill, it may be evidence in his favor, and more especially so where such codefendant, being a mere depositary of a chattel claimed by both parties, defends himself under the title of the other defendant. Mills *v.* Gore, 20 Pick. (Mass.) 28.

A bill charged fraud and collusion between the vendor and vendee in the sale of property, made them both defendants, and sought discovery and relief against them. *Held*, that the answer of the vendor was as against the complainant evidence for the vendee so far as it was responsive to the allegations in the bill. Ligon *v.* Rogers, 12 Ga. 281.

Though it is in general true that the answer of one defendant is not evidence for another, yet the answer of one defendant may contain an admission that will be evidence for another, as an admission that another defendant has paid the answering defendant a debt due from that other defendant and the plaintiff. Carithers *v.* Jarrell, 20 Ga. 842.

Answer as Evidence for Codefendant Failing to Answer.—If a joint defendant answers a bill and removes the equity set up against himself and the other defendant who does not answer, no decree can be rendered against the defendant failing to answer. McDaniel *v.* Goodall, 2 Coldw. (Tenn.) 391.

Answer Not Excluded Because Evidence for Codefendant.—Where a complainant calls upon defendant to answer he makes the latter a witness, and his answer cannot be excluded because it may operate in favor or a codefendant. Powles *v.* Dilley, 9 Gill (Md.) 222.

Answer of Trustee as Evidence for Cestui Que Trust.—A bill was filed against a *feme covert* (the owner of a separate estate), her husband, and the trustee, to subject her separate estate to the satisfaction of a note executed in common form by the *feme covert* and her husband for the payment of money. The trustee answered the bill and denied the equity thereof. The husband and wife did not answer, and there was an order that the bill be taken *pro confesso* as to them. *Held*, that the answer of the trustee removed the equity as to the wife. Cherry *v.* Clements, 10 Humph. (Tenn.) 552.

2. Harris *v.* Harris, 6 Gill & J. (Md.) 111; Kent *v.* Taneyhill, 6 Gill & J. (Md.) 1; Stewart *v.* Duvall, 7 Gill & J. (Md.) 179; Benson *v.* Wright, 4 Md. Ch. 278; Stephenson *v.* Stephenson, 6 Paige (N. Y.) 353; Alexandria Bank *v.* Patton, 1 Rob. (Va.) 528; Cochran *v.* McDowell, 15 Ill. 10; Stinson *v.* Pickering, 71 Me. 167.

Answer Mere Pleading.—The answer of an infant by his guardian is a pleading merely, and not evidence. Bulkley *v.* Van Wyck, 5 Paige (N. Y.) 536.

Bill Must be Proved.—"The answer of a guardian *ad litem*, admitting the

evidence in his favor.[1] Nor has the answer of an adult co-defendant any effect against an infant.[2]

12. Answer of Corporation Aggregate.—The answer of a corporation aggregate under its corporate seal has the same force and effect as evidence, as the answer of an individual not under oath would have in a like case and no other or greater. The effect of such answer is to create an issue which, before decree can be pronounced for complainant, must be decided on testimony of at least one witness or corroborating circumstances in support of the bill.[3]

truth of the charges in the bill, cannot affect the infant's rights, but with respect to him all the allegations must be proved with the same strictness as if the answer had interposed a direct and positive denial of their truth; nor can a default or a decree *pro confesso* be entered against an infant. Breese, J., in Chaffin *v.* Kimball, 23 Ill. 33, *citing* McClay *v.* Norris, 9 Ill. 370; Cochran *v.* McDowell, 15 Ill. 10; Greenough *v.* Taylor, 17 Ill. 602; Tuttle *v.* Garrett, 16 Ill. 354; Hitt *v.* Ormsbee, 12 Ill. 166; Masterson *v.* Wiswould, 18 Ill. 48; Reavis *v.* Fielden, 18 Ill. 77.

Answer of Executor.—Where infant children, by their father, file their bill, alleging his inability to support them, and praying income from their estates for that purpose, the fact of their father's ability will be inquired into and determined by the court; admissions by the answer of the executor are not sufficient. Tompkins *v.* Tompkins, 18 N. J. Eq. 303.

No Decree on Admissions.—No decree can be made against infants on admissions in the answer of their guardian *ad litem*. Wright *v.* Miller, 1 Sandf. Ch. (N. Y.) 103; James *v.* James, 4 Paige (N. Y.) 115.

Answer of Complainant to Cross-Bill.—The answer of a complainant to the cross-bill of adult defendants is not evidence against infant's defendants who appear by guardian *ad litem*. Campbell *v.* Campbell, 1 Ind. 220.

West Virginia — Taking Answer as True.—Sec. 36, ch. 125 of the Code, so far as it relates to taking material allegations of a bill, or material allegations of new matter in an answer constituting a claim for affirmative relief, as true, should not be applied strictly, if at all, to the answers of infant defendants by guardian *ad litem*. Laidley *v.* Kline, 8 W. Va. 219.

1. Carnall *v.* Wilson, 14 Ark. 482.

Proof Necessary—Decree.—The answer of infant defendants, calling upon the complainants to prove the bill, only puts them to the proof of what is charged, and entitles them only to a decree on the case made in the bill, when proved. Robinson *v.* Townshend, 3 Gill &. J. (Md.) 413.

2. Watson *v.* Godwin, 4 Md. Ch. 25.

3. Maryland, etc., Coal, etc., Co. *v.* Wingert, 8 Gill (Md.) 170; Bouldin *v.* Mayor, 15 Md. 18; Farmers', etc., Bank *v.* Nelson, 12 Md. 49; Whalen *v*, Delashmutt, 59 Md. 250; Haight *v.* Proprietors Morris' Aqueduct, 4 Wash. (U. S.) 601; Union Bank *v.* Geary, 5 Pet. (U. S.) 112; Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40; State Bank *v.* Ellis, 30 Ala. 478; Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 192; McLard *v.* Linnville, 10 Humph. (Tenn.) 163; Lindsley *v.* James, 3 Coldw. (Tenn.) 487; Woodfork *v.* Union Bank. 3 Coldw. (Tenn.) 497; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 600; Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 58; Fulton Bank *v.* New York, etc., Canal Co., 1 Paige (N. Y.) 311.

The answer of a corporation without oath where complainant does not require it to be sworn to or supported by the sworn answers of the officers of the corporation cannot be said to answer the double purpose of a pleading to put the material matters of the bill in issue, and of an examination of the defendant for the purpose of obtaining his evidence in support of the complainant's allegations; and it is for the latter purpose alone that the complainant makes a witness of his adversary in the cause. Such answer is a mere pleading to put in issue the matter of the bill. Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 59.

Contra.—The answer of a corporation

13. Answer of Party Interested or Incompetent.—An answer is not to be discredited, or any presumption indulged against it, on account of its being the answer of a party interested.[1] Nor because the defendant is incompetent as a witness in ordinary cases.[2]

14. Answers in Injunction Proceedings.—On the hearing of a motion to dissolve an injunction, the allegations of the answer, so far as the same are responsive to the allegations of the bill, must be taken as true, and if they deny the averments of the bill upon which the equity of the injunction rests, the latter must be dissolved.[3]

if responsive though made by a corporation aggregate under the seal without oath, is competent evidence and cannot be overturned by the testimony of one witness alone. Salmon *v.* Clagett, 3 Bland (Md.) 165. See also Carpenter *v.* Providence Washington Ins. Co., 4 How. (U. S.) 218.

Answer Sworn to by Officer.—The fact that such answer is sworn to by the cashier who is no party to the proceeding cannot alter the rule. Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 192.

1. Clason *v.* Morris, 10 Johns. (N. Y.) 524; Petrie *v.* Wright, 6 Smed. & M. (Miss.) 647.

2. The effect of an answer responsive to a bill does not depend upon respondent's competency as a witness. Saffold *v.* Horne (Miss., 1894), 15 So. Rep. 639. See also Hartley *v.* Matthews, 96 Ala. 224; Dexter *v.* Ohlander, 95 Ala. 467; Patterson *v.* Scott, 142 Ill. 138; Harding *v.* Hawkins, 141 Ill. 572.

"It is no objection to the validity and efficacy of an answer, that the defendant is infamous or a negro, and, as such, an incompetent witness in ordinary cases; his answer must, notwithstanding, have full credit allowed to it, since the plaintiff, by calling him into court, has given him a competency to this extent for the purpose of defending himself and protecting his property." Bland, C., in Salmon *v.* Clagett, 3 Bland (Md.) 165, *citing* Davis's Case, 2 Salk. 461, 5 Mod. 74; Omichund *v.* Barker, 1 Atk. 50; Bowyer *v.* McEvoy, 1 B. & B. 562.

3. Colvin *v.* Warford, 17 Md. 433; Webster *v.* Hardisty, 28 Md. 593; Dougherty *v.* Piet, 52 Md. 425; Wood *v.* Patterson, 4 Md. Ch. 335; Harris *v.* Sangston, 4 Md. Ch. 394; Huston *v.* Huston, 20 Md. 306; Cronise *v.* Clark, 4 Md. Ch. 403; Alexander *v.* Ghiselin, 5 Gill (Md.) 138; Briesch *v.* McCauley, 7 Gill (Md.) 189; Chase *v.* Manhardt, 1 Bland (Md.) 333; Salmon *v.* Clagett, 3 Bland (Md.) 125, *distinguished* in Belt *v.* Blackburn, 28 Md. 241; Voshell *v.* Hynson, 26 Md. 83; Att'y-Gen'l *v.* Oakland County Bank, Walk. (Mich.) 90; West *v.* Rouse, 14 Ga. 715; Moore *v.* Ferrell, 1 Ga. 7; U. S. *v.* Parrott, 1 McAll. (U. S.) 271; Dillingham *v.* Roberts, 77 Me. 284; Harris *v.* Reece, 10 Ill. 212; Fowler *v.* Roe, 3 Stock. (N. J.) 367; Jones *v.* McKenzie, 6 Jones Eq. (N. Car.) 203; Rembert *v.* Brown, 17 Ala. 667.

No Case for Injunction.—An easement in water was granted for the use of machinery then in use; a bill to enjoin the use of the easement alleged a change in machinery, which the answer, to which oath was waived, denied; no proofs were heard. *Held*, that the answer met the bill, and was of equal weight, and, therefore, in the absence of evidence, no case for an injunction was made. Mandeville *v.* Comstock, 9 Mich. 536.

Injunction in Limine.—Where a bill brought to cancel a mortgage alleged payment of the same, the burden of proof is on complainants and if it be denied in a sworn answer made on knowledge, the allegation of payment will not sustain an injunction *in limine* restraining legal proceedings by a purchaser under the mortgage. Hartley *v.* Matthews, 95 Ala. 224.

Answer of Corporate Body.—The answer in chancery of a corporate body, under its common seal, denying the equity of the bill, is sufficient to warrant the denial of an injunction, or to dissolve it if granted. Haight *v.* Morris Aqueduct, 4 Wash. (U. S.) 601.

The answer of a corporation, under its seal, is something more than pleading, and where it negatives the bill, warrants the dissolution of an injunc-

When Dissolved.—As a general rule, if the answer to a bill of injunction fully, fairly, plainly, distinctly, and positively denies the material allegations in the bill, and no proof is taken to sustain the bill, the court ought, on the coming in of the answer, to dissolve the injunction.[1]

Answer Not Responsive.—If the answer is not responsive to the bill and sets up new matter in avoidance, the injunction will not be dissolved.[2]

Allegations Unanswered.—Neither will the injunction be dissolved

t on. (Collier, C.J., *dissenting*, was inclined to think that an attestation nnder the common seal was essential to the authenticity of the answer, where a discovery was not specially sought from the officers, agents, etc., of the corporation; but when an answer is thus authenticated, the president, etc., may verify it by his own oath, and then, if responsive, it will be entitled to the force of evidence. Hogan *v.* Bank, 10 Ala. 485.

When a Charge is Not Fully Answered, yet if the complainant do not show himself entitled to claim the equity growing out of that transaction, it will not stand in the way of dissolving an injunction. Quackenbush *v.* Van Riper, 1 N. J. Eq. 476.

Answer Not Positive.—An answer which does not deny the averments in which the equity of the bill consists, but states "that respondent does not believe, and cannot admit that the said attorney made any such arrangements or contract set forth in the bill," is not sufficient to dissolve an injunction. Kent *v.* Richards, 3 Md. Ch. 392.

Answer on Information and Belief is likewise insufficient to dissolve injunction. Irick *v.* Black, 17 N. J. Eq. 189.

Evasive Answer.—An answer in which the denial is made in such form as to leave it in doubt whether the denial is of the fact alleged, or only of the facts in the form and manner and at the time alleged in the bill, is evasive, and will not avail to dissolve an injunction. McMahon *v.* O'Donnell, 20 N. J. Eq. 306.

Answer Founded on Hearsay.—An injunction can only be dissolved by positive contradictory averments in the answer, and an answer founded upon hearsay is not sufficient to remove the complainant's equity, though resting upon information derived from others, it denies the facts out of which that equity arose. Doub *v.* Barnes, 1 Md. Ch. 127.

Answer to Be Read.—On a motion for an injunction made or submitted after filing of answer, the answer is to be read; and where the answer swears away the equity of the bill, the injunction should be refused: If granted, should be dissolved. Lynn *v.* Mount Savage Iron Co., 34 Md. 603; Bell *v.* Purvis, 15 Md. 22; Hall *v.* McPherson, 3 Bland (Md.) 539.

Usury.—A bill was filed praying an injunction on the ground of usury. The allegations of usury were denied in the answer, and no proof was offered, though the answer raised suspicions. *Held*, that such bill must be dismissed. Sneed *v.* Smith, 1 Patt. & H. (Va.) 46.

Answer Not Under Oath.—An injunction should not be dissolved, and a bill dismissed, upon the filing of an answer, not under oath; or without evidence of the truth of the facts alleged in the answer. Gray *v.* M'Cance, 11 Ill. 325.

1. Shonk *v.* Knight, 12 W. Va. 667; Moore *v.* Farrell, 1 Ga. 7; Parkinson *v.* Trousdale, 4 Ill. 367; Cox *v.* Douglass, 20 W. Va. 175.

When Rule should be Followed—Exception.—There are some exceptions to this general rule, but it ought to be followed when great injury would result to the defendant if the injunction was continued till the hearing, and no serious loss would be sustained by the plaintiff if it were dissolved, even if the cause was or should be decided in his favor on the hearing. Shonk *v.* Knight, 12 W. Va. 667.

2. Att'y Gen'l *v.* Oakland County Bank, Walk. (Mich.) 90; Ferriday *v.* Selcer, Freem. Ch. (Miss.) 258; Moore *v.* Ferrell, 1 Ga. 7; Wooten *v.* Smith, 27 Ga. 216; State *v.* Northern Cent. R. Co., 18 Md. 193; Hutchins *v.* Hope 7 Gill (Md.) 123.

where any material allegation constituting the equity of the bill remains unanswered.[1]

15. Answers as Evidence in other Causes—*a.* SUITS IN EQUITY—**As Evidence Against Defendant.**—An answer in equity is admissible evidence against defendant, in a subsequent suit in equity to which he is a party, even though the parties to the two suits are not the same.[2]

Answer Not an Estoppel.—But the answer of defendant in one cause can only be used and regarded as evidence, and not as an estoppel in a subsequent cause.[3]

As Evidence For Defendant.—So also it seems that such answer is evidence for defendant in a subsequent suit in equity, and if complainant, after sworn answers are filed, dismisses his bill and files another setting up substantially the same grounds for relief but waiving answer under oath, such answers filed in the prior suit will remain evidence, and complainant can have no decree under the second bill until such sworn answers are overcome by a preponderance of other proof.[4]

1. Wooten *v.* Smith, 27 Ga. 216; State *v.* Northern Cent. R. Co., 18 Md. 193; Salmon *v.* Clagett, 3 Bland (Md.) 125, *distinguished* in Belt *v.* Blackburn, 28 Md. 241.

Injunction Continued till Final Hearing.—When motion to dissolve is heard on bill and answer, so much of the bill as is not denied by answer is taken for true, and if any one of its material allegations remains unanswered, injunction will be continued till the final hearing; because in such a case, the equity upon which injunction issued is not sworn away. Brown *v.* Stewart, 1 Md. Ch. 87. See also Jones v. Edwards 4 Jones Eq. (N. Car.) 257.

2. Royall *v.* McKenzie, 25 Ala. 363; Mims *v.* Mims, 3 J. J. Marsh (Ky.) 110.

Answer of Defendant as Evidence for his Representatives.—The answer of defendant to a bill in equity is not legal evidence for his representatives in a new suit against them relative to the same cause of action. Drury *v.* Conner, 6 Har. & J. (Md.) 288.

Answer a Part of Deposition.—Where a witness, in his deposition, referred to an answer in chancery made by him in another case, and made a certified copy of the answer a part of his deposition—*held*, that the certified copy would not be read as a part of his deposition. Hamilton Supreme Court, 1844; Knox *v.* Strader, 2 W. L. J. 69.

Answer to Bill of Review as Evidence in Original Suit.—Where a bill of review has been dismissed, on the ground that it ought not to have been allowed, the decree not being final, the complainant in that bill (being defendant to the original suit) is not authorized, in his subsequent defense, to make use of the answer to the bill of review. Ellzey *v.* Lane, 4 Munf. (Va.) 66.

Answer Made but Not Filed as Evidence in Another Suit.—A. having filed a bill to compel B. to convey lands alleged to have been purchased by him in trust, B. prepared his answer, made oath to it, and was about to file it, when the bill was dismissed. After B.'s death another bill was filed, for the same purpose by the same parties, against the heirs and representatives of B. *Held*, that since it appeared that many of the transactions must have been known exclusively to B. and unknown to his heirs, they should be permitted to make the answer thus prepared by him a part of their answer and evidence in their favor. Culbertson *v.* Matson, 11 Mo. 493. See also Matson *v.* Melchor, 42 Mich. 477.

Answer to Cross-bill which has been Dismissed cannot be read in evidence in complainant's favor. Saffold *v.* Horne (Miss., 1894), 15 So. Rep. 639.

When Complainant may Read Answer to Cross-bill.—A complainant cannot read in evidence his own answer to a bill of discovery in a cross-suit, unless the defendant first produce it. Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131; Montgomery Branch Bank *v.* Parker, 5 Ala. 731.

3. Young *v.* Mackall, 4 Md. 362.

4. Mey *v.* Gulliman, 105 Ill. 272.

b. ACTIONS AT LAW—**As Evidence Against Defendant.**—An answer is also admissible against defendant in an action at law subsequently instituted,[1] though the parties to the two causes are not the same.[2]

1. Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55; Rees *v.* Lawless, 4 Litt (Ky.) 219; Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 249; Mims *v.* Mims, 3 J. J. Marsh. (Ky.) 110; McNutt *v.* Dare, 8 Blackf. (Ind.) 35; Randall *v.* Parramore, 1 Fla. 458; Saltmarsh *v.* Bower, 23 Ala. 230; Crocker *v.* Clements, 23 Ala. 296; Cox *v.* Cox, 2 Port. (Ala.) 533; Gordon *v.* Green, 10 Ga. 534; Fant *v.* Miller, 17 Gratt. (Va.) 187; Daniel *v.* Johnson, 29 Ga. 207; Sowerwein *v.* Jones, 7 Gill & J. (Md.) 541; Kiddie *v.* Debrutz, 1 Hayw. (N. Car.) 420.

Illustrations.—Where a defendant in an action of assumpsit against him, in *Virginia*, filed a bill of discovery against the plaintiff, who answered, and the defendant read the bill and answer to the jury, *held*, that the contents of the answer might be considered by the jury, so far as they credited them, as evidence of the plaintiff's right to recover. Sowerwein *v.* Jones, 7 Gill & J. (Md.) 335.

In replevin for a horse distrained for rent, an answer by defendant in a suit in chancery between the same parties is competent evidence against him, and much more ought it to be so where it is made in a solemn procedure in a court of justice under the sanction of an oath. Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 249.

The answer to a bill in chancery, filed by the party making a remainder by parol in trust, against the trustee, which clearly admits the nature and objects of the trust, was held to be admissible, to sustain the remainder in an action of assumpsit by the *cestui que trust*, against the trustee, for the trust fund. Gordon *v.* Green, 10 Ga. 534.

An answer in chancery by a defendant in ejectment, in a chancery case on the same subject, is admissible as proof of his declarations. Earl *v.* Shoulder, 6 Ohio 409; Bermon *v.* Woodbridge, 2 Doug. 788.

The distinction between an answer as evidence in the cause in equity in which it is made and when offered as evidence in a common-law action, is that in the first it is evidence only so far as it is responsive, but in the latter the whole of it is evidence; and it is for the jury to give each portion whatever weight it may deserve. Saltmarsh *v.* Bower, 22 Ala. 230.

Contra.—In *Georgia* it has been held that a defendant cannot use his answer for himself in another cause further than he could in the original cause, and not in either unless it appears to be responsive to the bill. Daniel *v.* Johnson, 29 Ga. 207.

Answer as Evidence Against Complainant.—In ejectment by L. against R., an answer in a chancery suit brought by L. against C. to obtain a conveyance of the land in suit, to which land L. obtained title by purchase after answer in the chancery suit was filed, is competent evidence against L., so far as it contains any admissions or confessions which are competent to prove any material fact in controversy. Rees *v.* Lawless, 4 Litt. (Ky.) 219.

Answer to Bill of Discovery.—A party cannot read as evidence for himself, in an action at law, his own answer to a bill of discovery; but where he proposed reading bill and answer, and the defendant said, "You may read the bill," and he then read both bill and answer—*held*, that the verdict will not be set aside upon this ground, especially where the reading of the bill and answer could not have varied the result. Thompson *v.* French, 10 Yerg. (Tenn.) 453.

A party cannot use his answer to a bill of discovery as evidence in his favor, in an action at law, unless it is introduced by his adversary; and the same rule applies to answers to interrogatories propounded by one party to the other, under the act of 1837. Montgomery Branch Bank *v.* Parker, 5 Ala. 731.

Further Answer.—When a bill in equity and answer are introduced as evidence, the court have no power, on motion, to order the defendant in equity to answer further, in order that such answer may be used as evidence in the cause. Lowney *v.* Perham, 20 Me. 235.

2. Kiddie *v.* Debrutz, 1 Hayw. (N. Car.) 420. Thus the answer of a de-

Hearsay Admissions.—Where, however, the answer contains admissions stated merely on hearsay, it is not evidence against the defendant in a subsequent suit at law.[1]

As Evidence for Defendant.—When offered in evidence the whole answer must be taken together, so far as it is pertinent to the issue, whether its allegations are strictly responsive, or set up affirmative matter in avoidance.[2]

Weight as Evidence.—The truth of the answer should be weighed, like other evidence, subject to be overcome by the nature of its statements and by other proof.[3]

16. Answers as Evidence in Issues Sent to Jury. — Where issues in an equity court are sent down to be tried by a jury, the answer of the defendant cannot be read as evidence unless it is so directed in the order of the trial.[4]

Defendant is not entitled as a matter of right to have his answer read as evidence on the trial of such issue, the question of whether or not it should be so read being dependent on the particular facts and circumstances of the case.[5]

fendant in equity is competent evidence against him, though the plaintiff at law was not a party to the suit in equity. Hunter *v.* Jones, 6 Rand. (Va.) 541.

1. Roe *v.* Ferris, 2 B. & P. 548. See also Stephens *v.* Vroman, 16 N. Y. 381. But it has been held, that if the answer contains matters stated as a fact, the admissions are competent evidence against defendant though it appears to have been made upon information. Shaddock *v.* Clifton, 22 Wis. 115, 94 Am. Dec. 588.

2. Crocker *v.* Clements, 23 Ala. 296; McNutt *v.* Dare, 8 Blackf. (Ind.) 35: Saltmarsh *v.* Bower, 22 Ala. 230; Fant *v.* Miller, 17 Gratt. (Va.) 187; Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 247; Butterworth *v.* Bailey, 15 Ves. 358; Ormond *v.* Hutchinson, 13 Ves. 47; Earl of Bath *v.* Bathersea, 5 Mod. 9.

3. Allen *v.* McNew, 8 Humph. (Tenn.) 46.

4. Kinsey *v.* Grimes, 7 Blackf. (Ind.) 290; Jackson *v.* Harris, 63 N. Car. 261; Sturtevant *v.* Waterbury, 1 Edw. Ch. (N. Y.) 442; Glynn *v.* Bank of England, 2 Ves. 38; Arnot *v.* Biscoe, 1 Ves. 95; Ibbotson *v.* Rhodes, 2 Vern. 554.

Illustration.—Thus on the trial of an issue from chancery to try the title to a copyright, the bill and answer cannot be read to the jury unless it is so ordered by the court of chancery when the issue is ordered. King *v.* Force, 2 Cranch (C. C.) 208.

5. Sturtevant *v.* Waterbury, 1 Edw. Ch. (N. Y.) 443; Cartwright *v.* Godfrey, Murph. (N. Car.) 422; Ibbotson *v.* Rhodes, 1 Eq. Cas. Abr. 229; Only *v.* Walker, 3 Atk. 408; Milton *v.* Edgeworth, 5 Bro. P. C. 313.

In Sturtevant *v.* Waterbury, 1 Edw. Ch. (N. Y.) 343, it is said: "In the present case the court directed an issue upon a question of fraud presented, not upon the answer and the testimony of one witness merely, but depending upon a variety of facts and circumstances disclosed by the pleadings and testimony of several witnesses examined on both sides, and all of such leave the question involved in doubt and of difficult determination. In such cases, if it is not a matter of right in the defendant to have his answer read to the jury (and I am strictly inclined to think it is not, since the issue is directed, not by his desire, but upon the volition of the court itself), it is certainly a matter of discretion with the court to give him the benefit of the evidence before the jury as fully as it exists here, and to the same extent to which he would be entitled if the cause was to be decided without such trial."

Illustrations.—In Ibbotson *v.* Rhodes, 1 Eq. Cas. Abr. 229, the answer denied notice of the plaintiff's trial, but which notice the plaintiff proved by one witness. There was oath against oath, and issue was awarded; but as it would have been a matter of course for the jury to find for plaintiff if the

Effect as Evidence.—When so read it has not the same weight as it has on a hearing before the chancellor. The jury have the right to view it with the suspicion which attends the testimony of an interested witness, and to give it such credit only as they may think it entitled to.[1]

cause had been submitted upon the testimony of this witness alone, and as the court would then be called upon to decree according to the verdict, which would in effect have been a decree upon the evidence of one witness against the positive denial of the answer, the court directed the answer to be read at the trial, not as conclusive evidence, but so that the defendant might have the benefit of his oath, and the jury give to it such weight as they should think proper.

In Kincheloe *v.* Kincheloe, 11 Leigh (Va.) 409, it is said: "In a suit in chancery the object of which is to contest the validity of a will on an issue *devisavit vel non*, under the Act of Assembly, I do not think that the answer of the defendant becomes of necessity evidence in the cause on the question as to the validity of the will where no appeal is made to the conscience of he defendant, where no discovery is sought from him as to facts within his particular knowledge, but he is called on to answer merely as a step or part of the proceedings through which it is necessary to pass for obtaining a trial before jury. In such a case it would be unjust to make the answer evidence as to the validity of the will; * * * but in the case before us, an appeal is directly made to the conscience of the defendant by various searching interrogatories which he is called on to answer specially. Being thus called on and required to give evidence which might have operated against him, he ought on the question of chancery practice to be entitled to its benefit when it operates in his favor."

Where an answer is replied to, and its allegations are disproved by more than one witness, it should not be read in evidence on the trial of an issue of fact in the cause. Cartwright *v.* Godfrey, 1 Murph. (N. Car.) 422.

1. Kinsey *v.* Grimes, 7 Blackf. (Ind.) 290; Sturtevant *v.* Waterbury, 1 Edw. Ch. (N. Y.) 442; Glynn *v.* Bank of England, 2 Ves. 38; Hunter *v.* Wallace, 1 Overt. (Tenn.) 239. See also Humphreys *v.* Blevins, 1 Overt. (Tenn.) 178.

APPEAL BONDS AND UNDERTAKINGS.

By WILLIAM P. AIKEN.

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I. DEFINITION.—An appeal bond is a voluntary obligation entered into by the appellant and his sureties, as obligors, and the appellees, as obligees, conditioned that the obligors shall prosecute the appeal with effect or answer to the liability created by the bond.[1]

1. Ring *v.* Mississippi River Bridge Co., 57 Mo. 498; Staley *v.* Howard, 7 Mo. App. 377; Sauer *v.* Griffin, 67 Mo. 654; Cook *v.* King, 7 Ill. App. 549; Boyd *v.* Boyd, 2 Nott & M. (S. Car.) 126; Hodge *v.* Hodgdon, 8 Cush. (Mass.) 294; Hinkle *v.* Holmes, 85 Ind. 405; Ross *v.* Swiggett, 16 Ind. 433; Mason *v.* Smith, 11 Lea (Tenn.) 67; Whitehead *v.* Thorp, 22 Iowa 425; Erickson *v.* Elder, 34 Minn. 370; Matlock *v.* State Bank, 7 Yerg. (Tenn.) 91.

"It is an obligation conditional for the prosecution of the appeal with effect, and if the appeal is prosecuted with effect and the case is reversed for error in law, the conditions are avoided and the liability ceases." Ring *v.* Mississippi River Bridge Co., 57 Mo. 498.

Bail in Error.—Bail in error at common law was an obligation of the plaintiff in error to prosecute the writ with effect, and, if judgment was affirmed, to satisfy and pay the debt and damages or costs awarded. 2 Tidd Pr. 1156.

Distinction in Securities.—An *appeal bond* is a specialty under seal; an *undertaking* on appeal is an unsealed promise in writing; a *recognizance* on appeal is a statutory obligation entered of record binding the appellant to do some act, such as to appear in court, to pay the debt, etc. Anderson Dict. of Law, 862.

Character of Contract. — Where the statute requires the obligors to perform the judgment as affirmed, it is a contract for the payment of money if the judgment as affirmed is a money judgment. Myers *v.* Shoreman, 90 Ill. 80; Reitan *v.* Goebel, 35 Minn. 384. It is a security for the performance of the judgment as affirmed, not an un-

II. **Purely Statutory.**—The purpose of an appeal bond is to protect the appellee from vexatious litigation and the expenses of appeal.[1] At common law no bail in error was required of the party prosecuting a writ of error, and under modern practice the requirement that the appellant shall furnish security on appeal is purely statutory.[2] Where not authorized by statute no court or judge has power to demand it.[3]

III. **Statutory Requirements Mandatory.**—Under their general authority to regulate appellate procedure legislatures may require

dertaking in a fixed sum as liquidated damages for delay. Cook *v.* King, 7 Ill. App. 549.

1. Santom *v.* Ballard, 133 Mass. 464; Folsom *v.* Cornell, 150 Mass. 14.

2. Kilbee *v.* Myrick, 12 Fla. 416; Bauknight *v.* Sloan, 17 Fla. 287; Archer *v.* Hart, 5 Fla. 234; Smith *v.* Curtis, 19 Fla. 786; Florida Orange Hedge Fence Co. *v.* Branham, 27 Fla. 526; Burgess *v.* O'Donoghue, 90 Mo. 299; Crawford *v.* Greenleaf, 48 Mo. App. 591; *In re* Claasen, 140 U. S. 200; Swann *v.* Horne, 54 Miss. 337; Winters *v.* Claitor, 54 Miss. 341.

3. Bonnett *v.* Townsend (Supreme Ct.), 17 N. Y. Supp. 566; Republic of Honduras *v.* Soto, 112 N. Y. 310.

Hence it was held that where there was no statute authorizing the court to require a new undertaking on appeal on the insolvency or death of the sureties on the original undertaking, the appellate court had no authority to demand it. Bonnett *v.* Townsend (Supreme Ct.), 17 N. Y. Supp. 566; Crawford *v.* Greenleaf, 48 Mo. App. 592; Paddock-Hawley Iron Co. *v.* Graham, 48 Mo. App. 638.

And where exacted of the appellant by a court, without statutory authority, it is void. People *v.* Cabannes, 20 Cal. 525.

In Florida it has been held that under technical chancery practice a chancellor has power to require the appellant to give security to the appellee for the costs of the appeal. Robinson *v.* Roberts, 16 Fla. 156.

Supersedeas Bond.—Where a bond is required only to effect a stay of proceedings on the judgment pending an appeal, the failure to give the bond does not affect the validity of the appeal. Bauknight *v.* Sloan, 17 Fla. 281; Kilbee *v.* Myrick, 12 Fla. 416; Winters *v.* Hughes, 3 Utah 438; Beach *v.* Southworth, 6 Barb. (N. Y.) 173; Emerson *v.* Burney, 6 How. Pr. (N. Y. Supreme Ct.) 32; Nicholson *v.* Dunham, 1 Code Rep. (N. Y.) 119; Halsey *v.* Flint, 15 Abb. Pr. (N. Y. Supreme Ct.) 367; Davis *v.* Duffie, 8 Bosw. (N. Y.) 691; Niles *v.* Battershall, 26 How, Pr. (N. Y. Super. Ct.) 93; O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404; Ten Broeck *v.* Hudson River R. Co., 7 How. Pr. (N. Y. Supreme Ct.) 137; Ritter *v.* Krekeler, 44 How. Pr. (N. Y. Super. Ct.) 445; Parsons *v.* Suydam, 4 Abb. Pr. (N. Y. C. Pl.) 134; Reynolds *v.* Freeman, 4 Sandf. (N. Y.) 702; Allen *v.* Johnson, 2 Sandf.(N. Y). 629; Cook *v.* Pomeroy, 10 How. Pr. (N. Y. Supreme Ct.) 103.

Construction of Statutes.—A statute requiring security on appeal from judgments at law does not extend to appeals from chancery unless expressly so stated. Robinson *v.* Roberts, 16 Fla. 156.

A bond must be given on appeal taken in a special proceeding, where the law provides that it shall be taken similarly as an appeal from a decision by a court of general jurisdiction, and a bond is there required. Matter of Beckwith, 15 Hun (N. Y.) 327.

A statute requiring an appellant to give a bond upon appeal from a judgment after a "trial at law on the merits" was held not to apply to judgments obtained by "default for not pleading." Davies *v.* Skidmore, 5 Hill (N. Y.) 501.

A Code provision requiring an undertaking to be given on appeal from a judgment does not include appeals from orders unless expressly so stated. Emerson *v.* Burney, 6 How. Pr. (N. Y. Supreme Ct.) 32.

The requirement of a bond on appeal from a judgment directing the sale or delivery of real property includes a judgment of foreclosure. Gerald *v.* Gerald, 30 S. Car. 348.

appeal bonds of the appellant in either civil or criminal cases.[1] The general principle that acts required by statute to perfect an appeal are jurisdictional, and must be strictly complied with to vest the appellate court with power to entertain the appeal, applies to statutes requiring appeal bonds.[2] Neither the appellate nor the trial court can dispense with the statutory security[3] or accept

1. *In re* Liquors of McSoley, 15 R. I. 610; Littlefield *v.* Peckham, 1 R. I. 500; Jones *v.* Robbins, 8 Gray (Mass.) 329; Hapgood *v.* Doherty, 8 Gray (Mass.) 373; Com. *v.* Whitney, 108 Mass. 5; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; Lincoln *v.* Smith, 27 Vt. 328; Beers *v.* Beers, 4 Conn. 535, 10 Am. Dec. 186; Biddle *v.* Com., 13 S. & R. (Pa.) 405.

Trial by Jury.—The legislative requirements of a recognizance on appeal in a criminal case, to secure a trial by jury before a higher tribunal, is not unconstitutional as violating the right of trial by jury where the conditions required are reasonable. *In re* Liquors of McSoley, 15 R. I. 608.

2. *Indiana.*—Martin *v.* Kennard, 3 Blackf. (Ind.) 430; Silver *v.* Govenor, 4 Blackf. (Ind.) 15; Spader *v.* Frost, 4 Blackf. (Ind.) 190; Sherry *v.* Foresman, 6 Blackf. (Ind.) 56; Olds *v.* State, 6 Blackf. (Ind.) 91; State *v.* Lynch, 6 Blackf. (Ind.) 395; State *v.* Inman, 7 Blackf. (Ind.) 225; Marshall *v.* State, 8 Blackf. (Ind.) 162; Parker *v.* Henderson, 1 Ind. 62; Ellis *v.* State, 2 Ind. 262; Skelton *v.* Bliss, 7 Ind. 77; Butler *v.* Wadley, 15 Ind. 502; Myers *v.* State, 19 Ind. 127; Macey *v.* Titcombe, 19 Ind. 135; Byers *v.* State, 20 Ind. 47; Caffrey *v.* Dudgeon, 38 Ind. 512.

North Carolina —Orr *v.* McBryde, 3 Murph. (N. Car.) 235; Forsyth *v.* M'Cormick, 2 Law Repos. (N. Car.) 472; Lytle *v.* Lytle, 90 N. Car. 649; Smith *v.* Abrams, 90 N. Car. 21; Royster *v.* Burwall, 90 N. Car. 24; Anthony *v.* Carter, 91 N. Car. 229; McMillan *v.* Nye, 90 N. Car. 12; Harshaw *v.* McDowell, 89 N. Car. 181; Gruber *v.* Washington, etc., R. Co., 92 N. Car. 1; McCauless *v.* Reynolds, 91 N. Car. 244; Turner *v.* Quinn, 91 N. Car. 92; *In re* Berry, 107 N. Car. 326.

Missouri.—Lengle *v.* Smith, 48 Mo. 276; Filley *v.* Walls, 4 Mo. 271; Slater *v.* Steamboat Convoy, 10 Mo. 513; Adams *v.* Wilson, 10 Mo. 341; Hayton *v.* Hope, 3 Mo. 53; Cochran *v.* Bird, 2 Mo. 141; Byrne *v.* Thompson, 1 Mo. 443; Green *v.* Castello, 35 Mo. App. 127.

Massachusetts.—Santom *v.* Ballard, 133 Mass. 464; Keene *v.* White, 136 Mass. 23; Wheeler Mfg. Co. *v.* Burlingham, 137 Mass. 581; Com. *v.* Parker, 140 Mass. 439; Putnam *v.* Boyer, 140 Mass. 235.

Louisiana.—Dubreuil *v.* Dubreuil, 5 Martin (La.) 82; Davis *v.* Curtis, 3 Martin N. S. (La.) 142; State *v.* Heuchert, 42 La. Ann. 270.

New York.—Jones *v.* Decker, 14 Abb. Pr. (N. Y. Supreme Ct.) 391; Blood *v.* Wilder, 6 How. Pr. (N. Y. Supreme Ct.) 446.

Maine. — Dolloff *v.* Hartwell, 38 Me. 54; Jordan *v.* McKenny, 45 Me. 306.

Kentucky.—Clinton *v.* Phillipi, 7 T. B. Mon. (Ky.) 118; Wickliffe *v.* Clay, 1 Dana (Ky.) 585.

Other States.—Bell *v.* Wheeler, 3 S. Car. 104; Com. *v.* Jackson, 1 Leigh (Va.) 485; Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332; Law *v.* Nelson, 14 Colo. 409; Sutherland *v.* Putnam (Arizona, 1890), 24 Pac. Rep. 320. See COMMON-LAW BOND, XIII., 6, *infra*.

Original Jurisdiction.—The necessity of a bond is not dispensed with because the appellate tribunal had original jurisdiction over the case appealed. Green *v.* Castello, 35 Mo. App. 127.

Recognisance.—Where a recognizance is required no appeal is operative until such recognizance be duly given. Hayton *v.* Hope, 3 Mo. 53.

3. Architectural Iron Works Co. *v.* Brooklyn, 85 N. Y. 652; Staub *v.* Williams, 1 Lea (Tenn.) 36; State *v.* Watson, 33 Tex. 338; State *v.* Ivy, 33 Tex. 646.

But where an appellant failed to file security, relying on an order of the trial court dispensing with it, and it appeared that the appeal was taken in good faith, the neglect was deemed excusable, and the appellant was allowed to supply the undertaking. Architectural Iron Works Co. *v.* Brooklyn, 85 N. Y. 652.

a security of a different character from that named in the statute.[1] And it follows that where no bond is given as prescribed by the statute the appeal must be dismissed or stricken from the docket unless the requirement is deemed waived by the appellee.[2]

IV. ORDERS OF COURT.—Where the statute authorizes the court granting an appeal to require an appeal bond to be given, the terms of the order must, like those of a statute, be substantially followed.[3]

V. BY WHOM GIVEN.—An appeal bond must be given in the name of a party to the suit or his legal representatives.[4] All co-parties

1. Erbon *v.* Chowan County, 98 N. Car. 75; Allen *v.* Walnut Hills, etc., Turnpike Co., 12 Cinc. L. Bull. (Ohio) 168; King *v.* McCann, 25 Ala. 471; Laturner *v.* State, 9 Tex. 451; Bacon *v.* State, 10 Tex. 98; Corbin *v.* Laswell, 48 Mo. App. 626; State *v.* Thompson, 49 Mo. 189; St. Louis Dairy Co. *v.* Sauer, 16 Mo. App. 4; Nurse *v.* Porter, 18 N. H. 57; Steamboat Lake of the Woods *v.* Shaw, 2 Greene (Iowa) 91; Cuddelback *v.* Parks, 2 Greene (Iowa) 148.

Certified Check.—The court cannot therefore accept a certified check as a legal substitute for an undertaking, although it be for the same amount. Allen *v.* Walnut Hills, etc., Turnpike Co., 12 Cinc. L. Bull. (Ohio) 168; McIntyre *v.* Strong, 48 N. Y. Super. Ct. 299.

Recognizance and Bond.—Where a recognizance is required by the statute an appeal bond is insufficient, although it otherwise complies with the statutory conditions. Laturner *v.* State, 9 Tex. 451; Bacon *v.* State, 10 Tex. 98.

Even the Actual Payment of Costs has been held an insufficient substitute for the appeal bond required only to secure them. King *v.* McCann, 25 Ala. 471.

Where Form is Disregarded.—An undertaking in lieu of the statutory bond required is valid and effectual to perfect the appeal where the statute requires the appellate court to regard the substance of the obligation rather than the form. Wilson *v.* Morrell, 5 Wash. 654. Or where no particular form of allegation is required, and the undertaking complies otherwise with its requiremants. Conklin *v.* Dutcher, 5 How. Pr. (N. Y. Supreme Ct.) 388.

But a statutory direction that an undertaking shall be in writing is mandatory. Harshaw *v.* McDowell, 89 N. Car. 181.

Unnecessary Bond.—Where the statute requires only a simple acknowledgment in writing an appeal bond formally approved by the trial justice is a valid although unnecessary substitute. Williams *v.* McConico, 27 Ala. 572; Satterwhite *v.* State, 28 Ala. 65; Riddle *v.* Hanna, 25 Ala. 484.

2. State *v.* Stout, 28 Tex. 327; State *v.* Paschal, 22 Tex. 584; State *v.* Fatheree, 23 Tex. 202; Duggan *v.* Noell, 30 Tex. 451; Golden *v.* State, 32 Tex. 737; McLorne *v.* Russell, 29 Tex. 127; Langley *v.* Warner, 1 N. Y. 606; Kelsey *v.* Campbell, 38 Barb. (N. Y.) 238; Dresser *v.* Brooks, 5 How. Pr. (N. Y. Ct. of App.) 75; Mays *v.* King, 28 Ala. 690; King *v.* McCann, 25 Ala. 471; Ten Brook *v.* Maxwell, 5 Ind. App. 353; Law *v.* Nelson, 14 Colo. 409; Thompson *v.* Thompson, 24 Wis. 515; French *v.* Snell, 37 Me. 100; Rinehardt *v.* Vail, 103 Ind. 159; Webb *v.* Simpson, 105 Ind. 327. See also WAIVER, XV., *infra*

As to filing new bond, see AMENDMENT, XIII., *infra*.

3. Beall *v.* Hileman (Ill., 1886), 2 West. Rep. 899; Carson *v.* Merle, 4 Ill. 168; Ryder *v.* Stevenson, 4 Ill. 539; Watson *v.* Thrall, 8 Ill. 69; Johnson *v.* Barber, 9 Ill. 11; Niagara *v.* Martin, 42 Ill. 106.

Conditions.—Where the conditions to be embraced in the bond are not prescribed by the statute, the order must prescribe them or it is ineffectual; and in such a case the failure to file such a bond is not ground for dismissal. Pollock *v.* People, 1 Colo. 83.

4. Savannah, etc., R. Co. *v.* Clark, 23 Fla. 308; Armson *v.* Forsyth, 40 Ill. 49; Partridge *v.* Snyder, 78 Ill. 519; Appanovce *v.* Kueff, 2 Ill. App. 583; Gardner *v.* Chambersburgh 19

united in interest and appealing must be joined therein.[1] Parties allowed to come in and join in the appeal must also unite in the appeal bond, or they do not become parties.[2] Where one party to a joint judgment appeals in the name of all, the appeal bond need not recite the fact if it shows that the whole cause is brought up.[3] Separate parties who are aggrieved by the same judgment may join in the appeal bond on appeal therefrom.[4]

Official Capacity.—An appellant should give the appeal bond in the capacity in which he appeals.[5] Where appealing in an official or representative capacity the bond may be given in that capacity without subjecting him to personal liability.[6]

VI. APPELLANTS EXEMPTED.—No appeal bond is required of the state as appellant, since it is not within the contemplation of the statute.[7] Public corporations, executors, and administrators are generally expressly exempted by statute.[8]

Ill. 99; M'Alister *v.* Serice, 7 Yerg. (Tenn.) 277.

In Name of Town.—On an appeal by a town the bond should be signed in the name of the town by the proper official. Armson *v.* Forsyth, 40 Ill. 49.

Party in Interest.—Where the real appellant is the party in interest the appeal bond must be given in the name of the nominal party to the record. Armson *v.* Forsyth, 40 Ill. 49.

Bond in Name of Stranger.—A bond given in the name of a stranger to the record, or in the name of persons not parties to the order granting the appeal, does not perfect it. Propeller Niagara *v.* Martin, 42 Ill. 106.

1. Carson *v.* Merle, 4 Ill. 168; Watson *v.* Thrall, 8 Ill. 69; Johnson *v.* Barber, 9 Ill. 1; Ryder *v.* Stevenson, 4 Ill. 539; Wittenborg *v.* Murphy, 40 Ill. 46; Hileman *v.* Beale, 115 Ill. 355; Frank *v.* Thomas, 35 Ill. App. 547; Propeller Niagara *v.* Martin, 42 Ill. 106; Dingler *v.* Strawn, 36 Ill. App. 564; Price *v.* Thomas, 4 Md. 514.

2. Dunbar *v.* Creditors, 2 La. Ann. 727.

3. Deslonde *v.* Carter, 28 Ala. 541; Savage *v.* Walsh, 24 Ala. 293.

4. Schlieder *v.* Martinez, 38 La. Ann. 847.

Where a single party is entitled to appeal upon the refusal of the rest, his appeal bond alone is good. Weeks *v.* Sego, 9 Ga. 204.

5. Smith *v.* Dennison, 94 Ill. 582; Beardsley *v.* Hill, 61 Ill. 354; Crawford *v.* Alexander, 14 La. Ann. 719.

6. Smith *v.* Dennison, 94 Ill. 582; Beardsley *v.* Hill, 61 Ill. 354. Unless the appeal also concerns his individual rights, in which case he must give also his individual bond. Crawford *v.* Alexander, 14 La. Ann. 719.

Where the condition of the appeal bond recites the representative capacity of the obligor, and his official designation is added to his signature, it cannot be considered his personal bond. Beardsley *v.* Hill, 61 Ill. 354.

Sufficiency of Bond.—Where an individual brings writ in an official capacity for an organization, a bond furnished by him as such official is sufficient to perfect an appeal. St. Patrick's Church *v.* Consumers' Ice Co., 44 La. Ann. 1021.

Conditions of Such Bond.—The condition of a bond given by an administrator in his capacity as such is properly conditioned to pay the decree in the due course of administration. Smith *v.* Dennison, 94 Ill. 582.

7. People *v.* Clingan, 5 Cal. 389; Holmes *v.* Mattoon, 111 Ill. 28, 53 Am. Rep. 602.

8. Statutes exempting political corporations from the requirement of giving an appeal bond do not violate constitutional provisions forbidding special legislation. McClay *v.* Lincoln, 32 Neb. 412; Holmes *v.* Mattoon, 111 Ill. 28, 53 Am. Rep. 602; Chester *v.* Wilson, 15 Ill. App. 239; Hanover Tp. Drainage Dist. *v.* Kelsey, 120 Ill. 483.

In Holmes *v.* Mattoon, 111 Ill. 28, 53 Am. Rep. 602, it was said: "It is believed that in no government in ancient or modern times has it been required to give bond for the payment of costs of litigation before bringing suit or on appeal or on error. * * * This being true of the state govern-

Construction of Exemptions.—Statutory exemptions will not be extended by implication beyond the specified cases, as they are exceptions to the general policy of the law in protecting appellees.[1]

ment, it is necessarily true of all its officers, agents, and instrumentalities while employed in seeking the rights of the government in courts of justice. Hence officers suing for or defending the rights of the state are acting for and in the stead of the state, and to that extent not only may but should be permitted to do so on the same terms and for the same reasons that the state is permitted to sue for or defend its rights. Again, municipalities such as counties, cities, villages, towns, school districts, and, in the language of the act, 'all other municipal corporations,' and the corporations of all charitable, educational, penal, or reformatory institutions under the patronage and control of the state, and all public officers when suing or defending in their official capacity for the benefit of the public, are the instruments of the state to carry out its powers for the public welfare; and in exercising their powers and enforcing public rights they act as agents, and may have extended to them the same exemptions in suits as belong to the state."

Towns.—A town as a municipal corporation is within the terms of a statute exempting incorporated "cities" from the requirement of filing appeal bonds. Elma *v.* Carney, 4 Wash. 418.

A township drainage district is a municipal corporation within the intent of such a statute. Hanover Tp. Drainage Dist. *v.* Kelsey, 120 Ill. 482.

Officials.—Public officials appealing in behalf of political corporations exempted by law need not furnish an appeal bond. Merchants' Mut. Ins. Co. *v.* Assessors, 40 La. Ann. 371; State *v.* New Orleans, 34 La. Ann. 467; Smith *v.* New Orleans, 43 La. Ann. 726; People *v.* Marion County, 10 Cal. 344; Warden *v.* Mendocino County, 32 Cal. 655.

Trustees.—Statutes exempting persons acting in a trust capacity—as administrators and executors—apply to appeals affecting the interests of the trust estate only. Hudson *v.* Gray, 158 Miss. 589; Haliman *v.* Dibrell, 51 Miss. 96; Hunter *v.* Thurmon, 25 Miss. 463; Biddle *v.* Phipps, 2 Ohio Cir. Ct. Rep. 61; McCay *v.* Devers, 9 Ga. 184; Merchants' Bank *v.* Rawls, 21 Ga. 289; Irving *v.* Melton, 27 Ga. 330.

But where such trustee appeals to protect his own individual interests, or to protect his sureties on an administration bond, he must give an appeal bond like any other appellant. Haliman *v.* Dibrell, 51 Miss. 96; Hunter *v.* Thurmon, 25 Miss. 463; Taylor *v.* McCullom, 5 Cinc. L. Bull. (Ohio) 414; Hudson *v.* Gray, 58 Miss. 589. Or where the appeal affects both his private and his representative interests, as an appeal by the committee of a lunatic from a judgment against him on accounting. Butler *v.* Jarvis, 117 N. Y. 115.

Married Women.—Statutes exempting married women from the obligation of giving an appeal bond apply although the appeal affects her separate property alone. Armstrong *v.* Nelson, 57 Ala. 556; Ware *v.* McDonald, 62 Ala. 81; Coleman *v.* Smith, 52 Ala. 259.

Substituted Appellant.—Where, on the death of the appellant to the record, the administrator has been substituted, he cannot be required to furnish additional security in place of an insolvent surety where statutes exempt trustees. Lattimer *v.* Ware, 2 Kelly (Ga.) 272.

An appeal by an administrator from a decree revoking his letters of administration is not a proceeding had upon the estate of which he is executor within the meaning of a Code provision that no bond need be given in such cases. *In re* Danielson, 88 Cal. 480.

1. State *v.* Judge, 18 La. 444; Von Schmidt *v.* Widber (Cal., 1893), 32 Pac. Rep. 532; Crismon *v.* Bingham, etc., R. Co., 3 Utah 249.

County Official.—A statute exempting state officials will not be extended by implication to county officers. Von Schmidt *v.* Widber (Cal., 1893), 32 Pac. Rep. 532.

Tax Collector.—A collector of taxes is not a trustee of taxes collected within the meaning of a statute exempting trustees from giving appeal bond. Crismon *v.* Bingham, etc., R. Co., 3 Utah 249.

VII. To Whom Payable.—An appeal bond must be made payable to the person designated in the statute, and where no person is designated, to the appellee.[1] Where no obligee is named, or one is named other than the statute requires, the appeal bond is void, and the appeal will be dismissed on motion,[2] unless the appellate court has power to allow a new bond to be filed.[3]

Joinder of Unnecessary Appellants.—Where persons exempted by statute appeal, the joinder of parties as appellants who have no substantial interest in the appeal does not make a bond essential to perfect it. Ruch *v.* Biery, 110 Ind. 444.

Decree for Money.—A statute requiring an appeal bond only where the judgment or decree is for the payment of money must be complied with although different relief be included in the same decree. Flynn *v.* Des Moines, etc., R. Co., 62 Iowa 521.

Appeal by Ward.—A statute requiring an appeal bond on appeal from probate does not include the appeal by a ward from a decree dismissing a petition for removal of her guardian. Atwood *v.* Warwick, 17 R. I. 537.

Appellant Non Compos Mentis.—A person appealing from a decision adjudging him *non compos mentis* is not required to give an appeal bond, although the statute makes no exemption in his favor, since, if the judgment is affirmed, it will in effect declare him to have been incompetent to enter into the bond. M'Donald *v.* Morton, 1 Mass. 543.

Surviving Partners.—A surviving partner administering on partnership effects has all the rights and liabilities of a general administrator, and is exempted from giving an appeal bond where a statute exempts the administrator. *In re* Partnership Estate of Bruening, etc., *v.* Oberschelp, 42 Mo. 278.

Raising Question of Exemption.—The proper mode of raising the question whether the trial court erred in requiring security for costs under a statute making exemptions is by *mandamus* to compel the granting of the appeal without bond, and not by assignment of error. Johnson *v.* Ward, 82 Ala. 487; Roberts *v.* Taylor, 64 Ala. 549.

Discretionary Power.—Where a court has discretionary power to dispense with security on appeals by executors it is sufficient if the judgment is answerable out of the assets of the estate. It is not required that it should have been rendered against the executor in his representative capacity. Kirsch *v.* Derby, 93 Cal. 574.

1. Garrett *v.* Shore, 15 R. I. 538; Phelps *v.* Call, 7 Ired. (N. Car.) 262; Price *v.* Halsed, 3 Mo. 461; Smith *v.* Montreil, 26 Mo. 578; Bigler *v.* Waller, 12 Wall. (U. S.) 142; Hill *v.* Chicago, etc., R. Co. 129 U. S. 170; White *v.* Moerlidge, 7 Ohio Cir. Ct. Rep. 348; Johnston *v.* Letson (Arizona, 1892), 29 Pac. Rep. 893; Reilly *v.* Atchinson (Arizona, 1893), 32 Pac. Rep. 262.

Infant Appellee.—Where the appellee is an infant suing by his next friend, the appeal bond must be given to him, and the next friend need not be named therein. Cooper *v.* Maclin, 25 Ala. 299. "The next friend is not, strictly speaking, a party to the cause. The infants sue by him, and his name is placed upon the record in order that the court may have some person before it who is responsible for the costs and conduct of the cause." Cooper *v.* Maclin, 25 Ala. 299.

2. Reilly *v.* Atchinson (Arizona, 1893), 32 Pac. Rep. 262; Johnston *v.* Letson (Arizona, 1892), 29 Pac. Rep. 893; Garrett *v.* Shore, 15 R. I. 538; Phelps *v.* Call, 7 Ired. (N. Car.) 262; Harper *v.* Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; Alexander *v.* Smith, 4 Smed. & M. (Miss.) 258.

A Bond Payable to a Stranger to the record is void unless the statute names him as payee. Garrett *v.* Shore, 15 R. I. 538; Davenport *v.* Fletcher, 16 How. (U. S.) 142; Smyth *v.* Strader, 12 How. (U. S.) 327.

3. Corey *v.* Lugar, 62 Ind. 60; Bigler *v.* Waller, 12 Wall. (U. S.) 149; The Dos Hermanos, 10 Wheat. (U. S.) 306; Brobst *v.* Brobst, 2 Wall. (U. S.) 97.

The court cannot without express statutory authority supply the name of the appellee by construction where the maker of the bond has omitted it. Garrett *v.* Shore, 15 R. I. 538; unless the bond is made payable by the stat-

Joint Obligees.—All the parties to the appeal interested to maintain the judgment should be made joint obligees.[1]

ute to an official payee. Nugent *v.* McCaffrey, 33 La. Ann. 271; Schlieder *v.* Martinez, 38 La. Ann. 847.

Payable to State.—An appeal bond payable to the state and not to the appellee is void and unamendable, Price *v.* Halsed, 3 Mo. 461; or to the court instead of appellee, White *v.* Moerlidge, 7 Ohio Cir. Ct. Rep. 348.

Where suit is brought in the name of the state on relation of a private individual it may be made payable either to the relator or the state. Spalding *v.* People, 2 How. (U. S.) 66.

In Tax Suits the appeal bond should be made payable to the municipality, where it brings the suit, not to the people or for the use of the people. Nashville *v.* Weiser, 54 Ill. 245; Griffin *v.* Belleville, 50 Ill. 422.

Assignor.—The assignor of an assigned judgment appealed from is still the "adverse party" of the statute, but the assignee may have recourse thereon. May *v.* Kellar, 1 Mo. App. 381.

Action on Official Bond.—Where the bond is given to an official instead of to the appellee, the appellate court cannot, on affirmation of the judgment appealed from, render judgment directly against the sureties; an independent action should be brought on the bond. State *v.* Montgomery, 74 Ala. 226.

1. Bigler *v.* Waller, 12 Wall. (U. S.) 142; Hill *v.* Chicago, etc., R. Co., 129 U. S. 170; Zeigler *v.* Hunter, 16 La. Ann. 165; Cotton *v.* Sterling, 19 La. Ann. 137; Michael *v.* Babin, 19 La. Ann. 197; Hickman *v.* Bailey, 9 La. Ann. 485; Bacchus *v.* Moreau, 4 La. Ann. 313; Lebeau *v.* Trudeau, 10 La. Ann. 164; Conery *v.* Webb, 12 La. Ann. 282; Williams *v.* Courtney, 8 La. Ann. 63; Nouret *v.* Armant, 12 La. Ann, 71; Dow *v.* Hardy, 13 La. Ann. 441; Maples *v.* Reed, 15 La. Ann. 496; Bronson *v.* Balch, 19 La. Ann. 39; Knox *v.* Duplantier, 20 La. Ann. 328; Newson *v.* Creswell, 10 La. Ann. 232; Hamilton *v.* Phillipi, 11 La. Ann. 675; Long *v.* Barnes, 13 La. Ann. 392; Cummings *v.* Irwin, 14 La. Ann. 315; Scriviner *v.* Maxey, 6 Martin, N. S. (La.) 317; Jenkins *v.* Bonds, 3 La. Ann. 339; Percy *v.* Millandon, 6 La. 586; Anderson *v.* Cade, 10 La. 269; Lynch *v.* Brewer, 16 La. 247; Brigham *v.* Taylor, 2 La. Ann. 906, 10 La. Ann. 232; Dunlap *v.* Price, 10 La. Ann. 155, 11 La. Ann. 409, 11 La. Ann. 674; Beer *v.* Creditors, 12 La. Ann. 774, 12 La. Ann. 71; McCrindell's Succession, 13 La. Ann. 231; Armstrong *v.* Creditors, 8 La. Ann. 367; Simmons *v.* Creditors, 12 La. Ann. 765.

Who is Adverse Party.—An adverse party within the meaning of a statute requiring an appeal bond to be given to such is one having an interest conflicting with the reversal or modification of the decision appealed from. Thompson *v.* Ellsworth, 1 Barb. Ch. (N. Y.) 624.

Parties below having no substantial interest in maintaining the judgment need not be made payees. Rachel *v.* Rachel, 11 La. Ann. 687.

Separate Adverse Parties.—Where the interests of adverse parties are distinct and conflicting a separate bond should be given to each. Thompson *v.* Ellsworth, 1 Barb. Ch. (N. Y.) 624.

The names of those for whose use the writ is instituted need not be named. Bank of Tennessee *v.* McKee, 2 La. Ann. 461.

An appeal bond payable only to some of the appellees is substantially defective, and will authorize the dismissal of the appeal. Chandler *v.* Lappington, 36 Tex. 272.

So where a judgment was rendered in favor of M. L. & Co., and an appeal bond was given to H. L. Co., it was held fatally defective. Lynch *v.* Brewer, 16 La. 247.

But the validity of an appeal is not destroyed because the bond, besides being given to obligees as to whom the suit was dismissed below, is also given to a party against whom a decree was rendered below. Hill *v.* Chicago, etc., R. Co., 129 U. S. 170.

Intervenors.—Where an appeal bond is given by intervenors it must run to both plaintiffs and defendants. Greenwade *v.* Smith, 57 Tex. 195.

"Appellee."—A statute requiring an appeal bond to be given to the "appellee" intends all joint appellees. Young *v.* Russell, 60 Tex. 684; Brown *v.* Levine, 6 Port. (Ala.) 414.

Sufficient Reference.—All the joint appellees need not be mentioned by name "if the appeal bond so refers to them as to make them parties thereto

VIII. ON SEPARATE APPEALS.—Where distinct appeals are taken from separate judgments and orders, a separate obligation, conditioned as the statute requires, must accompany each appeal.[1] Where separate decisions are consolidated and brought up on a single appeal, one appeal bond is sufficient.[2]

and identify them with certainty." Bacchus *v.* Moreau, 4 La. Ann. 313; Lebeau *v.* Trudeau, 10 La. Ann. 164; Williams *v.* Courtney, 8 La. Ann. 63; Blanc *v.* Cousin, 8 La. Ann. 71; Hickman *v.* Bailey, 9 La. Ann. 485; Smith *v.* Montreil, 26 Mo. 578; as a bond payable to appellees, "*et al*," Bacchus *v.* Moreau, 4 La. Ann. 313.

1. Sharon *v.* Sharon, 68 Cal. 327; Horn *v.* Volcano Water Co., 18 Cal. 141; Bornheimer *v.* Baldwin, 38 Cal. 671; Berniaud *v.* Beecher, 74 Cal. 617; Corcoran *v.* Desmond, 71 Cal. 100; Home, etc., Assoc. *v.* Wilkins, 71 Cal. 626; McCormick *v.* Belvin, 96 Cal. 182; Cronin *v.* Bear Creek Gold Min. Co., 2 Idaho 1146; Eddy *v.* Van Ness, 2 Idaho 93; Mathison *v.* Leland, 2 Idaho 712; Schermerhorn *v.* Anderson, 1 N. Y. 430.

Specific Reference.—Where one undertaking is erroneously given to cover two distinct appeals, it will be void as to both unless it can be determined from the context to which of the two appeals it refers. Mathison *v.* Leland, 1 Idaho 712; Eddy *v.* Van Ness, 2 Idaho 93; Cronin *v.* Bear Creek Gold Min. Co., 2 Idaho 1146; Corcoran *v.* Desmond, 71 Cal. 100; Home, etc., Assoc. *v.* Wilkins, 71 Cal. 626; McCormick *v.* Belvin, 96 Cal. 182. And in such a case the appellant cannot be allowed to file new undertakings, as this would be in effect to take a new appeal after the expiration of the statutory period. Hastings *v.* Halleck, 10 Cal. 31; Home, etc., Assoc. *v.* Wilkins, 71 Cal. 626.

Undertaking.—But several undertakings may be embraced in the same instrument, so as to cover distinct appeals in the same case by the same parties. Sharon *v.* Sharon, 68 Cal. 327.

Judgment for Distinct Sums.—One undertaking or appeal bond in the statutory amount is sufficient to perfect an appeal from a judgment, although two distinct sums are adjudged due to different defendants therein. Smith *v.* Lynes, 2 N. Y. 569.

Distinct Orders. — One undertaking will not suffice to perfect an appeal from two different orders, although one order be unappealable. The undertaking in such case may be amended on terms by striking out so much as relates to the non-appealable order. Schermerhorn *v.* Anderson, 1 N. Y. 430; Corcoran *v.* Desmond, 71 Cal. 100.

An appeal bond given by one party appellant does not bind the obligors in appeals taken by other parties in the same case. Sturgis *v.* Rogers, 26 Md. 1.

2. Clark's Succession, 30 La. Ann. 801; Elder *v.* New Orleans, 31 La. Ann. 500; Edgecomb *v.* His Creditors, 19 Nev. 151; Cooper *v.* Maddan, 6 Ala. 432; Gregory *v.* Dodge, 3 Paige (N.Y.) 90.

Where One Obligation is Sufficient.—In Edgecomb *v.* His Creditors, 19 Nev. 151, one undertaking was held sufficient on one appeal from several orders, all relating to the question whether certain property was exempt from execution.

And where one order substantially embraced a prior order made in the same cause and entered on the same day, one appeal bond was held sufficient. Gregory *v.* Dodge, 3 Paige (N. Y.) 90.

And where several judgments were rendered against the same parties, and they were all removed by the same proceeding, *held*, that the trial court might direct one appeal bond to cover all. Cooper *v.* Maddan, 6 Ala. 432.

Where a judgment is rendered against the surety and principal on an injunction bond ordering them to pay a certain sum *in solido*, they may unite and give one appeal bond. Elder *v.* New Orleans, 31 La. Ann. 500.

California.—In *California* one undertaking may be given to cover an appeal taken from a judgment and an order denying a new trial in the same cause embraced in the same transcript and notice of appeal. But the undertaking must expressly recite that the appeal is taken from the order as well as from the judgment, or the appeal from the order will be dismissed, un-

On Second Appeal.—Where the first appeal is dismissed or falls for want of prosecution the appeal bond falls with it,[1] and on a second appeal a new bond must be given to perfect it.[2]

IX. Execution of Bond—1. Sealing.—Where an appeal bond is required the instrument given must have the essential requisites of a bond.[3] Where bonds are required to be sealed, and it is without a seal or its legal equivalent, it is defective as a statutory obligation.[4]

2. Signature.—The obligation of the appellant to perform the judgment rendered on appeal results from the judgment itself,[5] and an appeal bond is accordingly valid without his signature,[6] unless

less the respondent has waived the defect or is estopped from objecting. Forni *v.* Yoell, 95 Cal. 442; People *v.* Center, 61 Cal. 191; Page *v.* Page, 77 Cal. 83; Corcoran *v.* Desmond, 71 Cal. 100; Home, etc., Assoc. *v.* Wilkins, 71 Cal. 626; Duffy *v.* Greenebaum, 72 Cal. 157; Berniaud *v.* Beecher, 74 Cal. 617; Wood *v.* Pendola, 77 Cal. 82; Schurtz *v.* Romer, 81 Cal. 245; Crew *v.* Diller, 86 Cal. 555; Pacific Paving Co. *v.* Bolton, 89 Cal. 155; Sharon *v.* Sharon, 67 Cal. 185; Williams *v.* Dennison, 86 Cal. 430; Chester *v.* Bakerfield Town Hall Assoc., 64 Cal. 42; Webb *v.* Trescony, 76 Cal. 621; Lee Chenk *v.* Quan Wo Chong, 81 Cal. 224.

1. Lavigne *v.* May, 2 Martin, N. S. (La.) 628; Kelsey *v.* Campbell, 38 Barb. (N. Y.) 238.

2. Lavigne *v.* May, 2 Martin, N. S. (La.) 628; Kelsey *v.* Campbell, 38 Barb. (N. Y.) 238.

3. State *v.* Thompson, 49 Mo. 189.

4. Corbin *v.* Laswell, 48 Mo. App. 626; State *v.* Thompson, 49 Mo. 189; St. Louis Dairy Co. *v.* Sauer, 16 Mo. App. 4; State *v.* Thompson, 49 Mo. 189; Cuddelback *v.* Parks, 2 Greene (Iowa) 148.

Recognizance and Undertaking.—Sealing is not essential to a recognizance, Cuddelback *v.* Parks, 2 Greene (Iowa) 148; or to an undertaking, Fisher *v.* Trevor, 7 Cinc. L. Bull. (Ohio) 322.

Texas.—In *Texas* no seal or scroll is required to validate an appeal bond, as its essentials are referred to the civil law in force in *Texas* prior to its statehood. Boney *v.* Waterhouse, 35 Tex. 180; Foster *v.* Champlin, 29 Tex. 22; Russell *v.* McCampbell, 27 Tex. 31.

5. Richardson *v.* Terrel, 9 Martin (La.) 34.

6. North American Coal Co. *v.* Dyatt, 4 Paige (N. Y.) 274; Florida Orange Hedge Fence Co. *v.* Branham, 27 Fla. 526; Anonymous, Hard. (Ky.) 156; Harrison *v.* Bank of Ky., 3 J. J. Marsh. (Ky.) 375; Shelton *v.* Wade, 4 Tex. 148; Lindsay *v.* Price, 33 Tex. 280; Thorn *v.* Savage, 1 Blackf. (Ind.) 51; Richardson *v.* Terrel, 9 Martin (La.) 34; Doane *v.* Farrow, 10 Martin (La.) 74; Mon *v.* Gariner, 6 La. 324; Wells *v.* Lamothe, 10 La. 410; Fisk *v.* Friend, 3 Rob. (La.) 264; Marshall *v.* Morehouse, 14 La. Ann. 701; Williams *v.* Hood, 11 La. Ann. 113; Vallance *v.* Sawyer, 4 Me. 62; Walker *v.* Williams, 88 N. Car. 7; McMinn *v.* Patton, 92 N. Car. 371; Drouilhat *v.* Rawner, 13 Oregon 493; Geller *v.* Puchta, 1 Ohio Cir. Ct. Rep. 30; Johnson *v.* Johnson, 31 Ohio St. 131; Coil *v.* Davis, Wright (Ohio) 164; Pasley *v.* McConnell, 38 La. Ann. 470; Clark *v.* Strong, 14 Neb. 229; Eaton *v.* Nash (Tex. App., 1890), 16 S. W. Rep. 788; Railsback *v.* Greve, 58 Ind. 72; Hinkle *v.* Holmes. 85 Ind. 405; Keene *v.* Deardon, 8 East 298; Pettee *v.* Flewellen, 2 Ga. 237; Bellinger *v.* Gardiner, 12 How. Pr. (N. Y. Super. Ct.) 381; Shaw *v.* Tobias, 3 N. Y. 188; Thompson *v.* Blanchard, 3 N. Y. 335; Curtis *v.* Richards, 9 Cal. 33; Gregory *v.* Levy, 12 Barb. (N. Y.) 612.

Massachusetts.—In *Massachusetts* by statute an appeal bond executed by one other than a party is sufficient if good reason is shown why it is so executed and it is duly approved. Wellesley *v.* Washburn, 156 Mass. 359.

Undertaking.—An undertaking is an original and independent contract on the part of the sureties to which the signature of the principal is not essential. Sacramento *v.* Dunlap, 14 Cal. 423; Curtis *v.* Richards, 9 Cal. 38; Tissot *v.* Darling, 9 Cal. 278.

It follows that if an appeal bond is executed on behalf of all the joint appellants by a portion of them, it is good when properly executed by sure-

the statute expressly requires "execution by" the appellant.[1]

Joint Appellants.—Where the bond must be executed by the appellant, all the joint appellants having an appealable interest must sign.[2]

Signature of Sureties.—The bond must be properly signed and executed by the sureties, or it is void.[3] It is not sufficient that their names appear in the body of the bond without their signature.[4] But where they sign with the intent of assuming suretyship, the validity of the bond is not affected by the circumstance that their names do not appear in the body.[5]

ties. Warner *v.* Whittaker, 5 Mich. 241; Deslonde *v.* Carter, 28 Ala. 541; Savage *v.* Walsh, 24 Ala. 293; Florida Orange Hedge Fence Co. *v.* Branham, 27 Fla. 526.

1. Matter of King's Will, 2 Edw. Ch. (N. Y.) 428; *Ex p.* Brooks, 7 Cow. (N. Y.) 428; Curtis *v.* Richards, 9 Cal. 33; Scarborough *v.* State (Tex. Crim. App., 1892), 20 S.W. Rep. 384; Dahl *v.* Tibbats, 5 Wash. 259; Nichols *v.* St. Louis County, 1 Mo. 357; State *v.* Austin, 35 Minn. 51; Bean *v.* Parker, 17 Mass. 591; Wood *v.* Washburn, 2 Pick. (Mass.) 24; Russell *v.* Annable, 109 Mass. 72; Bunn *v.* Jetmore, 70 Mo. 228; Hall *v.* Parker, 37 Mich. 570, 26 Am. Rep. 540; Richardson *v.* Craig 1 Duer (N. Y.) 666; Republic of Mexico *v.* De Arrangois, 11 How. Pr. (N. Y. Super. Ct.) 6; Newton *v.* Haggerman, 1 Browne (Pa.) 95; Day *v.* Pickett, 4 Munf. (Va.) 4; Rootes *v.* Holliday, 4 Munf. (Va.) 323; Hardaway *v.* Rider, 1 Smed. & M. (Miss.) 657.

In such cases it is held that the liability of the sureties rests upon the consideration existing between the principal and the obligee, and that the principal must sign in order that the consideration may appear on the face of the instrument. *Ex p.* Brooks, 7 Cow. (N. Y.) 428.

By Married Woman.—Where a married woman takes an appeal from a judgment rendered against her and her husband, she may execute the appeal bond in her own name without joining her husband, but it will not vitiate the bond if he joins in it; signature by the husband alone is not sufficient. Childress *v.* Taylor, 33 Ala. 185; Wood *v.* Noll, 5 La. Ann. 179; Allen *v.* Landreth, 7 La Ann. 650; Day *v.* Gordon, 9 La. Ann, 183; De Gruy *v.* Aiken, 43 La Ann. 798.

Joint Appellants.—Where the signature of the appellant is not required, signature by some of the joint appellants does not invalidate the bond or alter its legal effect. McClellan *v.* Pyeatt, 49 Fed. Rep. 259; Murrell *v.* Murrell, 33 La. Ann. 1233.

By Partnership.—Signature by a partnership as appellant instead of by the individual members of the firm is a fatal defect unless all proceedings were brought in that name without objection. Burchard *v.* Covins, 77 Tex. 365; Hedger *v.* Armistead, 60 Tex. 277.

2. Hileman *v.* Beale, 115 Ill. 355; Carson *v.* Merle, 4 Ill. 168; Ryder *v.* Stevenson, 4 Ill. 539; Watson *v.* Thrall, 8 Ill. 69; Johnson *v.* Barber, 9 Ill. 1; Frank *v.* Thomas, 35 Ill. App. 547; Andre *v.* Jones, 1 Colo. 489; Cody *v.* Filley, 4 Colo. 342; Gordon *v.* Robertson, 26 Ga. 410; Singler *v.* Strawn, 36 Ill. App. 563.

In Colorado it is held that an appeal bond executed only by a portion of the joint appellants is not amendable. Andre *v.* Jones, 1 Colo. 489.

In United States Practice an appeal bond signed by only a portion of the joint appellants is good where duly approved by the trial judge. Brockett *v.* Brockett, 2 How. (U. S.) 238; Washington, etc., R. Co. *v.* Bradley, 7 Wall. (U. S.) 578; U. S. *v.* Tilden, 10 Ben. (U. S.) 12; Rutherford *v.* Pennsylvania Mut. L. Ins. Co., 1 McCrary (U. S.) 128.

The Objection may be Waived by the appellee, as where no motion to dismiss the appeal on that ground is seasonably made. Frank *v.* Thomas, 35 Ill. App. 547.

3. Ford *v.* Albright, 31 Ohio St. 33.

4. Ford *v.* Albright, 31 Ohio St. 33.

5. Briant *v.* Hebert, 30 La. Ann. 1129; Union Bethel M. E. Church *v.* Sheriff, 33 La. Ann. 1461; Coyle *v.* Creevy, 34 La. Ann. 539; Vignie *v.*

Place of Signature.—The place where the obligors sign is immaterial if the character in which they sign, and an intention to authorize the instrument, are apparent.[1]

On Approval.—Sureties are not required to sign an appeal bond in the presence of the official designated by statute to approve it;[2] it is sufficient if the bond be presented to him properly signed.[3] But where he deems proper he may require the genuineness of the signatures to be proved.[4]

Execution in Blank.—An appeal bond may be executed in blank,[5] and the filling up of such blanks pursuant to an express or implied authority is an immaterial alteration,[6] and is binding on the sureties.[7]

Brady, 35 La. Ann. 560; Kendall *v.* Gleason, 152 Mass. 457; Danker *v.* Nowood, 119 Mass. 146; Ahrend *v.* Odiorne, 125 Mass. 50; Guez *v.* Dupuis, 158 Mass. 454; Cooke *v.* Crawford, 1 Tex. 9; Baldridge *v.* Penland, 68 Tex. 441; Brown *v.* Jessup, 19 Oregon, 288; Dore *v.* Covey, 13 Cal. 502; *Ex p.* Fulton, 7 Cow. (N. Y.) 484; Scott *v.* Whipple, 5 Me. 336.

1. Baldridge *v.* Penland, 68 Tex. 441; Taylor *v.* State, 16 Tex. App. 515; Alexander *v.* Boyle, 20 Tex. 560; Fulshear *v.* Randon, 18 Tex. 275; Prince *v.* Thompson, 21 Tex. 480; Gage County *v.* Fulton, 16 Neb. 5.

Signature Above Condition.—Consequently the signature of the obligors need not be below the condition of the bond; a signature beneath the penalty clause validates the whole bond where the intention to authorize it is apparent. Gage County *v.* Fulton, 16 Neb. 6.

Name Not Appearing in Bond.—A person signing an instrument between other parties, where the law or the intention of the parties contemplates sureties to be given, will be presumed to have signed as such surety although his name does not appear in the body of the bond. Coyle *v.* Creevy, 34 La. Ann. 541.

2. State *v.* Clark, 24 Neb. 320.

3. State *v.* Clark, 24 Neb. 320.

4. State *v.* Clark, 24 Neb. 320.

Signature Evidence of Appeal.—In Mulanphy *v.* Murray, 12 Martin (La.) 429, it was held that the signature of the defendant at the foot of an appeal bond was evidence that he appealed.

Signature by Mark.—Signature of a surety by a simple cross-mark is good, and he is a competent witness to prove the signature to be his. State *v.* Byrd, 93 N. Car. 624.

Record.—It must appear by the record that the sureties signed the appeal bond; the bill of exceptions is not sufficient. Hydraulic Press Brick Co. *v.* Zeppenfeld, 9 Mo. App. 595.

5. Smith *v.* Crocker, 5 Mass. 537; Scott *v.* Whipple, 5 Me. 337; Carlton *v.* Bailey, 7 N. H. 230; Cooke *v.* Crawford, 1 Tex. 9; *Ex p.* Fulton, 7 Cow. (N. Y.) 484; Parker *v.* Bradley, 2 Hill (N. Y.) 584; Wiley *v.* Moore, 17 S. & R. (Pa.) 438; Duncan *v.* Hodges, 4 McCord (S. Car.) 239, 15 Am. Dec. 734; Stone *v.* Wilson, 4 McCord (S. Car.) 203; Bank of Commonwealth *v.* Curry, 2 Dana (Ky.) 142.

6. Hunt *v.* Adams, 6 Mass. 522; Whitsett *v.* Womack, 8 Ala, 466; Iredell *v.* Barbee, 9 Ired. (N. Car.) 250.

7. Smith *v.* Crocker, 5 Mass. 537; Hunt *v.* Adams, 6 Mass. 522; Granite R. Co. *v.* Bacon, 15 Pick. (Mass.) 239; Humphreys *v.* Crane, 5 Cal. 173; Barrett *v.* Thorndike, 1 Me. 73; Hale *v.* Russ, 1 Me. 334; Kershow *v.* Cox, 3 Esp. 24.

Estoppel.—Where a surety signs a bond in blank he is estopped from setting up as a defense that a different bond was to be made than that filled out. Willis *v.* Rivers, 80 Ga. 556.

Revocation.—Sureties may revoke such authority before the execution of the bond. Williams *v.* Hart, 17 Ala. 107; Gibbs *v.* Frost, 4 Ala. 729.

Ratification of Signature.—Signature of the surety's name does not bind him, but he may ratify such authority expressly or impliedly. Winham *v.* Crutcher, 10 Lea (Tenn.) 610; Coles *v.* Anderson, 8 Humph. (Tenn.) 491.

Implied Authority.—Authority to fill out the blanks may be implied from circumstances as well as from words, on the signature of the bond by sureties. The request of the appellant

3. Execution by Agent.—An attorney or agent may execute an appeal bond in the name of his principal.[1] But he must be authorized by a special power of attorney under seal;[2] the general authority to prosecute the suit is not sufficient.[3] The power of attorney should properly be filed with the appeal bond,[4] but where the record does not show the contrary, it will be presumed that the agent's authority was shown on approval of the bond before the proper official.[5]

in the presence of the clerk held to imply authority in the clerk to fill up a blank. Gibbs *v.* Frost, 4 Ala. 729.

Ratification by Silence.—Silence by a surety after knowledge that another may be injured by his failure to disaffirm his signature may amount to his ratification. Winham *v.* Crutcher, 10 Lea (Tenn.) 610.

Erasure.—Erasure of surety's name on the appeal bond before the principal has signed invalidates the bond. Smith *v.* Boykin, 61 Miss. 110.

Affidavit.—Where the affidavit of justification of a surety attached to an undertaking on appeal began thus: "——, being duly sworn," but the surety's name was properly signed thereto, it was held sufficient. Brown *v.* Jessup, 19 Oregon 288.

By Corporation.—After a decree of forfeiture has been rendered against a corporation, it will be presumed that the statute contemplated the continued existence of such corporation for the purpose of executing an appeal bond on appeal against such decree. Texas Trunk R. Co. *v.* Jackson, 85 Tex. 605; Texas Trunk R. Co. *v.* State, 83 Tex. 1; East Line, etc., R. Co. *v.* State, 75 Tex. 434.

Recognizance on Appeal.—The prevailing rule is that an appellant need not personally enter into a recognizance on appeal, but that if it be entered into by his sureties or attorneys it will be sufficient. Vallance *v.* Sawyer, 4 Me. 65; Goodtitle *v.* Bennington, Barnes 75; Lushington *v.* Doe, Barnes 78; Barnes *v.* Bulwar, Carth. 121; Keene *v.* Deardon, 8 East 298; Dixon *v.* Dixon, 2 B. & P. 443; Adams *v.* Robinson, 1 Pick. (Mass.) 462.

In Texas it is held in criminal cases that the appellant must personally enter into the recognizance on appeal. Chaney *v.* State, 23 Tex. 23; Terrill *v.* State, 29 Tex. 489.

When Executed.—An appeal bond executed after the death of the appellee is void. Dial *v.* Rector, 12 Tex. 99. The facts may be tried upon affidavits to the appellate court. Dial *v.* Rector, 12 Tex. 99.

1. Wood *v.* Wayne Circuit Judges, 48 Mich. 647; Schneck *v.* Hagar, 24 Minn. 339; Schofield *v.* Felt, 10 Colo. 146; Western Union Tel. Co. *v.* Graham, 1 Colo. 183; Murray *v.* Peckham, 15 R. I. 297; Clark *v.* Courser, 29 N. H. 170; *Ex p.* Holbrook, 5 Cow. (N. Y.) 35.

By Corporations.—Execution of an appeal bond for a corporation by an attorney in fact appointed pursuant to a resolution of the executive committee is sufficient. Western Union Tel. Co. *v.* Graham, 1 Colo. 183.

2. Schofield *v.* Felt, 10 Colo. 146; Murray *v.* Peckham, 15 R. I. 297; Andrews *v.* Beane, 15 R. I. 451.

In the case of other appeal securities the attorney must be authorized by an instrument of equal legal rank with the security required. Schofield *v.* Felt, 10 Colo. 146.

Where the security is executed without a proper authority from the principal, it is void against his objection. Andrews *v.* Beane, 15 R. I. 451. And a statute validating such a bond without the consent of the obligor is unconstitutional and void. Andrews *v.* Beane, 15 R. I. 451.

Agent's Name.—The appeal bond is ineffectual when given in the agent's own name. Savannah, etc., R. Co. *v.* Clark, 23 Fla. 308; or where signed "A. B., agent for C. D., appellant." It should be signed "C. D., appellant, by A. B., his attorney, or agent." Savannah, etc., R. Co. *v.* Clark, 23 Fla. 308.

3. Murray *v.* Peckham, 15 R. I. 297; Clark *v.* Courser, 29 N. H. 170; *Ex p.* Holbrook, 5 Cow. (N. Y.) 35.

Recognizance on Appeal.—In *Massachusetts* at attorney of record is held impliedly authorized to enter into a recognizance on appeal in the name of his client. Adams *v.* Robinson, 18 Mass. 461.

4. Schofield *v.* Felt, 10 Colo. 146.

5. Carmichael *v.* West Felician R.

Subsequent Ratification.—Where executed without authority it will be deemed ratified by a general appearance of the principal and a proceeding to hearing without objection.[1]

X. DELIVERY.—An appeal bond is not binding until delivered to the appellee, his attorney or agent;[2] a delivery to the clerk of the court is not sufficient.[3]

XI. CONTENTS AND SUFFICIENCY—1. Amount.—Statutory Directions as to the amount in which the appeal bond shall be given are mandatory.[4] Where given in a larger amount than the statute re-

Co., 2 How. (Miss.) 817; Robertson *v.* Johnson, 40 Miss. 500; Sullivan *v.* Lowder, 11 Me. 426; Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35; Union Gold Min. Co. *v.* Bank, 2 Colo. 227; Delisle *v.* Gaines, 4 Martin (La.) 671; Singleton *v.* Smith, 4 La. 432; Poydras *v.* Patin, 5 La. 128; Jackson *v.* Harsly, 27 Fla. 205.

General Presumption.—On appeal, an appeal bond will be presumed to have been executed by the parties whose names are signed to it, and it can be attacked in the appellate court only for error manifest on its face. Carmichael *v.* West Feliciana R. Co., 2 How. (Miss.) 817.

1. Campbell *v.* Pope, 96 Mo. 468; Boorman *v.* Freeman, 12 Ill. 165; Burton *v.* Collin, 3 Mo. 315.

Or where ratified by a subsequent ratification under seal. Boorman *v.* Freeman, 12 Ill. 165.

Execution in Name of Partnership.—A bond signed by one party in the name of the partnership will bind all the partners consenting to the agreement. Kasson *v.* Brocker, 47 Wis. 79; Wilson *v.* Hunter, 14 Wis. 683; Waterman *v.* Dutton, 6 Wis. 265; Cady *v.* Shepherd, 11 Pick. (Mass.) 405; Gram *v.* Seton, 1 Hall (N. Y.) 262.

Presumption.—And where such a bond is approved by the proper official it will, in the absence of proof to the contrary, be presumed to be so executed as to bind all the partners. Kasson *v.* Brocker, 47 Wis. 79.

Where a proceeding is brought or a claim is presented in the name of a partnership without objection, an appeal bond may properly be given in the same name. Kasson *v.* Brocker, 47 Wis. 79.

2. Harris *v.* Register, 70 Md. 109; Covert *v.* Shirk, 58 Ind. 264; James *v.* Woods, 65 Miss. 528.

3. Harris *v.* Register, 70 Md. 109.

As an appeal bond does not take effect until delivery, its signature and sealing prior to the rendition of judgment appealed from do not affect its validity where it is not delivered until the judgment is rendered. James *v.* Woods, 65 Miss. 528; Chateaugay Ore, etc., Co *v.* Blake, 35 Fed. Rep. 804; Covert *v.* Shirk, 58 Ind. 264.

What Constitutes Delivery.—An appeal bond is delivered by filing the original with the clerk and serving a copy on the appellee. Where service is required by statute it is essential to perfect the appeal. Cushman *v.* Martine, 13 How. Pr. (N. Y. Super. Ct.) 402; New York Cent. Ins. Co. *v.* National P. Ins. Co., 10 How. Pr. (N. Y. Ct. of App.) 344; Maxwell *v.* Wessels, 7 Wis. 103; Eaton *v.* Manitowoc Co., 42 Wis. 317.

Proof of Delivery.—The execution of an appeal bond, delivery of it to the clerk, and filing it among the papers with an affidavit, if required, is a sufficient proof of delivery. Dore *v.* Covey, 13 Cal. 502.

Voluntary Bond.—The delivery to and filing with the clerk of an appeal bond which does not comply with the statute is not a good delivery as a voluntary bond to the appellee without some act expressing the appellee's acceptance and his ratification of the clerk as his agent to receive it. Reilly *v.* Atchinson (Arizona, 1893), 32 Pac. Rep. 262.

Acknowledgment.—Unless a statute, or a judge in the exercise of a discretionary power, so requires, an appeal bond need not be acknowledged and proved. Wilson *v.* Allen, 3 How. Pr. (N. Y. Supreme Ct.) 369.

4. Kaiser *v.* Dallas (Tex. Crim. App., 1893), 21 S. W. Rep. 767; Scott *v.* Milton, 26 Fla. 52; Brown *v.* Keirns, 13 Ill. 296; Brennan *v.* Academy of Christian Brothers, 85 Ill. 509; State *v.* McKinmore, 8 Oregon 207; Shannon *v.* Spencer, 1 Blackf. (Ind.) 120; Landa

quires the bond is valid, because the appellee obtains the protection contemplated by the statute.[1] Where given in a smaller amount

v. Heermann, 85 Tex. 1; Talbot *v.* Morton, 5 Litt. (Ky.) 326; Wickliffe *v.* Clay, 1 Dana (Ky.) 589; Allen *v.* Sudduth, 1 J. J. Marsh. (Ky.) 15.

A court has no power to dispense with any portion of the security required by statute. Wice *v.* Commercial Ins. Co., 7 Daly (N. Y.) 258.

Amount of Different Bonds Cannot be Cumulated.—The amount of one appeal bond cannot be added to that of another bond—such as an injunction bond given at the inception of the suit—to make the required statutory amount. Grounx *v.* Abat, 7 La. 36; State *v.* King, 40 La. Ann. 841.

Louisiana.—Where it does not otherwise appear whether an appeal is suspensive or devolutive, the amount of the bond determines. McKown *v.* Mathes, 19 La. 542; Grounx *v.* Abat, 7 La. 36.

In Fixed Sum.—A bond in a fixed sum where the statute requires it to be conditioned for payment of the judgment, damages, and costs is illegal unless these items are capable of exact computation and the amount of the bond agrees therewith. State *v.* McKinmore, 8 Oregon 207.

Deposit of Money.—Where statutes permit the deposit of a sum of money as a substitute for an appeal bond, the deposit of a sum less than the amount required in the bond is irregular, but may be amended. Lane *v.* Humbert (C. Pl.), 9 N. Y. Supp. 744.

Certificate of Deposit.—A certificate of deposit may be accepted by the clerk in place of cash where a deposit is permitted as security. Alt *v.* California Fig Syrup Co., 18 Nev. 423.

The Cash Deposited in the inferior appellate court must remain there until the final determination of the appeal. Parsons *v.* Travis, 2 Duer (N. Y.) 659; McIntyre *v.* Strong, 48 N. Y. Super. Ct. 299.

It is subject only to the decision of the appeal, and upon reversal of the judgment the fund is released from liens except those created by judgment or assignment. Jordan *v.* Volkening, 14 Hun (N. Y.) 118.

Payment in Gold.—A stipulation in the appeal bond that sureties will pay in gold coin is not a substantial variation from the statute. State *v.* California Min. Co., 13 Nev. 203.

Reduction of Amount.—An appellant who deposits a less amount than the statute requires has no standing in the appellate court to move for a reduction of the amount. Jesup *v.* Carnegie, 45 N. Y. Super. Ct. 310.

He will not be permitted to withdraw the cash and to substitute an undertaking so as to subject the appellee to the expense of investigating the sureties. Wiebold *v.* Rauer, 95 Cal. 418.

In Suits Affecting Real Property.—Appeal bonds given generally to cover costs and to perform the judgment do not embrace mesne profits in an action affecting real property unless the statute expressly so provides. Opp *v.* Ten Eyck, 99 Ind. 345; Hays *v.* Wilstach, 101 Ind. 100; Shenk *v.* Shaeffer, 8 Lanc. L. Rev. (Pa.) 49. It is otherwise if it includes damages sustained by reason of the appeal. Cahall *v.* Citizens' Mut. Bldg. Assoc., 74 Ala. 539.

Unsecured Judgment. — Where the amount may be fixed by the judge or must be given to secure the amount of the decree, it must be for the entire amount of the unsecured judgment rendered. Richardson *v.* Richardson, 82 Mich. 307; Catlett *v.* Brodie, 9 Wheat. (U. S.) 553; Roberts *v.* Cooper, 19 How. (U. S.) 373; Providence Rubber Co. *v.* Goodyear, 6 Wall. (U. S.) 153; French *v.* Shoemaker, 12 Wall. (U. S.) 86; Jerome *v.* McCarter, 21 Wall. (U. S.) 17; *Ex p.* French, 100 U. S. 1; Wayne County *v.* Kennicott, 103 U. S. 554; Kountze *v.* Omaha Hotel Co., 107 U. S. 381.

In *Michigan* it is held that, where the judgment or decree is secured wholly or partially by a mortgage or by a fund in court, the amount of the appeal bond need in the one case be only for damages and costs, and in the other only for the unsecured amount plus damages and costs. Richardson *v.* Richardson, 82 Mich. 307; Michie *v.* Ellair, 60 Mich. 73; Kennedy *v.* Nims, 52 Mich. 153; Prosser *v.* Whitney, 46 Mich. 407; Daly *v.* Litchfield, 11 Mich. 497; Kephart *v.* Farmers', etc., Bank, 4 Mich. 602.

1. **Larger Amount than Required.**—The general rule is that the appellee cannot object on the ground that the bond is for a larger amount than the

he is entitled to a dismissal of the appeal unless the bond is properly amended.[1]

Amount of Judgment.—Where the amount for which judgment was rendered determines the amount of the appeal bond, interest on the original claim up to the time of the rendition of the judgment below must be included as a part thereof.[2]

Costs.—And where the judgment to be rendered on appeal can in no event be for more than costs, a bond in that amount is ordinarily sufficient unless the statute fixes a sum named.[3]

statute requires. Davis *v.* Curtis, 3 Martin, N. S. (La.) 142; Levesque *v.* Anderson, 6 Martin, N. S. (La.) 294; Dore *v.* Covey, 13 Cal. 509; Ives *v.* Finch, 22 Conn. 101; Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 119.

In *Ohio* the contrary has been held. Coil *v.* Davis, Wright (Ohio) 164; Franklin Bank *v.* Bartlett, Wright (Ohio) 741; Pray *v.* Oliver, 5 Ohio 326.

1. **Amount Less than Required.**—Smith *v.* Vanhille, 10 La. 252; Duperron *v.* Van Wickle, 1 Rob. (La.) 324; Brown *v.* Keirns, 13 Ill. 296; Brennan *v.* Academy of Christian Brothers, 85 Ill. 509; Shannon *v.* Spencer, 1 Blackf. (Ind.) 120.

Paying Money into Court.—The appellant cannot remedy his bond by the voluntary deposit with the clerk of the amount required to complete the bond. Smith *v.* Vanhille, 10 La. 252.

Description of Amount.—A bond describing a judgment as for principal, interest, and "costs" does not vary substantially from a judgment for principal, interest, and "attorney's fees," where the sums are identical. Landa *v.* Heermann, 85 Tex. 1.

2. Paland *v.* Chicago, etc., R. Co., 42 La. Ann. 293; Ross *v.* Pargoud, 2 La. 85; Brown *v.* Brown, 9 La. Ann. 310; Jorda *v.* Judge, 29 La. Ann. 776.

But not interest accruing since the rendition of the judgment. Paland *v.* Chicago, etc., R. Co., 42 La. Ann. 290.

Costs.—And in *Louisiana* costs as taxed are not included in the "amount of judgment." Ross *v.* Pargoud, 2 La. 86.

A bond in double the amount of costs is sufficient to comply with the statute requiring it to be in double the amount of judgment and costs, where the judgment rendered is for costs. Ross *v.* Williams, 78 Tex. 371; Owens *v.* Levy, 1 Tex. App. Civ. Cas. § 409.

Damages.—Where a percentage is added to the judgment as "damages," the appeal bond must provide for the judgment plus the "damages" so given. Roman *v.* Peters, 1 Rob. (La.) 522.

The word "damages" in an appeal bond or undertaking binding the appellant to pay all costs and damages which may be awarded against him on appeal does not include damages already adjudged or which may thereafter be recovered against the appellant in the court from which the appeal is taken. Post *v.* Doremus, 60 N. Y. 371.

3. Chenault *v.* Chenault, 5 Sneed (Tenn.) 252; Watkins *v.* Clifton Hill Land Co., 91 Tenn. 683; Gibson *v.* Widener, 85 Tenn. 16; Younger *v.* Younger, 90 Tenn. 25; Kinsey *v.* Stanton, 6 Baxt. (Tenn.) 92; Staub *v.* Williams, 1 Lea (Tenn.) 123; Rogers *v.* Newman, 5 Lea (Tenn.) 255; Moore *v.* Alston (Tex., 1890), 15 S. W. Rep. 47; Ross *v.* Williams, 78 Tex. 371; State *v.* Lazarus, 36 La. Ann. 189; State *v.* Rightor, 44 La. Ann. 564; Hart *v.* Lazarus, 34 La. Ann. 1210; State *v.* King, 40 La. Ann. 841; State *v.* Judge, 39 La. Ann. 1042; Heath *v.* Vaught, 16 La. 515; Blanchin *v.* Steamer Fashion, 10 La. Ann. 345; Edwards' Succession, 34 La. Ann. 216; Pasley *v.* McConnell, 38 La. Ann. 470; State *v.* Judge, 22 La. Ann. 178; State *v.* Judge, 27 La. Ann. 685; State *v.* Judge, 30 La. Ann. 314; Goh's Succession, 37 La. Ann. 428.

What Costs Included.—A bond required by statute to cover costs generally includes costs of the court from which the appeal is taken, as well as those awarded on appeal. Prosser *v.* Whitney, 46 Mich. 405; Ray *v.* Shehee, 34 La. Ann. 1106; unless expressly limited to those arising in the appellate court. Michie *v.* Ellair, 60 Mich. 73; Robinson *v.* Masterson, 136 Mass. 560.

In *Indiana* costs are held to include those only which are incurred by the

When Discretionary.—Where the statute requires a bond, but does not define the amount in which it shall be given or otherwise determine the liability of the obligors, it is within the discretion of the trial court to fix the amount.[1] The discretion so exercised is

appellee and for which he is liable. Goodwin *v.* Smith, 68 Ind. 301.

In such cases an appeal bond is sufficient where the penalty is large enough to cover the appellate costs; but the appellate court will take judicial notice of their amount, and if the bond is insufficient the appeal will be dismissed on motion. Walker *v.* Hunter, 34 Ala. 204; Satterwhite *v.* State, 28 Ala. 65; Williams *v.* McConico, 27 Ala. 572; Barnett *v.* State, 34 Ala. 260.

In *Texas* it is held that, where a bond must be given for the amount of the judgment and "costs," the costs include those only which have accrued up to the time the appeal was taken. Costs subsequently arising should not be included. Drum *v.* Ft. Worth, 25 Tex. App. 664.

The agreement in an appeal bond to satisfy and perform a judgment on affirmance or dismissal embraces costs as well as the debt and interest. Stephens *v.* Miller, 80 Ky. 47.

Attorney's Fees.—Costs do not include attorney's fees unless expressly so required by statute or so stated in the bond. Noll *v.* Smith, 68 Ind. 188.

Damages on Injunction.—An appeal bond, given on appeal from a decision granting or dissolving an injunction, conditioned to pay all damages caused by suing out the injunction does not cover damages caused by the continuance of the injunction by the appeal. Mix *v.* Singleton, 86 Ill. 194.

Several Appeals.—Where an undertaking or appeal bond covers several appeals, its amount must be proportionately increased for each appeal. People *v.* Center, 9 Pac. Coast Law J. (Cal.) 764; Webb *v.* Trescony, 76 Cal. 621.

California.—Where, as in *California*, one obligation is sufficient to cover an appeal from a judgment and an order awarding a new trial in the same case, the amount required on a single appeal is sufficient. See VIII. ON SEPARATE APPEALS, *supra*.

One Bond Sufficient.—Where an appeal bond for costs only is required in each case, one bond for costs may cover an appeal from a final and an interlocutory judgment in the same case. People's Brewing Co. *v.* Boeblnger, 40 La. Ann. 277.

Cumulative Bond.—On appeal from an intermediate appellate tribunal to the Supreme Court the appeal bond need only cover costs, provided the obligation of the bond given in the original appeal holds good. McCall *v.* Moss, 100 Ill. 461; Ennor *v.* Galena, etc., R. Co., 104 Ill. 103.

1. Koch's Estate, 4 Rawle (Pa.) 268; Com. *v.* Judges, 10 Pa. St. 37; Chew's Appeal, 9 W. & S. (Pa.) 151.

Compliance Required.—Strict compliance with the order fixing the amount is essential to enable the appellant to prosecute an appeal against the objection of the appellee, otherwise the appeal may be dismissed on his motion. Hawkins *v.* Bell, 6 La. Ann. 561; Glaze *v.* Russell, 5 Martin, N. S. (La.) 237; Smith *v.* Vanhille, 10 La. 252; Rightor *v.* Phelps, 1 Rob. (La.) 325; Slater *v.* Commercial, etc., Bank, 12 Rob. (La.) 187; Ross *v.* Pargoud, 2 La. 86; Beasley *v.* Allen, 9 Rob. (La.) 39; Emerson *v.* Fox, 3 La. 181; Lowenstein *v.* Fudicker, 43 La. Ann. 886; State *v.* Meacham, 6 Ohio Cir. Ct. Rep. 31; Com. *v.* Wistar, 142 Pa. St. 373.

"Court," Not Judge.—Where the statute designates the court to fix the amount of the bond or the time of filing, it cannot be fixed by the judge. Gruner *v.* Moore, 6 Colo. 529; Wolfley *v.* Lebanon Min. Co., 3 Colo. 64.

By Clerk of Court.—The clerk of the court has no power to fix the penalty unless the statute expressly authorizes him. Ennis's Estate, 2 Del. (Pa.) 523.

No Motion Required.—A motion by either party is not essential to the action of the court in fixing the amount; the court must determine it if none is made. Hubble *v.* Renick, 1 Ohio St. 171.

Prior Execution.—Where the statute requires the amount of an undertaking to be fixed by a justice it is not invalidated by an execution prior to fixation of the sum. Scherer *v.* Hopkins (C. Pl.), 16 N. Y. Supp. 863.

Louisiana.—In *Louisiana*, when the prayer and order are for a suspensive appeal, and the amount of the bond fur-

not an arbitrary but a judicial discretion,[1] and the amount fixed must have reasonable regard to the peculiar circumstances of each case. The action of the court or judge is reviewable.[2]

Effect of Giving New Bond.—Where a new appeal bond is required to be given by the court in a larger amount than the original appeal bond, the liability on the original bond is discharged thereby.[3] The effect of the new bond is retroactive, and embraces all acts named in the bond from the time of taking the appeal.[4]

2. Description of Judgment.—An appeal bond must sufficiently describe the judgment appealed from to identify it with certainty.[5] Where it entirely fails to specify it or does not contain

nished in compliance with the order is insufficient to sustain it, or if the bond is not filed within the time required to perfect such appeal, but is required within the year given for a devolutive appeal, the appeal will be sustained as the latter appeal. Brode *v.* Fireman's Ins. Co., 8 Rob. (La.) 38.

Order.—The amount must be stated in the order granting the appeal, or the order is defective. Wolfley *v.* Lebanon Min. Co., 3 Colo. 64; Duperron *v.* Van Wickle, 1 Rob. (La.) 324; Surget *v.* Stanton, 10 La. Ann. 318; Rachel *v.* Rachel, 11 La. Ann. 687.

The court may be compelled to fix the amount by *mandamus* when it fails or declines to act. State *v.* Judge, 41 La. Ann. 1140.

In *Louisiana* a *mandamus* will not issue for that purpose after the time for taking a suspensive appeal has elapsed. State *v.* Judge, 41 La. Ann. 1140.

Time to Act.—The court cannot change or amend the order after the record of the case has been transferred to the appellate court, as the jurisdiction over it is lost thereby. Holbrook *v.* Holbrook, 32 La. Ann. 13; Chew's Appeal, 9 W. & S. (Pa.) 151; Com. *v.* Wistar, 142 Pa. St. 373.

1. Hart *v.* Lazarus, 34 La. Ann. 1210.

2. Hart *v.* Lazarus, 34 La. Ann. 1210; Demarest *v.* Beirne, 36 La. Ann. 751; Beard *v.* Russ, 32 La. Ann. 304; Lucas *v.* Fallen, 40 Mo. App. 551; Richardson *v.* Richardson, 82 Mich. 307; Catlett *v.* Brodie, 9 Wheat. (U. S.) 554; Roberts *v.* Cooper, 19 How. (U.S.) 373; Providence Rubber Co. *v.* Goodyear, 6 Wall. (U. S.) 153; French *v.* Shoemaker, 12 Wall. (U.S.) 86; Jerome *v.* McCarter, 21 Wall. (U. S.) 17; *Ex p.* French, 100 U. S. 1; Wayne County *v.* Kennicott, 103 U. S. 554; Kountze *v.* Omaha Hotel Co., 107 U. S. 381; Scott *v.* Milton, 26 Fla. 52.

The trial court or judge should consider the fact that the judgment is not a money judgment, or that the fund in dispute is in the custody of the court, in fixing the amount. State *v.* Dillon, 98 Mo. 90. And where the bond given affords ample security, a new appeal bond for an additional amount cannot be required. Reed *v.* Leffingwell, 30 Mo. 543; State *v.* Lavalley, 9 Mo. 834.

Security Less than Amount of Decision.—Fixing the appeal security at a less sum than the whole amount of the decision appealed from will generally constitute an abuse of discretion. Demarest *v.* Beirne, 36 La. Ann. 751; Catlett *v.* Brodie, 9 Wheat. (U. S.) 554; *Ex p.* French, 100 U. S. 1; Kountze *v.* Omaha Hotel Co., 107 U. S. 381; Scott *v.* Milton, 26 Fla. 52.

The Order of the Court is Amendable, and further security may be required. Demarest *v.* Beirne, 36 La. Ann. 751. *Contra*, Brasch *v.* Dick, 14 Ohio St. 557.

3. Poppers *v.* International Bank, 10 Ill. App. 531, *affirmed* 105 Ill. 491.

4. International Bank *v.* Poppers, 105 Ill. 491.

5. *Texas.*—Williams *v.* Sims (Tex. App., 1890) 16 S. W. Rep. 786; Warren *v.* Marberry, 85 Tex. 193; Edwards *v.* Allen (Tex. App., 1891), 19 S. W. Rep. 1074; Herndon *v.* Bremond, 17 Tex. 334; Christian *v.* Crawford, 60 Tex. 45; O'Hara's Estate, 60 Tex. 179; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 419; Dutton *v.* Norton, 1 Tex. App. (Civ. Cas.) § 358; Nelson *v.* Baird, 1 Tex. App. (Civ. Cas.) § 1236; Mills *v.* Hackett, 1 Tex. App. (Civ. Cas.) § 846; Parsons *v.* Crawford, 2 Tex. App. (Civ. Cas.) § 669; Austin *v.* McMahan, 2 Tex. App. (Civ. Cas.) § 429; Laird

terms of identification sufficient to correct misrecitals of dates, etc., it is void.[1] On appeal from an amended judgment *nunc pro tunc*

v. Frieberg, 2 Tex. App. (Civ. Cas.) § 111; Moses *v.* Clements, 3 Tex. App. (Civ. Cas.) § 171.

Louisiana.—Walker's Succession, 32 La. Ann. 525; People's Brewing Co. *v.* Boebinger, 40 La. Ann. 277.

Kansas.—Chicago, etc., R. Co. *v.* Brunson, 43 Kan. 371; Shuster *v.* Overturf, 42 Kan. 668; Kansas City, etc., R. Co. *v.* Hurst, 42 Kan. 462.

New York.—Dunseith *v.* Linke, 10 Daly (N. Y.) 363; Dinkel *v.* Wehle, 13 Abb. N. Cas. (N. Y. C. Pl.) 478; McElroy *v.* Mumford, 128 N. Y. 303.

North Carolina.—Bowen *v.* Fox, 98 N. Car. 396; Lackey *v.* Pearson, 101 N. Car. 657.

Florida.—McMichael *v.* Eckman, 26 Fla. 43; Savannah, etc., R. Co. *v.* Clark, 23 Fla. 308.

Arizona.—Sutherland *v.* Putnam (Arizona, 1890), 24 Pac. Rep. 320.

Massachusetts.—Putnam *v.* Boyer, 140 Mass. 235.

Wisconsin.—Johnston *v.* King, 83 Wis. 8.

Ohio.—Coil *v.* Davis, Wright (Ohio) 164.

Delaware. — Miller *v.* Holding, 5 Del. 494.

Statement of Amount.—The amount of the judgment appealed from need not be stated in the binding part of the undertaking if elsewhere stated in the appeal bond. Dunseith *v.* Linke, 10 Daly (N. Y.) 363.

Sufficient Description. — An appeal bond correctly describes the judgment appealed from when it states the style and number of the suit, the court wherein rendered, the date of its rendition, the amount for which it was rendered, and against whom it was rendered. Williams *v.* Sims (Tex. App., 1890), 16 S. W. Rep. 786; Johnston *v.* King, 83 Wis. 8.

Omission of Recital. — But the omission of any recital which does not destroy the identity of the judgment is not fatal to the validity of the bond, because its omission creates no variance or repugnance. Satterwhite *v.* State, 28 Ala. 65; Meredith *v.* Richardson, 10 Ala. 828; People *v.* Orleans, 2 Wend. (N. Y.) 292. Thus, while the date of a judgment should be correctly described in the appeal bond (Shuster *v.* Overturf, 42 Kan. 670; Dinkel *v.* Wehle 13 Abb. N. Cas. (N. Y. C. Pl.) 478; Lemon *v.* Stephenson, 40 Ill. 45; Dietrich *v.* Rumsey, 40 Ill. 50), yet the omission or misstatement of the date is not fatal to the validity where the judgment may be identified with certainty from the remaining description of the bond, Warren *v.* Marberry, 85 Tex. 193; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 419; Edwards *v.* Allen (Tex. App., 1891), 17 S. W. Rep. 1074; Forbes *v.* Porter, 23 Fla. 47; Dinkel *v.* Wehle, 13 Abb. N. Cas. (N. Y. C. Pl.) 478; Swasey *v.* Adair, 83 Cal. 136; or that the amount for which the judgment is rendered is omitted, or a portion of the parties thereto omitted in the description, Witten *v.* Caspary (Tex., 1890), 15 S. W. Rep. 47; Warren *v.* Marberry, 85 Tex. 193; Christian *v.* Crawford, 60 Tex. 45; Herndon *v.* Bremond, 17 Tex. 334. In other cases it is held that a description in the appeal bond of the judgment as rendered against a portion only of the appellees is fatally defective. Pittman *v.* Myrick, 16 Fla. 403; Satterwhite *v.* State, 28 Ala. 65; Dumas *v.* Hunter, 28 Ala. 688; McGarrah *v.* Burney, 4 Tex. 287; Willenberg *v.* Murphy, 40 Ill. 46. Where a judgment described in the appeal bond as for $2184.40 was actually rendered for $24,000, the appeal was dismissed. Lockhart *v.* Lytle, 36 Tex. 188. A failure to recite in the judgment the days when respective sums mentioned in it are required to be paid may be supplied by reference to the record. Satterwhite *v.* State, 28 Ala. 65; Thurman *v.* Blankenship, etc., Co., 79 Tex. 171.

1. Williams *v.* State, 26 Ala. 85; Dumas *v.* Hunter, 28 Ala. 688; Burdine *v.* Mustin, 33 Ala. 634; O'Hara's Estate, 60 Tex. 179.

Description of Offense in Criminal Appeal.—Where statutes require the recognizance in a criminal appeal to state the offense of which the prisoner was convicted, it must set out all the essential elements of the crime unless it is an offense *eo nomine*, when it will be sufficient to recite it by that name. Johnson *v.* State (Tex. Crim. App., 1893), 21 S. W. Rep. 371; Morgan *v.* State (Tex. Crim. App., 1893), 21 S. W. Rep. 260; Flemming *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 1038; Shackelford *v.* State (Tex. Crim. App..

the bond should recite the amended judgment.[1]

Undertaking.—The judgment must be recited in full in an undertaking on appeal so that it may appear that sureties have justified in the correct amount.[2]

3. Condition of Bond.—The condition of the appeal bond must be as broad as the statute, and must include all the essential stipulations required by it.[3] Where a stipulation in the bond

1893), 22 S. W. Rep. 26; Mullinix *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 407; Reed *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 969; Parker *v.* State (Tex Crim. App., 1892), 20 S.W. Rep. 707; Garza *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 139; Daggett *v.* State (Tex. Crim. App., 1893), 21 S. W. Rep. 360; Donahoe *v.* State (Tex. Crim. App., 1893), 21 S. W. Rep. 372; Alderete *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 17; Koritz *v.* State, 27 Tex. App. 53; Witten *v.* Caspary (Tex., 1890), 15 S. W. Rep. 47; McLaren *v.* State, 3 Tex. App. 680; Killingsworth *v.* State, 7 Tex. App. 28; Waterman *v.* State, 8 Tex. App. 671; Morris *v.* State, 4 Tex. App. 554.

Jurisdictional.—Description of the essential elements of the offense is, where required by statute, jurisdictional. Johnson *v.* State (Tex. Crim. App., 1893), 21 S. W. Rep. 371.

Description of Court.—Where the statute requires compliance with a form prescribed it must be substantially followed; and a misnomer of the court to which the appeal is taken, or failure to name it entirely, is a fatal defect. Cummings *v.* State, 31 Tex. Crim. App. 406; Neubauer *v.* State, 31 Tex. Crim. App. 513; Kaiser *v.* Dallas (Tex. Crim. App., 1893), 21 S. W. Rep. 767; Garza *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 139; Douglass *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 43.

1. Dumas *v.* Hunter, 30 Ala. 188.

2. Fay *v.* Lynch, 5 Month. L. Bull. (N. Y.) 57.

3. *Texas.*—Robinson *v.* Brinson, 20 Tex. 438; Little *v.* State, 26 Tex. 110; Stroud *v.* State, 33 Tex. 650; Pridgen *v.* Walker, 37 Tex. 410; Figures *v.* Dunklin, 68 Tex. 644; Hicks *v.* Oliver, 71 Tex. 776; Munzesheimer *v.* Wickham, 74 Tex. 638; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 418.

Tennessee.—Polk *v.* Plummer, 2 Humph. (Tenn.) 500; Mattock *v.* Bank, 7 Yerg. (Tenn.) 95; Alberton *v.* McGee, 7 Yerg. (Tenn.) 106; Jones *v.* Parsons, 2 Yerg. (Tenn.) 321.

Louisiana.—State *v.* Kink, 40 La. Ann. 841; Russ *v.* Creditors, 45 La. Ann. 442.

Other States.—Ballard *v.* Noaks, 1 Ark. 133; Stephens *v.* People, 13 Ill. 131; Bowie *v.* Hagan, 5 How. (Miss.) 13; Strange *v.* Ellis, 1 Mo. 412; Langley *v.* Warner, 1 N. Y. 606.

The liability of the principal and sureties on the appeal bond must be made dependent on all the contingencies named in the statute. An omission of any one is a fatal defect on objection. Calhoun's Succession, 35 La. Ann. 363.

Obligation Must Be Defined.—So a bond which does not define the obligation, but merely states that principal and sureties are "firmly bound," is void. Munzesheimer *v.* Wickham, 74 Tex. 638.

Substantial Compliance.—Where the condition substantially complies with the statute the bond is valid although its language varies therefrom. Robinson *v.* Brinson, 20 Tex. 438; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 418.

Thus the term "award" used in the condition of a bond is a sufficient substitute for the word "judgment." Richards *v.* Griffin, 5 Ala. 195.

Condition.—Where the statute requires literal compliance with a prescribed form, a bond conditioned more onerously than the statute requires is void. Scarborough *v.* State (Tex. Crim. App., 1892), 20 S. W. Rep. 584. Or where the condition varies in any essential particular from the statutory requirement. Drinkwine *v.* Eau Claire, 83 Wis. 428.

Illustrations of Sufficiency.—An appeal bond required by statute to secure damages and costs must be conditioned to pay both or it is invalid as *a statutory bond.* Langley *v.* Warner, 1 N. Y. 606.

Where the condition of an appeal bond was simply to "prosecute the

required by the statute governing the subject is omitted, the appeal may be dismissed for that reason on motion of the

appeal," and not to "prosecute the appeal with effect," it was held void. Jones *v.* Parsons, 2 Yerg. (Tenn.) 321; Albertson *v.* M'Gee, 7 Yerg. (Tenn.) 106; Matlock *v.* Bank, 7 Yerg. (Tenn.) 95; Polk *v.* Plummer, 2 Humph. (Tenn.) 500; Figures *v.* Dunklin, 68 Tex. 645.

A bond conditioned to pay the "judgment" rendered against the appellant is void *pro tanto* on appeal from an order awarding a new trial, since no amount will be awarded on the decision thereon, and the precedent event upon which the appellant's liability depends can never occur. Post *v.* Doremus, 60 N. Y. 371.

A stipulation "to pay such sum of money as shall be finally adjudged against the said defendants" is not a sufficient compliance with a statute requiring the obligors to bind themselves to pay the debt or damages and costs in case the judgment shall be affirmed on appeal. Ballard *v.* Noaks, 1 Ark. 133.

A condition that the appellant "will pay all damages and costs which may be awarded against defendants on appeal," omitting the words "or on a dismissal thereof," is defective, but amendable. Woodman *v.* Calkins, 12 Mont. 456. In *New York* such a bond has been construed to include dismissal as well as affirmance. Staples *v.* Gokey, 34 Hun (N. Y.) 289.

A condition of an appeal bond binding the obligors to pay costs only in case of affirmance of the judgment is not a compliance with the statute requiring it to secure the costs on appeal, since such a bond cannot be enforced for costs awarded on dismissal. Hinson *v.* Preslor, 27 Ala. 643.

A bond conditioned to "prosecute an appeal to effect *or* pay" is a sufficient compliance with the statute requiring it to be conditioned "to prosecute an appeal to effect *and* pay." Robinson *v.* Brinson, 20 Tex. 438; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 418.

Construction of Conditions.—Where the word *damages* is used generally in the condition of an appeal bond conditioned to pay "intervening damages and costs" it includes no additional item except interest. Bartholomew *v.* Chapin, 10 Met. (Mass.) 1; Swan *v.* Picquet, 4 Pick. (Mass.) 465; Burgess *v.* Doble, 149 Mass. 256; Kountze *v.* Omaha Hotel Co., 107 U. S. 378; McWilliams *v.* Morgan, 70 Ill. 62; Mason *v.* Smith, 11 Lea (Tenn.) 67; Blair *v.* Kilpatrick, 40 Ind. 312. It does not include rent or other items of damage to real estate incurred pending the appeal deciding its ownership. Kountze *v.* Omaha Hotel Co., 107 U. S. 378.

In *Alabama* it is held that a bond conditioned for the payment of "all costs and such damages as appellee may sustain by reason of the appeal" includes value and use of the real estate pending an appeal from a judgment affecting the possession thereto. Cahall *v.* Citizens' Mut. Ben. Assoc., 74 Ala. 539. And where damages for rents and profits are recovered in the suit in the trial court, they may be recovered in an action on a bond conditioned for the payment of the judgment and damages. Burgess *v.* Doble, 149 Mass. 256; Kountze *v.* Omaha Hotel Co., 107 U. S. 378.

In Davis *v.* Alden, 2 Gray (Mass.) 309, it was held that a recognizance conditioned by law for the payment of "all damages and loss which the plaintiff may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any injury done to the premises during such withholding," made the appellant liable for all waste, actual and permissive, and for all losses which may have happened from negligence and careless management on the part of the tenant.

When Costs Only Recoverable.—A condition to prosecute the appeal with effect and pay all costs that may be adjudged against the appellant will sustain only a recovery of costs upon dismissal of the appeal. Com. *v.* Wistar, 142 Pa. St. 373.

A bond conditioned to secure "all costs" means the costs of the appellee. Morris *v.* Morris, 92 N. Car. 142.

The omission of the words "pay to" in the obligation of an appeal bond *held* not to invalidate it. Billings *v.* Roadhouse, 5 Cal. 71.

Prosecution with Effect.—The words "prosecution with effect" in the condition of an appeal bond mean "with success." Trent *v.* Rhomberg, 66 Tex. 254; Robinson *v.* Brinson, 20 Tex. 439;

appellee;[1] or he may waive the defect and enforce the bond as valid.[2] No court or judge can alter the conditions named in the statute;[3] but where a more onerous condition than the statute demands is embraced in the bond it will be rejected as surplusage, and the bond held valid.[4]

XII. Time for Filing Security—1. Generally.—The appeal security must be filed within the time designated by the statute.[5]

Bailey *v.* Goodjohn, 64 Tex. 546; Perreau *v.* Bevan, 5 B. & C. 284, 12 E. C. L. 230; Legate *v.* Marr, 8 Blackf. (Ind.) 404; Karthaus *v.* Owings, 6 Har. & J. (Md.) 134; Champomier *v.* Washington, 2 La. Ann. 1013; Gould *v.* Warner, 3 Wend. (N. Y.) 54; Marott *v.* Young, 33 N. J. L. 336.

Contra.—Hobart *v.* Hilliard, 11 Pick. (Mass.) 143, is to the effect that filing a transcript in the appellate tribunal is a sufficient compliance with such a condition.

An appeal bond conditioned only for "due prosecution of appeal" binds sureties to pay appellee damages and costs. Evans *v.* Hardwick, 1 J. J. Marsh (Ky.) 436; Moore *v.* Gorin, 2 Litt. (Ky.) 186.

Reference to Amount.—Where an undertaking in its recitals states the amount of the judgment appealed from, and in its binding part distinctly refers to such judgment, its legal effect is the same as though the amount of the judgment had been inserted in the binding part of the undertaking. Dunseith *v.* Linke, 10 Daly (N. Y.) 365.

Intention of Parties.—Parties will be presumed to have intended every provision of the condition to be valid. Sheffler *v.* Nadelhoffer, 133 Ill. 555.

The inclusion of words implied by law does not affect its validity. Swann *v.* Horne, 54 Miss. 337.

Judgment.—The condition of an appeal bond to pay the judgment rendered means the final judgment. Rothgerber *v.* Wonderly, 66 Ill. 390.

Defenses.—It is no defense in a suit on a bond for breach of one condition that the other has been performed. Trent *v.* Rhomberg, 66 Tex. 254; Hobart *v.* Hilliard, 11 Pick. (Mass.) 143.

1. Rawle *v.* Feltus, 33 La. Ann. 421; Calhoun's Succession, 35 La. Ann. 363.

2. Young *v.* Mason, 8 Ill. 55; Tripler *v.* Gray, 7 Yerg. (Tenn.) 16; Nichol *v.* McCombs, 2 Yerg. (Tenn.) 83; Smith *v.* Erwin, 5 Yerg. (Tenn.) 296; Gholson *v.* Brown, 4 Yerg. (Tenn.) 496; Banks *v.* Brown, 4 Yerg. (Tenn.) 200; Mabry *v.* Tarver, 1 Humph. (Tenn.) 97; Morse *v.* Hodson, 5 Mass. 314; Bowie *v.* Hagan, 5 How. (Miss.) 13; unless the statute expressly provides that a variation shall avoid the bond, Morse *v.* Hodson, 5 Mass. 314. See *Common-Law Bond*, XIII, 6, *infra*.

3. State *v.* King, 40 La. Ann. 841; French *v.* Snell, 37 Me. 100; Owen *v.* Daniels, 21 Me. 180; Harrington *v.* Brown, 7 Pick. (Mass.) 232.

4. Where the bond is otherwise in conformity to the statute. Landa *v.* Heermann, 85 Tex. 1; Janes *v.* Langham, 29 Tex. 413; Tomlin *v.* Green, 39 Ill. 225. But see Scarborough *v.* State (Tex. Crim. App., 1892), 20 S. W. Rep. 584, where it was held that if the statute requires literal compliance with a prescribed form, a bond conditioned more onerously than the statute requires is void.

So the addition of the requirement that appellant "shall pay for use and detention of the property" involved to the statutory requirement of "costs and damages" was held void. Kountze *v.* Omaha Hotel Co., 107 U. S. 378.

5. *California.*—Wood *v.* Pendola, 77 Cal. 82; Coker *v.* Colusa County, 58 Cal. 178; Wood *v.* Monterey County, 67 Cal. 115; Berniaud *v.* Beecher, 74 Cal. 617; Home, etc., Assoc. *v.* Wilkins, 71 Cal. 626; Schurtz *v.* Romer, 81 Cal. 246; McKeen *v.* Naughton, 88 Cal. 462; Pacific Paving Co. *v.* Bolton, 89 Cal. 154; McCracken *v.* Los Angeles County, 86 Cal. 74; Shaw *v.* Randall, 15 Cal. 386; Elliott *v.* Chapman, 15 Cal. 383; Lowell *v.* Lowell, 55 Cal. 318; Reed *v.* Kimball, 52 Cal. 325.

Alabama.—Carey *v.* McDougald, 25 Ala. 109; Moore *v.* McGuire, 26 Ala. 461; Hinson *v.* Preslor, 27 Ala. 643; Mayo *v.* King, 28 Ala. 690; Thompson *v.* Lea, 28 Ala. 459; King *v.* McCann, 25 Ala. 471; Mayo *v.* King, 28 Ala. 690.

North Carolina.—Bowen *v.* Fox, 99 N. Car. 129; Graves *v.* Hines, 106 N. Car. 323; Sever *v.* McLaughlin, 82 N. Car. 332; Hutchinson *v.* Rumfelt, 82

Where the statute names no time it may be fixed by order of the

N. Car. 426; Boyden *v.* Williams, 92 N. Car. 546; McCanless *v.* Reynolds, 90 N. Car. 648; Applewhite *v.* Fort, 85 N. Car. 596.

Missouri.—Moore *v.* Damon, 4 Mo. App. 111; Green *v.* Castello, 35 Mo. App. 127; Corbin *v.* Laswell, 48 Mo. App. 626.

Oregon.—Strang *v.* Keith, 1 Oregon 312; Canyon Road Co. *v.* Laurence, 3 Oregon 519; Northern Pac. Terminal Co. *v.* Lowenberg, 11 Oregon 286; Cross *v.* Chichester, 4 Oregon 114; Odell *v.* Gotfrey, 13 Oregon 466.

United States.—Durousseau *v.* U. S., 6 Cranch (U. S.) 312; Marbury *v.* Madison, 1 Cranch (U. S.) 175; Stafford *v.* Union Bank, 16 How. (U. S.) 135; Silsby *v.* Foote, 20 How. (U. S.) 290.

Florida.—Gordon *v.* Camp, 2 Fla. 23; Curry *v.* Marvin, 2 Fla. 411; Union Bank *v.* McBride, 2 Fla. 7.

Michigan.—Weed *v.* Lyon, Walker (Mich.) 77; Moore *v.* Ellis, 18 Mich. 77; Covell *v.* Mosely, 15 Mich. 514.

Louisiana.—Reed *v.* Creditors, 37 La. Ann. 907; Wood *v.* Wall, 5 La. Ann. 179.

Mississippi.—Hardaway *v.* Biles, 1 Smed. & M. (Miss.) 657; Boone *v.* Poindexter, 12 Smed &. M. (Miss.) 640.

Ohio.—Burke *v.* Jackson, 22 Ohio St. 268; Mygate *v.* Ingham, Wright (Ohio) 176.

Tennessee.—Wooten *v.* Daniel, 16 Lea (Tenn.) 156; Willson *v.* Edwards, 5 Coldw. (Tenn.) 238.

Indiana.—*Ex p.* Sweeney, 131 Ind. 81; State *v.* U. S., 8 Blackf. (Ind.) 252.

Colorado.—Law *v.* Nelson, 14 Colo. 409.

Idaho.—Brown *v.* Hanley, 2 Idaho 950.

Kentucky.—Clinton *v.* Phillipi, 7 B. Mon. (Ky.) 118.

Texas.—McLana *v.* Russell, 29 Tex. 127.

Iowa. — Steamboat "Lake of the Woods" *v.* Shaw, 2 Greene (Iowa) 91.

Illinois.—Young *v.* Mason, 8 Ill. 55; Kenny *v.* Jones, 37 Ill. App. 615; Ettelson *v.* Jacobs, 40 Ill. App. 427.

Massachusetts.—Com. *v.* Dunham, 22 Pick. (Mass.) 11.

Utah.—Cook *v.* Oregon, etc., R. Co., 7 Utah 416.

Arizona. — Sutherland *v.* Putnam (Arizona, 1891), 24 Pac. Rep. 320.

Nebraska.—McKinley *v.* Chapman, 37 Neb. 378.

New York.—Langley *v.* Warner, 1 N. Y. 606; Skidmore *v.* Davies. 10 Paige (N. Y.) 316.

Virginia.—Yarborough *v.* Deshazo, 7 Gratt. (Va.) 374.

Maine.—French *v.* Snell, 37 Me. 100.

Wisconsin.—Thompson *v.* Thompson, 24 Wis, 515.

Montana.—Pardee *v.* Murray, 4 Mont. 35.

Recognizance.—So a recognizance on appeal must be taken and filed within the time named in the statute, or the appeal cannot be sustained. Knight *v.* Bean, 18 Me. 219.

Substituted Security.—Where money may be deposited in lieu of an undertaking the deposit must be made within the time for filing the undertaking. Stratton *v.* Graham, 68 Cal. 168.

Amendment.—An appeal bond cannot be amended after it has been filed, without the leave of the court. Dugas *v.* Truxillo, 14 La. Ann. 201. See AMENDMENT, XIII, *infra*.

Construction of Statute.—Where by statute the appeal is avoided for any purpose unless the appeal bond is filed or waived within the time defined, the court acquires no jurisdiction to hear the appeal or amend the bond unless the statute is complied with.

California.—Perkins *v.* Cooper, 87 Cal. 243; Boyd *v.* Burrel, 60 Cal. 281; Bragi *v.* Howes, 63 Cal. 384; Holcomb Sawyer, 51 Cal. 417; Brown *v.* Green, 65 Cal. 222; Stratton *v.* Graham, 68 Cal. 168; Little *v.* Jacks, 68 Cal. 344; Duffy *v*, Greenebaum, 72 Cal. 159; *In re* Skerrett, 80 Cal. 63; Schurtz *v.* Romer, 81 Cal. 245; Reed *v.* Kimball, 52 Cal. 325; Shaw *v.* Randall, 15 Cal. 385; Berniaud *v.* Beecher, 74 Cal. 618; Horn *v.* Volcano Water Co., 18 Cal. 143; Wood *v.* Pendola, 77 Cal. 82.

New York.—Langley *v.* Warren, 1 N. Y. 606; Kelsey *v.* Campbell, 38 Barb. (N. Y.) 238; Dresser *v.* Brooks, 5 How. Pr. (N. Y. Ct. of App.) 75; Cowdin *v.* Teal, 67 N. Y. 582; Architectural Iron Works Co. *v.* Brooklyn, 85 N. Y. 652; Raymond *v.* Richmond, 76 N. Y. 106; Matter of Dumesnil, 47 N. Y. 677; Benedict Mfg. Co. *v.* Thayer, 82 N. Y. 610; Musgrave *v.* Sherwood, 76 N. Y. 194; Wetting *v.* Moltz, 45 N. Y. Super. Ct. 392; Ferris *v.* Tannebaum (C. Pl.), 39 N. Y. St. Rep. 73.

trial court.[1] Compliance with the order is not essential to the jurisdiction of the appellate court, and it may allow a new bond to be filed after the expiration of the time stated;[2] although it is ground for dismissal of the appeal on proper objection by the appellee.[3]

Utah.—Cook *v.* Oregon Short Line, etc., R. Co., 7 Utah 416; People *v.* Fennel, 4 Utah 112; People *v.* Gough, 2 Utah 69.

Michigan. — Franks *v.* Smith, 45 Mich. 326; Craig *v.* Seitz, 63 Mich. 727.

When Waiver Made.—Under such a statute an order of court or an express stipulation of counsel dispensing with security must be made within the time for filing the undertaking or it is invalid. Newman *v.* Maldonado (Cal., 1892), 30 Pac. Rep. 833; *In re* Skerrett, 80 Cal. 63; Perkins *v.* Cooper, 87 Cal. 241. But it need not be filed within that time. Newman *v.* Maldonado (Cal., 1892), 30 Pac. Rep. 833.

After the right of appeal has been lost by the expiration of the time in which to take an appeal the undertaking cannot be waived. *In re* Skerrett, 80 Cal. 62; Wait *v.* Van Allen, 22 N. Y. 319; Clapp *v.* Hawley, 97 N. Y. 610.

Under such statutes a motion to dismiss the appeal, on the ground that the undertaking is substantially defective, is not proper. The undertaking being ineffectual, no return could properly be made, as the cause is not properly on the calendar and there is no appeal to dismiss. The proper motion is to strike the cause from the calendar. Raymond *v.* Richmond, 76 N. Y. 106; Reed *v.* Kimball, 52 Cal. 325.

Appeal Granted in Term.—Where an appeal may be taken either in term or by notice of appeal, and is granted in term upon order further requiring an appeal bond to be filed within a stated time, the filing of the bond is an essential step in perfecting the term appeal; and where not filed within the required time the term appeal falls, but a new appeal may be taken on notice. *Ex p.* Sweeny, 131 Ind. 81; Holloran *v.* Midland R. Co., 129 Ind. 274; June *v.* Payne, 107 Ind. 307; Goodwin *v.* Fox, 120 U. S. 775; Webber *v.* Brieger, 1 Colo. App. 92.

After Rendition of Judgment.—The fact that the appeal bond is executed and given before the judgment appealed from is rendered will not warrant dismissal, as the obligors thereto are presumed to have contemplated the liability subsequently arising. James *v.* Wood, 65 Miss. 531; Byers *v.* Cook, 13 Oregon 297; Weiss *v.* Jackson County, 8 Oregon 529; Poppleton *v.* Nelson, 10 Oregon 437.

Contra.—The contrary was held in Wilson *v.* Haleman, 2 Ohio 253, and the appeal dismissed for lack of jurisdiction where the bond was filed before rendition of judgment.

Where a statute expressly provided that a trial court might grant an appeal "after affidavit and bond have been filed and approved," *held*, that the filing and approval prior to the granting of the appeal were jurisdictional, and that where the trial court granted an appeal without such bond, the appeal would be dismissed. Green *v.* Castello, 35 Mo. App. 133; Corbin *v.* Laswell, 48 Mo. App. 626; Filley *v.* Walls, 4 Mo. 271; Townsend *v.* Finley, 3 Mo. 288; Jamison *v.* Yates, 7 Mo. 571.

Order of Adjournment.—Where an appeal bond must be filed within a certain time after final adjournment of the term, the final order of adjournment must appear in the transcript to show that the bond has been filed in time. Burr *v.* Lewis, 6 Tex. 76.

1. **Lusk** *v.* Kershow, 17 Colo. 481.

2. So, under the practice of the Supreme Court of the *United States* and *Illinois*, an appeal bond is not essential to the jurisdiction where an appeal has been allowed and transcript duly filed. A mere failure to execute the bond within due time may be ground for dismissal of the appeal, but the court may proceed to a determination of the appeal where the defect is waived. Edmanson *v.* Bloomshire, 7 Wall. (U. S.) 306; Richardson *v.* Green, 130 U. S. 104; Evans *v.* State Bank, 134 U. S. 330; Ettelson *v.* Jacobs, 40 Ill. App. 427; Kingsbury *v.* Buckner, 134 U. S. 682; Owen *v.* McKethe, 10 Ill. 79; Price *v.* Pittsburgh, etc., R. Co., 40 Ill. 44; Wormley *v.* Wormley, 96 Ill. 129; Carson *v.* Merle, 4 Ill. 168.

3. *Ex p.* Milwaukee R. Co., 5 Wall. (U. S.) 188; Edmanson *v.* Bloomshire, 7 Wall. (U. S.) 311; Seymour *v.* Freer, 5 Wall. (U. S.) 822; The Dos

Extension.—No court or judge has power to extend the time named in the statute;[1] but where fixed at discretion it may also be extended at discretion.[2]

Hermanos, 10 Wheat. (U. S.) 306; Davidson *v.* Lanier, 4 Wall. (U. S.) 454; O'Reilly *v.* Edrington, 96 U. S. 726; Brobst *v.* Brobst, 2 Wall. (U. S.) 96; Brown *v.* McConnell, 124 U. S. 491; Hewitt *v.* Filbert, 116 U. S. 142; Providence Washington Ins. Co. *v.* Wager, 37 Fed. Rep. 61.

Unless the appellant shows good ground for his motion the court will not grant the order. Ettelson *v.* Jacobs, 40 Ill. App. 427; Davis *v.* Davis, 27 Neb. 859; Bubb *v.* Cain, 37 Kan. 692; Duffy *v.* Greenbaum, 72 Cal. 157; Wooten *v.* Daniel, 16 Lea (Tenn.) 156; Pennington *v.* McNally, 11 Colo. 557; Harrison *v.* Hoff, 102 N. Car. 25.

The court may allow a new bond to be filed at any time while the appeal survives. *Ex p.* Milwaukee R. Co., 5 Wall. (U. S.) 188; Edmanson *v.* Bloomshire, 7 Wall. (U. S.) 311; Seymour *v.* Freer, 5 Wall. (U. S.) 822.

But where the appeal has lapsed from failure to file a transcript within the time required, it cannot be revived by filing an appeal bond thereafter. The Dos Hermanos, 10 Wheat. (U. S.) 306; Edmanson *v.* Bloomshire, 7 Wall. (U. S.) 311.

Computation of Time.—The first day upon which the appeal bond may be filed or the order is made is excluded. Ewing *v.* Bailey, 5 Ill. 420; Brainard *v.* Norton, 14 Ill. App. 643; Carson *v.* Merle, 4 Ill. 168; Bushong *v.* Graham, 4 Ohio Cir. Ct. Rep. 138; Hax *v.* Leis, 1 Colo. 171. And the last day is included, unless it is Sunday and expressly excluded by statute. Brainard *v.* Norton, 14 Ill. App. 643.

Presumption — The entry on the judge's docket, "appeal allowed," is evidence that the appeal bond is filed in time, as a public official is presumed to do his duty. Carroll *v.* Jacksonville, 2 Ill. App. 481.

Texas.—In Texas it is held that a statute requiring a bond to be filed within a certain period after judgment is complied with by filing it within the defined time after the denial of a motion for new trial. Williams *v.* Sims (Tex. App., 1890), 16 S. W. Rep. 786; West *v.* White (Tex. App., 1890), 16 S. W. Rep. 788.

Time—Meaning of Term "Rising of Court."—Where the statute requires an appeal bond to be filed within a certain period after the "rising of the court," final adjournment for the term is meant. Morgan *v.* Stittigan, 10 West L. J. (Ohio) 74.

Order Dispensing with Security.—Where statutes allow the trial court to dispense with security in special cases by making an order to that effect, the order should be made within the time allowed for filing the appeal bond, and that fact must be recited on its face. *In re* Skerrett, 80 Cal. 62.

Petition.—In Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, it was held that the days during which the court held the petition for appeal and the record, before granting the appeal, should be excluded in estimating the time within which an appeal bond must be filed.

Louisiana.—An appeal bond may be filed in a devolutive appeal any time before the return day. Glover *v.* Taylor, 38 La. Ann. 634.

1. Elliott *v.* Chapman, 15 Cal. 383; Gordon *v.* Wansey, 19 Cal. 82; Aram *v.* Shallenberger, 42 Cal. 277; Reed *v.* Kimball, 52 Cal. 325; McCracken *v.* Los Angeles County 86 Cal. 74; Kenny *v.* Jones, 37 Ill. App. 615; Davis *v.* Wilson, 85 Tenn. 385. Unless statutes expressly authorize it. McCracken *v.* Los Angeles County, 86 Cal. 74.

2. Pennington *v.* McNally, 11 Colo. 558; McFarland *v.* McFarland, 4 Ill. App. 157; Borden *v.* Houston, 2 Tex. 594.

The order fixing and extending the time must be made during the term at which judgment is rendered, unless authorized otherwise by statute. Pennington *v.* McNally, 11 Colo. 558; Owen *v.* Going, 7 Colo. 85; McFarland *v.* McFarland, 4 Ill. App. 157; Borden *v.* Houston, 2 Tex. 594; Layman *v.* Graybill, 14 Ind. 166; *Ex p.* Casey, 18 Fed. Rep. 86.

On Notice.—The adverse party must have notice of the application to extend the time, but where the record is silent it will be presumed to have been duly given. Pennington *v.* McNally, 11 Colo. 559; Martin *v.* Force, 3 Colo. 199; Gomer *v.* Chaffe, 5 Colo. 383; Hughes *v.* Cummings, 7 Colo. 138.

Further Security.—In Robare *v.* Kendall, 22 Neb. 677, it was held that, where

2. Notice of Appeal.—Where required by statute to be filed after the notice of appeal the bond is invalid if filed before.[1] But if filed the same day it will be presumed to have been filed after.[2] Unless the statute prescribes the order of filing it may be filed either before or after if within the statutory time.[3]

3. Date of Filing.—The date of an appeal bond or undertaking does not affect its validity.[4] It takes effect when approved and actually filed.[5] The recitals of the record as to date of filing prevail over the date of the bond, where they conflict.[6] Where nothing to the contrary appears the appeal bond will be presumed to have been filed on the day it was justified;[7] but appellant may show as a fact that it was seasonably filed, when not inconsistent with the record.[8]

an order requiring a further undertaking had been granted by the court, and not complied with, the court might again extend the time, or allow appellant to show the original security sufficient.

1. Brown *v.* Hanley, 2 Idaho 950; Cook *v.* Oregon, etc., R. Co., 7 Utah 416; Carpentier *v.* Williamson, 24 Cal. 609; Buckholder *v.* Byers, 10 Cal. 481; Darling *v.* More, 19 Cal. 81; Little *v.* Jacks, 68 Cal. 343; Weiss *v.* Jackson County, 8 Oregon 529; Poppleton *v.* Nelson, 10 Oregon 437; Dahl *v.* Tibbals, 5 Wash. 261. So, where the statute requires an undertaking to be served and filed with the notice of appeal, the undertaking is not good where filed and served at another time. New York Cent. Ins. Co. *v.* National Pro. Ins. Co., 10 How. Pr. (N. Y. Ct. of App.) 344.

Such statutes do not require that the bond should be filed within the time for "taking an appeal." If filed within the statutory time after service of notice it is sufficient. Lowell *v.* Lowell, 55 Cal. 318.

Date.—The fact that the appeal bond is dated anterior to the notice of appeal after which it is required to be filed will not invalidate the appeal where it is actually filed thereafter or on the same day with the notice of appeal. Dahl *v.* Tibbals, 5 Wash. 261; Poppleton *v.* Nelson, 10 Oregon 437.

Notice Before Undertaking.—So on appeal to the Supreme Court of *California* it was held that the filing of the notice must precede the filing of the undertaking; otherwise there is nothing on which to base the undertaking. Buckholder *v.* Byers, 10 Cal. 481; Hastings *v.* Halleck, 10 Cal. 31; Franklin *v.* Renier, 8 Cal. 340; Whipley *v.* Mills, 9 Cal. 641.

New York.—Under the practice of New York a notice of appeal to the court of appeals may be served before any undertaking has been executed, and the undertaking may be given at any time before the expiration of the time for appealing; but the notice of appeal does not become effectual for any purpose until the undertaking has been given. Raymond *v.* Richmond, 76 N. Y. 106.

2. Poppleton *v.* Nelson, 10 Oregon 437; Hastings *v.* Halleck, 10 Cal. 31.

Filing New Undertaking.—Where the undertaking is filed before notice of appeal is given it may be remedied by filing a new undertaking on affidavit showing reasonable excuse for the mistake; but simply refiling is not enough. Hawthorne *v.* East Portland, 12 Oregon 210; Weiss *v.* Jackson County, 8 Oregon 529.

3. Emerson *v.* Atwater, 5 Mich. 34; Dutertre *v.* San Francisco, 84 Cal. 535; Coker *v.* Colusa County, 58 Cal. 177; Columbet *v.* Pacheco, 46 Cal. 651.

Notice of Filing.—Service of notice of appeal operates as a notice of the filing of the appeal bond. Columbet *v.* Pacheco, 46 Cal. 650.

4. Pray *v.* Wasdell, 146 Mass. 327; Dahl *v.* Tibbals, 5 Wash. 261.

5. Pray *v.* Wasdell, 146 Mass. 327; Dahl *v.* Tibbals, 5 Wash. 261.

6. Miller *v.* Shea, 150 Mass. 283; Hoagland *v.* Schnorr, 17 Ohio St. 30.

7. Boyden *v.* Williams, 92 N. Car. 546; Harmon *v.* Herndon, 99 N. Car. 477.

8. Harmon *v.* Herndon, 99 N. Car. 477; Bowen *v.* Fox, 98 N. Car. 396; Carroll *v.* Jacksonville, 2 Ill. App. 481.

4. Official Misconduct.—Where the appellant complies in good faith with all the law requires of him, but the misconduct or negligence of an official prevents due filing of the bond, the omission will be excused and the bond allowed to be filed *nunc pro tunc.*[1]

XIII. AMENDMENT—1. When Bond is Void.—When the defects of an appeal bond render it void, the appellate court acquires no jurisdiction, even to allow an amendment.[2] Where irregular merely, it will vest jurisdiction to amend, or to hear the appeal as against the appellant.[3]

Effect of Lack of Jurisdiction.—Where the trial court has no jurisdiction of the person of the appellant in the suit in which the appeal

The date of an appeal bond is no part of it, and where essential the day of execution may be shown by parol. Littell *v.* Bradford, 8 Blackf. (Ind.) 185.

It is not necessary to specify the day of the month in the date of the bond. Shaughnessey *v.* Lewis, 130 Mass. 355; Guez *v.* Dupuis, 152 Mass. 454.

Appeal bonds will be held to have been completed at their date where there is nothing to establish another time. Allen *v.* Rhodebaugh, Wright (Ohio) 322.

Erroneous Indorsement.—Where an appeal bond is actually approved and filed in time, a subsequent erroneous date of approval indorsed by clerical mistake is an immaterial error. King *v.* Ingham Circuit Judge, 69 Mich. 84

1. Little *v.* Smith, 5 Ill. 400; Ewing *v.* Bailey, 5 Ill. 420; Beardsley *v.* Hill, 61 Ill. 354; Robinson *v.* Mhoon, 68 Miss. 712; Muller *v.* Humphreys (Tex. App., 1889), 14 S. W. Rep. 1068; Henderson *v.* Trousdale, 10 La. Ann. 548; Ingram *v.* Plasket, 3 Blackf. (Ind.) 450; State *v.* Leigh, 45 Kan. 523; Hooks *v.* Stamper, 18 Ga. 471.

2. Santom *v.* Ballard, 133 Mass. 464; Jacobs *v.* Narrow, 21 Neb. 233; Scotten *v.* Divelbisa, 46 Ind. 302; McVey *v.* Heavenridge, 30 Ind. 100; Pacific Paving Co. *v.* Bolton, 89 Cal. 154; Hardaway *v.* Biles, 1 Smed. & M. (Miss.) 658; Porter *v.* Grisham, 3 How. (Miss.) 76.

So where the appeal bond or undertaking is void because it fails to refer properly to the appeal, it will not support a motion for leave to file a new one. Pacific Paving Co. *v.* Bolton, 89 Cal. 154.

3. Riley *v.* Mitchell, 38 Minn. 13; Woodman *v.* Calkins, 12 Mont. 456; Stapleton *v.* Pease, 2 Mont. 508; Pierse *v.* Miles, 5 Mont. 549; Territory *v.* Milroy, 7 Mont. 559; Acker *v.* Alexandria, etc., R. Co., 84 Va. 650; Saterlee *v.* Stevens, 11 Ohio 420; Fairbank *v.* Streeter, 41 Ill. App. 436; Murphy *v.* Consolidated Tank Line Co., 32 Ill. App. 613; Knowles *v.* Wayne City, 31 Ill. App. 475; Com. *v.* Watts, 84 Ky. 537; Mahlman *v.* Williams (Ky., 1889), 12 S. W. Rep. 335; Willis *v.* Rivers, 80 Ga. 556; De Gruy *v.* Aiken, 43 La. Ann. 798; Wilson *v.* Bennett, 132 Ind. 210; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 418; Warren *v.* Marberry, 85 Tex. 193; Putnam *v.* Boyer, 140 Mass. 237; Santom *v.* Ballard, 133 Mass. 464; Keene *v.* White, 136 Mass. 23; Wheeler, etc., Mfg. Co. *v.* Burlingham, 137 Mass. 581; McCracken *v.* Los Angeles County, 86 Cal. 74; Coulter *v.* Stack, 7 Cal. 244; Cunningham *v.* Hopkins, 8 Cal. 33; Rath *v.* Hamilton, 15 Cal. 31; Gray *v.* Amador County, 61 Cal. 337; Coker *v.* Colusa County, 58 Cal. 177; Schurtz *v.* Romer, 81 Cal. 246; Smith *v.* Biscailuz, 83 Cal. 344; Forbes *v.* Porter, 23 Fla. 47; Ridabock *v.* Levy, 8 Paige (N. Y.) 197; Littell *v.* Bradford, 8 Blackf. (Ind.) 185.

Approval.—Or where the bond was not officially approved. Putnam *v.* Boyer, 140 Mass. 237.

Failure to Name Sureties.—A failure to name the sureties on the bond at the time of praying the appeal does not invalidate the bond. Wilson *v.* Bennett, 132 Ind. 210.

What Sufficient to Test Jurisdiction.—Any binding obligation duly filed to pay damages or costs on appeal in any contingency will, unless the statute expressly makes a defective bond void, confer jurisdiction on the appellate court to allow amendment. Woodman *v.* Calkins, 12 Mont. 456; Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 118; Saterlee *v.* Stevens, 11 Ohio 420.

is taken, the appeal bond therein is wholly void.[1] But lack of jurisdiction over the subject-matter in either the appellate or the trial court does not avoid the bond.[2] By entering into the bond the appellant is estopped from denying jurisdiction of the court where suit is brought upon the bond for costs by the appellee.[3]

2. When Unnecessary.—An appeal bond or undertaking is sufficient where it substantially complies with the statute, although it varies from its language.[4] It is sufficient if its legal effect be to

1. Robertson *v.* Smith, 129 Ind. 422; Caffrey *v.* Dudgeon, 38 Ind. 512; Olds *v.* State, 6 Blackf. (Ind.) 91; State *v.* Younts, 89 Ind. 313; Ham *v.* Greve, 41 Ind. 531; Deardorff *v.* Ulmer, 34 Ind. 353; State *v.* McLaughlin, 77 Ind. 335; Sherry *v.* Foresman, 6 Blackf. (Ind.) 56; Eddy *v.* Beal, 34 Ind. 159; Byers *v.* State, 20 Ind. 47; Memmler *v.* Roberts, 81 Ga. 659; Tarbell *v.* Gray, 4 Gray (Mass.) 444; Bridge *v.* Ford, 4 Mass. 641; Green *v.* Haskell, 24 Me. 180.

The appellant is not estopped to raise the objection of want of jurisdiction in the suit to enforce the obligation of the bond. Robertson *v.* Smith, 129 Ind. 422.

2. Robertson *v.* Smith, 129 Ind. 422; Adams *v.* Olive, 57 Ala. 249; Stevenson *v.* Miller, 2 Litt. (Ky.) 310; Hanna *v.* McKenzie, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122; Hoy *v.* Rogers, 4 T. B. Mon. (Ky.) 225; Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 39 Barb. (N. Y.) 16.

3. Robertson *v.* Smith, 129 Ind. 422; Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 39 Barb. (N. Y.) 16; Carver *v.* Carver, 77 Ind. 498; Cunningham *v.* Jacobs, 120 Ind. 306; Harbaugh *v.* Albertson, 102 Ind. 69; Stevenson *v.* Miller, 2 Litt. (Ky.) 310; Hoy *v.* Rogers, 4 T. B. Mon. (Ky.) 225; Hanna *v.* McKenzie, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122; Adams *v.* Olive, 57 Ala. 249.

Contra.—In other cases it is held that, where the appeal is void because not taken in time or for any other cause, the appeal bond is void as incidental thereto. Garnet *v.* Rodgers, 52 Mo. 145; Smith *v.* St. Louis, etc., R. Co., 53 Mo. 338; Hessey *v.* Heitkamp, 9 Mo. App. 36; Kinser *v.* Shands, 52 Mo. 326; Smith *v.* St. Louis, etc., R Co., 53 Mo. 338; Brown *v.* Missouri Pac. R. Co., 85 Mo. 123; Lamonte *v.* Montebello, 21 Ill. App. 186; Brounty *v.* Daniels, 23 Neb. 165; Memmler *v.* Roberts, 81 Ga. 359.

Where a motion to set aside a default is required before an appeal can be taken from a judgment, the appeal bond is void where no such motion is made. Brown *v.* Missouri Pac. R. Co., 85 Mo. 123.

A judgment against sureties on such a bond is erroneous. Smith *v.* St. Louis, etc., R. Co., 53 Mo. 338.

4. Knight *v.* People, 11 Colo. 308; Russell *v.* Monson, 33 Conn. 506.

Alabama.—Williams *v.* State, 26 Ala. 85; Modawell *v.* Holmes, 40 Ala. 391; Satterwhite *v.* State, 28 Ala. 65; Lightfoot *v.* Strahan, 7 Ala. 444; Windham *v.* Coats, 8 Ala. 285; Whitsett *v.* Womack, 8 Ala. 466; *Ex p.* Weissinger, 7 Ala. 710; Sanders *v.* Rives, 3 Stew. (Ala.) 109.

Texas.—Southern Pac. R. Co. *v.* Stanley, 76 Tex. 418; Batsel *v.* Blaine (Tex. App., 1891), 15 S. W. Rep. 283; Halbert *v.* Alford (Tex., 1891), 16 S. W. Rep. 814; Elkins *v.* State, 26 Tex. App. 220; Cavanaugh *v.* Fort Worth, 26 Tex. App. 85; Pace *v.* Webb, 79 Tex. 314; Figures *v.* Dunklin, 68 Tex. 645; Zidek *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 143; Jordan *v.* Moore, 65 Tex. 363; Halbert *v.* Alford (Tex., 1891), 16 S. W. Rep. 814.

Minnesota. — Anderson *v.* Meeker County, 46 Minn. 237; Riley *v.* Mitchell, 38 Minn. 9.

North Carolina. — Walker *v.* Williams, 88 N. Car. 7; Chamblee *v.* Baker, 95 N. Car. 98; McMinn *v.* Patton, 92 N. Car. 371; Bennehan *v.* Webb, 6 Ired. (N. Car.) 250; Iredell *v.* Barbee, 9 Ired. (N. Car.) 250; Gully *v.* Gully, 1 Hawks. (N. Car.) 20.

Ohio.—Bentley *v.* Dorcas, 11 Ohio St. 398; Gardener *v.* Woodyear, 1 Ohio 170; Creighton *v.* Harden, 10 Ohio St. 579.

Massachusetts.—Kendall *v.* Gleason, 152 Mass. 457; Com. *v.* Richards, 17 Pick. (Mass.) 295; Com. *v.* Dunham, 22 Pick. (Mass.) 11; Guez *v.* Dupuis, 152 Mass. 454; Wellesley *v.* Washburn, 156 Mass. 359.

secure to the appellee all the rights contemplated by the statute requiring the bond,[1] and in such cases it need not be amended.

Kentucky.—Stockton *v.* Turner, 7 J. J. Marsh. (Ky.), 192; Moore *v.* Gorin, 2 Litt. (Ky.) 186; Feemster *v.* Anderson, 6 T. B. Mon. (Ky.) 537; Cobb *v.* Beaty, 3 T. B. Mon. (Ky.) 391.

Illinois.—Hennies *v.* People, 70 Ill. 100; Schill *v.* Reisdorf, 88 Ill. 411; Waldo *v.* Averett, 2 Ill. 487; Gillilan *v.* Gray, 13 Ill. 705; Mason *v.* Johnson, 24 Ill. 159.

Georgia.—Seymore *v.* Howard, 15 Ga. 110; Scott *v.* Turpin, 30 Ga. 964; Hogg *v.* Mobley, 8 Ga. 256.

Louisiana.—DeGruy *v.* Aiken, 43 La. Ann. 798; Glover *v.* Taylor, 38 La. Ann. 634; Littleton *v.* Pratt, 10 La. Ann. 487.

California.—Billings *v.* Roadhouse, 5 Cal. 71; Zoller *v.* McDonald, 23 Cal. 136; Williams *v.* Dennison, 86 Cal. 430.

Missouri.—Strange *v.* Ellis, 1 Mo. 412; State *v.* Thompson, 81 Mo. 163.

New York.—Teall *v.* Van Wyck, 10 Barb. (N. Y.) 379; Foster *v.* Foster, 7 Paige (N. Y.) 48.

United States.—Gay *v.* Parpart, 101 U. S. 391; Kountze *v.* Omaha Hotel Co., 107 U. S. 396.

Mississippi.—Coleman *v.* Rowe, 4 Smed. & M. (Miss.) 747; Conger *v.* Robinson, 4 Smed. & M. (Miss.) 210; Swan *v.* Horne, 54 Miss. 337.

Indiana.—Canal-Boat Standard *v.* Bond, 8 Ind. 270; Carmichael *v.* Holloway, 9 Ind. 519.

Other States.—Miller *v.* Holding, 5 Del. 494; Mathew *v.* Morrison, 13 R. I. 309; Whitehead *v.* Thorp, 22 Iowa 425; Stapleton *v.* Pease, 2 Mont. 508.

An appeal bond sufficient to hold all the parties thereto liable upon all the contingencies and under all the conditions named in the statute is a substantial compliance with the statute. Bentley *v.* Dorcas, 11 Ohio St. 398; Creighton *v.* Harden, 10 Ohio St. 579.

Variations in Language.—Variations in language in the appeal bond cannot be carried to the extent of giving it an effect contrary to the intents of the statute. Kountze *v.* Omaha Hotel Co., 107 U. S. 395.

Surplusage.—If the bond embraces all the statutory requirements, the addition of matters not authorized thereby may be considered surplusage, and rejected unless so connected with the remainder that they cannot be elided. Mathews *v.* Morrison, 13 R. I. 307; Williams *v.* Dennison, 86 Cal. 430; Guez *v.* Dupuis, 152 Mass. 454; Jordan *v* Moore, 65 Tex. 363; Landa *v.* Heermann, 85 Tex. 1; Kountze *v.* Omaha Hotel Co., 107 U. S. 391.

"Intends to Appeal."—A recital in an appeal bond or undertaking that a party "intends to appeal," instead of "does appeal," does not avoid its effect where otherwise regular. Forrest *v.* Havens, 38 N. Y. 470.

1. Riley *v.* Mitchell, 38 Minn. 11; Kasson *v.* Brocker, 47 Wis. 79; Creighton *v.* Harden, 10 Ohio St. 579; Bentley *v.* Dorcas, 11 Ohio St. 398; Gardneer *v.* Woodyear, 1 Ohio 170; Gay *v.* Parpart, 101 U. S. 391; Kountze *v.* Omaha Hotel Co., 107 U. S. 396; Saunders *v.* Rives, 3 Stew. (Ala.) 109; Field *v.* Schricher, 14 Iowa 124; Kendall *v.* Gleason, 152 Mass. 457; Shaughnessey *v.* Lewis, 130 Mass. 355; Shaw *v.* McIntier, 5 Allen (Mass.) 423; Martin *v.* Campbell, 120 Mass. 126; Pray *v.* Wasdell, 146 Mass. 328; Doolittle *v.* Dininny, 31 N. Y. 350; Smith *v.* Norval, Code Rep. (N. Y.) 14; Foster *v.* Foster 7 Paige (N. Y.) 50; Coleman *v.* Rowe, 4 Smed. & M. (Miss.) 747; Waters *v.* Riley, 2 Har. & G. (Md.) 305, 18 Am. Dec. 302; Cobb *v.* Beaty, 3 T. B. Mon. (Ky.) 391; Kirby *v.* Collins, 5 Wash. 682.

Condition as to Costs.—As when the condition of the bond was to pay all costs which should be taxed against the appellants in the event of their failure on appeal, instead of to pay such costs in the event of their failure to obtain a reversal of the decision appealed from. Foster *v.* Foster, 7 Paige (N. Y.) 49.

Directory Provisions of Statute.—Noncompliance with directory provisions of the statute does not vitiate an appeal bond if the appellee make no objection on that ground. Dore *v.* Covey, 13 Cal. 503; Van Dusen *v.* Hayward, 17 Wend. (N. Y.) 67; Ives *v.* Finch, 22 Conn. 101; Clinton *v.* Phillips, 7 T. B. Mon. (Ky) 119.

What Provisions Directory.—In Dore *v.* Covey, 13 Cal. 503, requirements that residence of the sureties with their occupations should be stated in the undertaking, and that the penalty should be in double the amount of the judgment, were held directory.

3. Power to Amend.—Appellate courts cannot allow a substantially defective appeal bond to be amended without statutory authority.[1] But such statutory authority may be implied from a general authority to amend appellate proceedings.[2]

Strict Compliance with Substantial Requirements.—The substantial requirements of the statute or order must be strictly complied with. Chambers *v.* Miller, 7 Tex. 75; Payne *v.* State, 30 Tex. 397; Bennett *v.* State, 30 Tex. 446; Hasty *v.* State, 32 Tex. 97; Burch *v.* Bastrop, 38 Tex. 80; Lockart, *v.* Lytle, 36 Tex. 189; Doss *v.* Griswold, 1 Tex. 99; State *v.* Judge, 16 La. Ann. 371; Jordan *v.* McKenny, 45 Me. 306; State *v.* Boies, 41 Me. 346; Bowie *v.* Hogan, 5 How. (Miss.) 13; Crawford *v.* Ætna L. Ins. Co., 12 Heisk. (Tenn.) 154.

Recognizance.—Where the statute requires separate recognizance from the principal and his sureties, a joint recognizance is not sufficient. Stroud *v.* State, 33 Tex. 650.

Where the obligation of the sureties covers but one-half the amount of the recognizance, it is fatally defective. Adams *v.* State, 34 Tex. 526.

A recognizance on appeal reciting that defendant shall "appear from day to day, and from term to term, and abide the decision of the Supreme Court, and not depart without leave," is defective as stating no court at which he is bound to appear. Maxwell *v.* State, 38 Tex. 171.

A recognizance should state the time, place, offense, and court in which the party is required to appear. Adler *v.* State, 31 Tex. 61; Breeding *v.* State, 31 Tex. 94; Hicklin *v.* State, 31 Tex. 492.

A recognizance must bind the appellant to abide the judgment of the court to which the appeal is taken. A recognizance binding the defendant to "abide the judgment of the State of Texas" was held fatally defective, and the appeal was dismissed on motion. Douglass *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 43; Cummings *v.* State, 31 Tex. Crim. App. 406. So one which describes the appellate court as the "Court of Appeals," instead of "Court of Criminal Appeals." Garza *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 139.

Voluntary Bond.—An appeal bond, although a statutory obligation, is a voluntary, not an official, bond, unless given to a public officer; and where it substantially conforms to the statutory requirements it will not be construed with the stringency applicable to official bonds. Forrest *v.* Havens, 38 N. Y. 470.

1. Ramsey *v.* Childs, 34 Hun (N. Y.) 329. Wilson *v.* Allen, 3 How. Pr. (N. Y. Supreme Ct.) 369; Langley *v.* Warner, 3 How. Pr. (N. Y. Ct. of App.) 363; Crawford *v.* Alexander, 14 La. Ann. 719; Pittman *v.* Myrick, 16 Fla. 403; Walsh *v.* People, 12 Ill. 77; Swafford *v.* People, 2 Ill. 289; Beebe *v.* Young, 13 Mich. 222; Cuddleback *v.* Parks, 2 Greene (Iowa) 148; *Ex. p.* Chryslin, 4 Cow. (N. Y.) 80.

Filing Bond a "Proceeding." — In O'Dea *v.* Washington County, 3 Neb. 122, it was held that filing an appeal bond was a "proceeding" on appeal within the meaning of the statute of correction.

Criminal Cases.—The same requirement of statutory authority applies to criminal cases. Swafford *v.* People, 2 Ill. 289; Walsh *v.* People, 12 Ill. 77.

2. Wilson *v.* Allen, 3 How. Pr. (N. Y. Supreme Ct.) 369; Shelton *v.* Wade, 4 Tex. 148.

Effect of Curative Statutes.—*Indiana.*—Parties are deemed to have entered into an appeal bond with reference to existing statutes of amendment, and their intent will be interpreted in the light of their requirements. State *v.* Britton, 102 Ind. 216; State *v.* Berg, 50 Ind. 496.

A curative statute providing that no appeal bond shall be void for defects of form or sustance, but that such defects shall be deemed amended in conformity with the statute, binds the principal and sureties in the amount and under the conditions prescribed by the statute, whatever the defects of form or substance. Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349; Cook *v.* State. 13 Ind. 154; Sturgis *v.* Rogers, 26 Ind. 1; Huddson *v.* Armstrong, 70 Ind. 99; Opp. *v.* Ten Eyck, 99 Ind. 345; Black *v.* State, 58 Ind. 589; Fuller *v.* Wright, 59 Ind. 333; Gavisk *v.* McKeever, 37 Ind. 484; Corey *v.* Lugar, 62 Ind. 60; Dunn *v.* Crocker, 22 Ind. 324; Moore *v.* Jackson, 35 Ind. 360; Boden *v.* Dill, 58

Discretion of Court.—Unless the statute mandatorily requires the allowance of amendment in the mode specified, it is a matter of discretion.[1]

4. Construction of Statutes.—Statutes allowing amendment are liberally construed as remedial.[2] Where it appears that the appeal is taken in good faith the appellant will generally be allowed toamend an insufficient, or file a new, bond on seasonable application.[3]

Ind. 273; Bugle *v.* Myers, 59 Ind. 73, *overruling* Moline *v.* McClain, 3 Ind. 532; Epstein *v.* Greer, 85 Ind. 372.

Their effect is to legalize bonds otherwise fatally defective, and to make them by force of the statute such an instrument as the statute requires. Railsback *v.* Greve, 58 Ind. 72; Miller *v.* McAllister, 59 Ind. 491; Turner *v.* State, 66 Ind. 210; Graham *v.* State, 66 Ind. 386; State *v.* Wyant, 67 Ind. 25; Miller *v.* O'Reilly, 84 Ind. 168; State *v.* Britton, 102 Ind. 214; Yeakle *v.* Winters, 60 Ind. 554; Smock *v.* Harrison, 74 Ind. 348; Jones *v.* Droneberger, 23 Ind. 74; Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349; Easter *v.* Acklemire, 81 Ind. 163; Phillipi Christian Church *v.* Harbaugh, 64 Ind. 240; Bugle *v.* Myers, 59 Ind. 73; Koeniger *v.* Creed, 58 Ind. 554; Corey *v.* Lugar, 62 Ind. 60; Fuller *v.* Wright, 59 Ind. 333; Gavisk *v.* McKeever, 37 Ind. 484.

Omission to Name Penalty.—An omission to name a penalty does not therefore invalidate a bond where the statute prescribes its amount. State *v.* Britton, 102 Ind. 216.

Omission of Proper Condition.—In Opp *v.* Ten Eyck, 99 Ind. 345, it was held that, where a statute provided that an appeal bond should be conditioned, in an action for recovery of real estate to satisfy all damages for mesne profits pending the appeal, an omission to so condition the bond does not affect the validity of the bond or release the appellant from the statutory requirement.

Limitation on Effect of Curative Statute.—In Sturgis *v.* Rogers, 26 Ind. 1, it was held that no interpretation of a statute would be given whose effect would be to create a new and different contract and bind parties to perform it unless the statute would not possibly admit any other interpretation.

1. Shelton *v.* Wade, 4 Tex. 148; Crain *v.* Bailey, 2 Ill. 322; Griffin *v.* Bellevílle, 50 Ill. 422; Harlan *v.* Scott, 3 Ill. 66; Zuckerman *v.* Howes, 146 Ill. 59; Martin *v.* Hunter, 1 Wheat. (U. S.) 304; Seward *v.* Corneau, 102 U. S. 161; Hardt *v.* Schulting, 59 How. Pr. (N. Y. Supreme Ct.) 353; Parker *v.* McCunn, 9 N. Y. Wkly. Dig. 245; Thomas *v.* Alton, 5 Mo. 534.

Under a statutory power to amend, errors in matters of substance occurring through inadvertence or mistake of law may be corrected. Potter *v.* Baker, 4 Paige (N. Y.) 292.

2. Gaddis *v.* Palmer, 60 Miss. 758; Germania Bldg., etc., Co. *v.* Kern, 4 Ohio Cir. Ct. Rep. 35; Reformed Presbyterian Church *v.* Nelson, 35 Ohio St. 638; Johnson *v.* Johnson, 31 Ohio St. 131; Watts *v.* Shewell, 31 Ohio St. 331; Hays *v.* Rush, 5 Cinc. L. Bull. (Ohio) 328; Thomas *v.* Alton, 5 Mo. 534; Hawthorne *v.* East Portland, 12 Oregon 210; Architectural Iron Works Co. *v.* Brooklyn, 85 N. Y. 652; Hoyer *v.* Mascoutah, 59 Ill. 137; Fink *v.* Disbrow, 69 Ill. 76; Carroll *v.* Jacksonville, 2 Ill. App. 481; Hinman *v.* Kitterman, 40 Ill. 253; Dedman *v.* Barber, 2 Ill. 254; Hubbard *v.* Freer, 2 Ill. 469; Waldo *v.* Averett, 2 Ill. 487; Rider *v.* Bagley, 47 Ill. 365; Patty *v.* Winchester, 20 Ill. 261; Stilley *v.* King, 3 Ill. App. 338.

3. *California.*—Howard *v.* Harman, 5 Cal. 78; Billings *v.* Roadhouse, 5 Cal. 71; Coulter *v.* Stark, 7 Cal. 244; Coker *v.* Colusa County, 58 Cal. 177; Rabe *v.* Hamilton, 15 Cal. 31; Gray *v.* Amador County, 61 Cal. 337; Cunningham *v.* Hopkins, 8 Cal. 33; McCracken *v.* Los Angeles County, 86 Cal. 76.

Illinois.—Weist *v.* People, 39 Ill. 507; Carroll *v.* Jacksonville, 2 Ill. App. 481; Stuckey *v.* Churchman, 2 Ill. App. 584; Appanooce *v.* Kneff, 2 Ill. App. 583; Partridge *v.* Snyder, 78 Ill. 519; Wear *v.* Killeen, 38 Ill. 259; Patty *v.* Winchester, 20 Ill. 261; South Range *v.* Starbird, 13 Ill. 49; Hubbard *v.* Freer, 2 Ill. 467; Bragg *v.* Fessenden, 11 Ill. 544; Pacific Express Co. *v.* Hauptman, 11 Ill. App. 367.

Wisconsin.—Russell *v.* Bartlett, 9

Review of Order Allowing or Refusing Amendment.—An order of court granting or refusing a party desiring to appeal leave to amend an

Wis. 556; Falk *v.* Goldberg, 45 Wis. 94; Gibank *v.* Stephenson, 30 Wis. 155; Branger *v.* Buttrick, 30 Wis. 153; Grant *v.* Connecticut Mut. L. Ins. Co., 28 Wis. 387; Paris *v.* Eager, 15 Wis. 532; Helden *v.* Helden, 9 Wis. 557; Gilbank *v.* Stephenson, 30 Wis. 155.

Indiana.—State *v.* Wyant, 67 Ind. 25; Murphy *v.* Steele, 51 Ind. 81; Humble *v.* Williams, 4 Blackf. (Ind.) 473; McCall *v.* Trevor, 4 Blackf. (Ind.) 496; State *v.* Berg, 50 Ind. 496; Meehan *v.* Wiles, 93 Ind. 52; Yeakle *v.* Winters, 60 Ind. 554; Stevenson *v.* State, 71 Ind. 52; Graham *v.* State, 66 Ind. 386; Railsback *v.* Greve, 58 Ind. 72; Miller *v.* O'Reilly, 84 Ind. 168; Gavisk *v.* McKeever, 37 Ind. 484; Clift *v.* Brown, 95 Ind. 53.

Ohio.—Irwin *v.* Bank of Bellefontaine, 6 Ohio St. 86; Johnson *v.* Johnson, 31 Ohio St. 132; Reformed Presbyterian Church *v.* Nelson, 35 Ohio St. 638; Germania Bldg., etc., Co. *v.* Kern, 4 Ohio Cir. Ct. Rep. 35.

Montana.—Territory *v.* Bell, 5 Mont. 562; Territory *v.* Milroy, 7 Mont. 559; Woodman *v.* Calkins, 12 Mont. 456; Stapleton *v.* Pease, 2 Mont. 508; Pierse *v.* Niles, 5 Mont. 549.

Pennsylvania.—Kerr *v.* Martin, 122 Pa. St. 436; Means *v.* Tront, 16 S. & R. (Pa.) 349; Koenig *v.* Bauer, 57 Pa. St. 168; McIlhaney *v.* Holland, 111 Pa. St. 634.

New York.—Ten Eick *v.* Simpson, 11 Paige (N. Y.) 177; Architectural Iron Works Co. *v.* Brooklyn, 85 N. Y. 652; O'Sullivan *v.* Connors, 22 Hun (N. Y.) 137.

Iowa.—Brock *v.* Manatt, 1 Iowa 128; Hammitt *v.* Coffin, 3 Greene (Iowa) 205; Mitchell *v.* Goff, 18 Iowa 424.

Oregon.—Hawthorne *v.* East Portland, 12 Oregon 210; DeLashmutt *v.* Sellwood, 10 Oregon 319; State *v.* McKinsmore, 8 Oregon 207.

Tennessee.—Snyder *v.* Summers, 1 Lea (Tenn.) 482; Andrews *v.* Page, 8 Heisk. (Tenn.) 641; Morris *v.* Smith, 11 Humph. (Tenn.) 134.

Nebraska.—Jacobs *v.* Morrow, 21 Neb. 233; Bazzo *v.* Wallace, 16 Neb. 293; Clark *v.* Strong, 14 Neb. 229.

Texas.—George *v.* Lutz, 35 Tex. 694; Shelton *v.* Wade, 4 Tex. 148.

United States.—O'Reilly *v.* Edrington, 96 U. S. 724; Furguson *v.* Dent, 29 Fed. Rep. 1.

Arkansas.—Morrison *v.* State, 40 Ark. 448.

Minnesota.—Riley *v.* Mitchell, 38 Minn. 13.

Washington.—Kirby *v.* Collins, 5 Wash. 682.

Void Bond.—A bond which is void cannot be amended, as the court acquires no jurisdiction over the appeal to act on the application. Riley *v.* Mitchell, 38 Minn. 13.

Time.—Nor can a bond be amended which was not filed within the statutory period, as the allowance of the amendment would be in effect to allow a new appeal after the time for appealing had expired. Jacobs *v.* Morrow, 21 Neb. 233.

Correction by Clerk.—The clerk has no power to correct irregularities in a bond of his own motion. Livingston *v.* White, 2 La. Ann. 902.

Amendable Defects.—Omission of some of the conditions required by statute is an amendable defect. Johnson *v.* Johnson, 31 Ohio St. 131.

Defective Conditions.—So, where the appeal bond was conditioned that "said appellant will pay all damages and costs which may be awarded against defendants on appeal," and omitted the words required by statute, "or on a dismissal thereof," held amendable. Woodman *v.* Calkins, 12 Mont. 456.

Acknowledgment.—The failure to acknowledge an appeal bond before a proper officer may be cured by the allowance of a new acknowledgment to the bond filed. Ridabock *v.* Levy, 8 Paige (N. Y.) 197.

Statutory Amount.—A bond deficient in not being for the statutory amount is amendable. Long *v.* Smith, 39 Tex. 164; King *v.* Hopkins, 42 Tex. 48.

Naming Only One Surety.—Where an appeal bond is deficient in naming only one surety where two are required, it is amendable. Hays *v.* Rush, 5 Cinc. L. Bull. (Ohio) 328; Landa *v.* Heerman, 85 Tex. 1; King *v.* Hopkins, 42 Tex. 48.

Name of Court.—The failure to name the court to which the appeal is taken is amendable. George *v.* Lutz, 35 Tex. 694.

Official Negligence.—Where the bond is defective from official negligence the parties should, where any power of amendment exists, be allowed to exe-

appeal bond is reviewable on appeal as affecting a substantial right.[1]

Right of Appellee.—The appellee is strictly entitled to the very bond prescribed by statute.[2] He may compel the correction of clerical and formal errors by a proper motion, although they are not sufficient to authorize the appellate court to dismiss the appeal.[3] And where the defects are substantial, his motion to

cute a new bond. Adams *v.* Settles, 2 Duv. (Ky.) 76; Bates *v.* Courtney, 1 Dana (Ky.) 145; Ford *v.* Com., 3 Dana (Ky.) 46; Watters *v.* Patrick, 1 Bush (Ky.) 223; Mamier *v.* Lindsey, 3 Bush (Ky.) 94.

Defects in Amended Bond. — Where the bond filed on the amendment is also defective from carelessness, the court will allow no further amendment, and will dismiss the appeal. Smith *v.* Keenam, 14 Mo. 530.

Technical Errors.—The court will not exercise its power to allow a technical error in an appeal bond to be corrected where the object of the appeal is to take advantage of a technical error of the appellee. Ridabock *v.* Levy, 8 Paige (N. Y.) 197.

Alternative Obligees.—A bond given on appeal from a decision in the Surrogate's Court to the Supreme Court to the people or the respondent in the alternative is defective, but is amendable on a motion to dismiss. Marvin *v.* Marvin, 11 Abb. Pr. N. S. (N. Y. Ct. of App.) 100.

Consent of Sureties. — An appellant cannot be allowed to amend an appeal security changing the liability of the sureties without their consent. Langley *v.* Warner, 1 N. Y. 606; Ramsey *v.* Childs, 34 Hun (N. Y.) 329.

Recognizance.—The statutory recognizance required on appeal in a criminal case is jurisdictional, and where defective cannot be amended. Holman *v.* State, 10 Tex. 558.

Rules of Court.—Where the amount of an appeal bond and the manner of approving it are regulated by rules of court, the court may dispense with the strict letter of the rule and permit a new bond to be filed and approved on payment of costs. Eldridge *v.* Howell, 4 Paige (N. Y.) 459.

Filing No Bond. — Where no bond whatever has been filed, the appellate court has no power to allow a new bond to be filed after expiration of the time to appeal, as this would be in effect to allow a new appeal after the statute had run. Nelson *v.* Tenny, 113 N. Y. 616; Covell *v.* Mosely, 15 Mich. 514; unless an express statute allows the appellate court to supply any omission or deficiency in perfecting the appeal. State *v.* Coahoma County, 64 Miss. 358; Briggs *v.* Swales, 29 How Pr. (N. Y. Supreme Ct.) 201.

Where Statute Directory.—Where the statutory provision requiring the trial judge to take a bond is directory and not mandatory, he may allow appellant to file new bond under such conditions as he shall impose. Martin *v.* Hunter, 1 Wheat. (U. S.) 304; Seward *v.* Corneau, 102 U. S. 161.

1. Ramsey *v.* Childs, 34 Hun (N. Y.) 329; O'Sullivan *v.* Connors, 22 Hun (N. Y.) 137; Hardt *v.* Schulting, 59 How. Pr. (N. Y. Supreme Ct.) 353; Zuckerman *v.* Hawes, 146 Ill. 59.

Abuse of Discretion. — It is not an abuse of discretion to allow a new undertaking to be filed *nunc pro tunc* where the justification of the sureties on the prior undertaking had been inadvertently adjourned "out of court." Hardt *v.* Schulting, 59 How. Pr. (N. Y. Supreme Ct.) 353.

Where the appellant is ruled to give an appeal bond and proffers sureties which he deems sufficient, it will be considered an abuse of discretion to refuse permission to substitute other sureties if those proffered prove insufficient. Zuckerman *v.* Hawes, 146 Ill. 59.

2. Chateaugay Ore, etc., Co. *v.* Blake, 35 Fed. Rep. 804; Putnam *v.* Boyer, 140 Mass. 237; Acker *v.* Alexandria, etc., R. Co., 84 Va. 650.

3. Chateaugay Ore, etc., Co. *v.* Blake, 35 Fed. Rep. 804; Acker *v.* Alexandria, etc., R. Co., 84 Va. 650; James *v.* Roberts, 78 Tex. 670; Richardson *v.* Richardson, 83 Mich. 653; Corey *v.* Lugar, 62 Ind. 60.

Where there is any doubt of the bond offered furnishing the full protection contemplated by the statute, it is the duty of the court to require a new one to be filed. Kirby *v.* Collins, 5 Wash. 682.

dismiss must be granted unless a proper amendment is made.[1]

5. Motion to Amend—*a.* WHERE MADE.—The motion to amend must be made in the court to which the appeal is taken,[2] as it is incident to the appeal, which has passed out of the jurisdiction of the trial court by filing the bond.[3]

b. TIME OF MOTION.—The motion for leave to amend should properly be made before the motion of the appellee to dismiss for the irregularity comes on for hearing.[4] The application

The Test Whether Recovery May Be Had on the bond actually given is not final. The appellee is entitled to an *entirely* regular bond. James *v.* Roberts, 78 Tex. 670; Richardson *v.* Richardson, 83 Mich. 653; Corey *v.* Lugar, 62 Ind. 60. But a bond upon which recovery may be had in the statutory amount will support the appeal and justify denial of a motion to dismiss. Pleasants *v.* Botts, 5 Martin, N. S. (La.) 128.

Trivial Errors.—In many cases it is held that trivial and harmless errors may be disregarded by the appellate court and will not sustain a motion to dismiss or to compel the appellant to amend. Carmichael *v.* Holloway, 9 Ind. 519; McCall *v.* Trevor, 4 Blackf. (Ind.) 496; McCrory *v.* Anderson, 103 Ind. 12; Taylor *v.* State, 16 Tex. App. 514; Kinsborough *v.* Pitts, 63 Ga. 496; Holly *v.* Perry, 94 N. Car. 30; Asch *v.* Wiley, 16 Neb. 41.

Defective Acknowledgment.—Where only a simple acknowledgment for costs is required, if the security is sufficient for the costs of the appeal, it will not be invalidated by a failure to name all the appellants in the acknowledgment of the sureties. Crump *v.* Wallace, 27 Ala. 280.

Unnecessary Details. — A condition substantially conforming to the statute is not invalidated by a long recital of unnecessary details and irrelevant facts. *Ex p.* Weissinger, 7 Ala. 710.

Surplusage.—The following of the statement of damages and costs in the appeal bond by the word "and"—no further sum being mentioned—*held* immaterial. Guez *v.* Dupuis, 152 Mass. 454.

1. Putnam *v.* Boyer, 140 Mass. 237.

2. O'Sullivan *v.* Connors, 22 Hun (N. Y.) 137; Falk *v.* Goldberg, 45 Wis. 94; Pulte *v.* Wayne Circuit Judge, 47 Mich. 646; Parker *v.* Murray, 109 N. Y. 646.

3. O'Sullivan *v.* Connors, 22 Hun (N. Y.) 137.

Motion by Surety.—The motion to amend the undertaking may be properly made by a surety thereto. O'Sullivan *v.* Connors, 22 Hun (N. Y.) 137.

Amendment of Bond in Lower Court.—But an appellate court has no discretionary power except by statute to allow amendments to bonds filed to effect an appeal to an inferior tribunal. Gillilan *v.* Gray, 13 Ill. 705.

4. Cross *v.* Chichester, 4 Oregon 114; State *v.* McKinsmore, 8 Oregon 207; Robeson *v.* Lewis, 64 N. Car. 738.

Practice.—The motion should be on notice to the adverse party, and the applicant should set up the facts upon which he bases his application for relief by affidavit. Rauschauft *v.* Carpenter, 63 Ind. 359.

Where statutes do not mandatorily require amendment appellant should show a good excuse and a diligent endeavor to comply with the statute. De Lashmutt *v.* Sellwood, 10 Oregon 51; State *v.* McKinsmore, 8 Oregon 207.

Where the appellant has been guilty of gross negligence the motion will be denied. Parker *v.* McCunn, 9 N. Y. Wkly. Dig. 245. But where an appeal has been taken in good faith it is error to refuse leave to amend a defective appeal bond where leave is seasonably asked. Territory *v.* Milroy, 7 Mont. 560; Pierse *v.* Miles, 5 Mont. 549; Cunningham *v.* Hopkins, 8 Colo. 33.

Order.—Where under a statute parties are permitted to file a new bond through which the rights of parties adversely interested but to whom the former bond was not made, may be affected, the order allowing the filing should require notice to be given to such parties. First Nat. Bank *v.* Preston Nat. Bank, 85 Tex. 560.

The court may attach to the order granting leave to amend a further order of dismissal in case the terms of amendment are not complied with. Robare *v.* Kendall, 22 Neb. 680.

should strictly be accompanied by the tender of a proper bond, duly executed, with sufficient surety;[1] but an offer to file a proper bond within the time ordered by the court is ordinarily sufficient,[2] and if a proper bond be actually tendered and filed before the motion to dismiss is granted the court will ordinarily deny it.[3]

6. Common-law Bond.—An appeal bond is not necessarily void because invalid as a statutory obligation.[4] Where it contains the

1. Richardson *v.* Howk, 45 Ind. 451; Scotten *v.* Divelbiss, 46 Ind. 301.

2. Adams *v.* Law, 16 How. (U. S.) 148; Anson *v.* Blue Ridge R. Co., 23 How. (U. S.) 1; Brobst *v.* Brobst, 2 Wall. (U. S.) 96; Catlett *v.* Brodie, 9 Wheat. (U. S.) 555; Deen *v.* Hemphill, Hempst. (U. S.) 154; Seymour *v.* Freer, 5 Wall. (U. S.) 822; The Dos Hermanos, 10 Wheat. (U. S.) 311; Swasey *v.* Adair, 83 Cal. 136; Murphy *v.* Consolidated Tank Line Co., 32 Ill. App. 614; Thomas *v.* Georgia R., etc., Co., 38 Ga. 222.

3. *Missouri.*—State *v.* Thompson, 81 Mo. 163; Bagley *v.* Kelly, 38 Mo. App. 623; Jones *v.* Davis, 4 Mo. 28; Williams *v.* Watson, 34 Mo. 95; Hamilton *v.* Jeffries, 15 Mo. 617; sec. 3053 Rev. Sts. Mo. 1879.

United States.—Davidson *v.* Lanier, 4 Wall. (U. S.) 447; Edmondson; *v.* Bloomshire, 7 Wall. (U. S.) 306 Shepherd *v.* Pepper, 133 U. S. 626; Brobst *v.* Brobst, 2 Wall. (U. S.) 96.

New York.—Potter *v.* Baker, 4 Paige (N. Y.) 290; Van Slyke *v.* Schmeck, 10 Paige (N. Y.) 301.

Wisconsin.—Russell *v.* Bartlett, 9 Wis. 556; Helden *v.* Helden, 9 Wis. 557.

Other States.—Beebe *v.* Young, 13 Mich. 221; O'Dea *v.* Washington Co., 3 Neb. 122; State *v.* Richards, 77 Ind. 101.

In Murphy *v.* Steele, 51 Ind. 81, it was held erroneous to grant a motion to dismiss an appeal where the appellant filed a good and sufficient bond pending the motion to dismiss; and to the same effect, see Cunningham *v.* Hopkins, 8 Cal. 33.

Discretion of Court in Fixing Time.—The court granting the motion to amend may, by an exercise of reasonable discretion, fix the time within which to amend. Weist *v.* People, 39 Ill. 507; Stilley *v.* King, 3 Ill. App. 338.

Allowing Bond to be Filed after Dismissal Discretionary.—Where the appeal has been dismissed for insufficiency it is discretionary with the court to set aside the dismissal and allow a new appeal bond to be filed. Smith *v.* Davis, 89 Ill. 203.

In Colorado and Illinois.—The court will not dismiss an appeal on motion for an insufficient appeal bond although the appellant does not ask leave to file a new one; but a rule will be made making the dismissal absolute on the appellant's failure to file a new or amended bond within a reasonable time named in the rule. Schofield *v.* Felt, 10 Colo. 146; Wear *v.* Killeen, 38 Ill. 259.

And in Georgia it is held that an appeal should not be dismissed for insufficient surety until the appellant has been required to give other security or show cause why the appeal should not be dismissed. Thomas *v.* Georgia R., etc., Co., 38 Ga. 222.

4. Pray *v.* Wasdell, 146 Mass. 327; Meserve *v.* Clark, 115 Ill. 580; Mix *v.* People, 86 Ill. 329; George *v.* Bischoff, 68 Ill. 236; Field *v.* Schricher, 14 Iowa 119; Park *v.* State, 4 Ga. 329.

Consideration. — The expenses incurred by appellee in defending the appeal on the faith of the bond afford a sufficient consideration to sustain it as a valid contract. Meserve *v.* Clark, 115 Ill. 580; George *v.* Bischoff, 68 Ill. 236; Reilly *v.* Atchinson (Arizona, 1893), 32 Pac. Rep. 262; Seacord *v.* Morgan, 17 How. Pr. (N. Y. Supreme Ct.) 394.

The effect given by the statute to an appeal bond or undertaking is a sufficient consideration therefor. Post *v.* Doremus, 60 N. Y. 371.

But where containing obligations in excess of the requirement of statute, and not based on any order of court or independent considerations expressed therein or shown to exist by parol, it is void as a *nudum pactum*. Post *v.* Doremus, 60 N. Y. 371; Thompson *v.* Blanchard, 3 N. Y. 335. Doolittle *v.* Dininny, 31 N. Y. 350;

essential elements of a good contract it will bind the obligors,[1] unless the statute declares that none other than the statutory appeal bond shall be given[2] or the bond contravenes public policy.[3] In other cases the appellee may ratify an appeal bond substantially varying from the statute by enforcing it as a common-law contract for his benefit.[4]

XIV. APPEALS IN FORMA PAUPERIS.—The fact that appellant is a pauper does not of itself relieve him from the necessity of giving an appeal bond.[5] There must be express statutory authority for an appeal *in forma pauperis*.[6]

Requisites of Affidavit.—To avail himself of an appeal *in forma pauperis* the appellant must file an affidavit in strict conformity to the statute.[7] The affidavit must set out all the facts making

Seaman *v.* McReynolds, 50 How. Pr. (N. Y. Super. Ct.) 425.

Where a legitimate statutory purpose appears to have been intended, it will not be presumed that the parties voluntarily made a common-law bond. Mathews *v.* Morrison, 13 R. I. 309.

Where an appeal bond is given, not in pursuance of an agreement between the parties, but to secure a statutory privilege which is not gained by it, it is void as without consideration. Powers *v.* Chabot, 93 Cal. 266; Powers *v.* Crane, 67 Cal. 65.

Variance from Statute.—The fact that none of the conditions are directed by the court or statute does not affect its validity as a common-law obligation. Mix *v.* People, 86 Ill. 329.

1. Meserve *v.* Clark, 115 Ill. 580; George *v.* Bischoff, 68 Ill. 236; Smith *v.* Whitaker, 11 Ill. 417; Pritchett *v.* People, 6 Ill. 525; Higgins *v.* Parker, 48 Ill. 445; Courson *v.* Browning, 78 Ill. 208; Fournier *v.* Faggott, 4 Ill. 347; Young *v.* Mason, 8 Ill. 55; Turner *v.* Armstrong, 9 Ill. App. 24; Miner *v.* Rodgers. 65 Mich. 225; Healey *v.* Newton, 96 Mich. 228; Goodwin *v.* Bunzl, 102 N. Y. 224; Cook *v.* Freudenthal, 80 N. Y. 202; Decker *v.* Judson, 16 N. Y. 439; Nunn *v.* Goodlet, 10 Ark. 89; Dennard *v.* State, 2 Ga. 137; Farnham *v.* Morrison, 2 Ld. Raym. 1138; Johnson *v.* Lasere, 2 Ld. Raym. 1458; Edgecomb *v.* Dee, Vaughan 102; Saterlee *v.* Stevens, 11 Ohio 420; Pray *v.* Wasdell, 146 Mass. 327; Morse *v.* Hodson, 5 Mass. 314; Sweetser *v.* Hay, 2 Gray (Mass.) 49; Bank of Brighton *v.* Smith, 5 Allen (Mass.) 413; Conant *v.* Newton, 126 Mass. 105; U. S. *v.* Linn, 15 Pet. (U. S.) 290; Cunningham *v.* Jacobs, 120 Ind. 306; Sheppard *v.* Collins, 12 Iowa 570; Williams *v.* Coleman, 49 Mo. 325; Barnes *v.* Webster, 16 Mo. 258, 57 Am. Dec. 252; Baker *v.* Washington County, 53 Ind. 497; Whitsett *v.* Womack, 8 Ala. 475; Sewall *v.* Franklin, 2 Port. (Ala.) 493.

2. Sheppard *v.* Collins, 12 Iowa 573; Pray *v.* Wasdell, 146 Mass. 327; Reitan *v.* Goebel, 35 Minn. 384; Sturgis *v.* Rogers, 26 Ind. 1; Whitsett *v.* Womack, 8 Ala. 476.

3. Pray *v.* Wasdell, 146 Mass. 327.

It has been held that where statutes expressly provide that bonds taken in a manner different from that therein prescribed shall be void, the prohibition does not invalidate bonds valid at common law unless taken under color of office or under pretence of authority. Sheppard *v.* Collins, 12 Iowa 574; Burrall *v.* Acker, 23 Wend. (N. Y.) 606.

4. Bartlett's Appeal, 82 Me. 210; Tuck *v.* Moses, 54 Me. 115; Holbrook *v.* Klenert, 113 Mass. 268.

5. Whittaker *v.* Kershaw, 44 Ch. Div. 296; Green *v.* Castello, 35 Mo. App. 127; Butler *v.* Jarvis, 117 N. Y. 115; Halloran *v.* Texas, etc., R. Co., 40 Tex. 465.

6. Fite *v.* Black, 85 Ga. 413.

7. Holmes *v.* McIntyre, 61 Tex. 9; Perry *v.* Scott, 68 Tex. 208; Golightly *v.* Irvine (Tex. App., 1890), 15 S. W. Rep. 48; Perry *v.* Scott, 68 Tex. 208; State *v.* Duncan, 107 N. Car. 818; Gibbons *v.* McComb, 3 Ga. 252; Hearne *v.* Prendergast, 61 Tex. 627; Halloran *v.* Texas, etc., R. Co., 40 Tex. 465.

Who May Take Affidavit.—And so an affidavit on appeal *in forma pauperis* cannot be taken before any other than the designated officer. Davis *v.* Dyer, 5 Sneed (Tenn.) 679.

a case within the statute,[1] and must identify the judgment with like certainty required of an appeal bond.[2] It must be made by the appellant himself.

XV. WAIVER OF DEFECTS BY APPELLEE.—The general rule, that all technical steps in appellate procedure pertaining merely to bringing up the case may be waived, applies to the statutory requirements of appeal bonds.[3] They are ordinarily held intended purely for the appellee's benefit,[4] consequently he may waive all security whatever.[5]

1. Elder *v.* Whithead, 25 Ga. 262; State *v.* Duncan, 107 N. Car. 818; Golightly *v.* Irvine (Tex. App., 1890), 15 S. W. Rep. 48.

Allegations.—So where the statute requires that an appellant *in forma pauperis* shall have certain qualifications, the allegation, in the affidavit, of each such qualification is jurisdictional, and the appeal will be dismissed on motion where any one of them is wanting. Golightly *v.* Irvine, (Tex. App., 1890), 15 S. W. Rep. 48; State *v.* Shoulders, 111 N. Car. 637; State *v.* Wylde, 110 N. Car. 500; State *v.* Tow, 103 N. Car. 350; State *v.* Divine, 69 N. Car. 390; State *v.* Morgan, 77 N. Car. 510; State *v.* Moore, 93 N. Car. 500; State *v.* Payne, 93 N. Car. 612; State *v.* Jones, 93 N. Car. 617; State *v.* Duncan, 107 N. Car. 818.

An affidavit on appeal *in forma pauperis* that appellant is "unable to pay the costs" is an insufficient compliance with a statute requiring him to make oath that he "is unable to pay the costs of appeal or give security therefor." Golightly *v.* Irvine (Tex. App., 1890), 15 S. W. Rep. 48.

An affidavit alleging that appellant is "unable to give security," without alleging that it is because of his poverty, is insufficient. Gibbons *v.* McComb, 3 Ga. 252.

2. Perry *v.* Scott, 68 Tex. 208; Holmes *v.* McIntyre, 61 Tex. 9.

Time for Filing.—As the affidavit takes the place of an appeal bond, the court has no power to allow an extension of the time within which it may be filed without express authority. Stell *v.* Barham, 85 N. Car. 88; Leach *v.* Jones, 86 N. Car. 404; State *v.* Moore, 93 N. Car. 500; Warren *v.* Harvey, 92 N. Car. 137; State *v.* Warren, 100 N. Car. 489.

Amendment to Show Appeal in Forma Pauperis.—Where a motion is made to dismiss an appeal for lack of sufficient security, it may be amended where the appellant can on sufficient affidavit show the necessary qualification to an appeal *in forma pauperis*. Burkhalter *v.* Bullock, 18 Ga. 371; Sample *v.* Cary, 19 Ga. 573.

Not Traversable.—The affidavit on appeal *in forma pauperis* is not traversable. Hines *v.* Rosser, 27 Ga. 85.

A Municipal Corporation may enter an appeal *in forma pauperis*. Savannah *v.* Brown, 64 Ga. 229.

Joint Appeal by Husband and Wife.—In McPhatridge *v.* Gregg, 4 Coldw. (Tenn.) 324, it was held that where husband and wife are joint parties it is necessary only for the husband to take the oath of poverty on joint appeal *in forma pauperis*.

3. Thompson *v.* Lea, 28 Ala. 454; Martin *v.* Higgins, 23 Ala. 775; Moore *v.* Fiquett, 19 Ala. 318; Merrill *v.* Jones, 8 Port. (Ala.) 554; Wyatt *v.* Judge, 7 Port. (Ala.) 37; Ives *v.* Finch, 22 Conn. 101; State *v.* State, 12 Pet. (U. S.) 720; Bostwick *v.* Perkins, 4 Ga. 50; Holbrook *v.* Klenert, 113 Mass. 268; Tuck *v.* Moses, 54 Me. 115; Greely *v.* Currier, 39 Me. 516; Hall *v.* Monroe, 73 Me. 123.

4. Dore *v.* Covey, 13 Cal. 508; Wildman *v.* Rider, 23 Conn. 175; Jones *v.* Droneberger, 23 Ind. 74.

Costs of Court—But where the appeal bond covers costs of court it cannot in any event be waived. Cape Fear, etc., Nav. Co. *v.* Costen, 63 N. Car. 264.

5. Jester *v.* Hopper, 13 Ark. 43; Wilson *v.* Dean, 10 Ark. 308; Thompson *v.* Lea, 28 Ala. 454; Ross *v.* Tedder, 10 Ga. 426; Howard *v.* Harman, 5 Cal. 79; Coulter *v.* Stark, 7 Cal. 245; Forni *v.* Yodell, 95 Cal. 442; Newman *v.* Maldonado (Cal., 1892), 30 Pac. Rep. 833; Billings *v.* Roadhouse, 5 Cal. 71; Pedrick *v.* Post, 85 Ind. 255; West *v.* Cavins, 74 Ind. 265.

Contra.—In *Massachusetts* and *Indiana* it is held that the provision of law requiring an appeal bond is not wholly intended for the appellee's

What Amounts to Waiver.—A general appearance, as by joinder in error in an or agreement to submit the cause on briefs or oral arguments, is a sufficient waiver.[1]

benefit, but partly on the ground of public policy, to discourage frivolous and vexatious litigation. Parties cannot therefore waive all appeal security, since it would be equivalent to conferring jurisdiction by consent. Santom *v.* Ballard, 133 Mass. 464; Folsom *v.* Cornell, 150 Mass. 121; Henderson *v.* Benson, 141 Mass. 218; Putnam *v.* Boyer, 140 Mass. 235; Ten Brook *v.* Maxwell, 5 Ind. App. 353.

Nor in *Massachusetts* can the requirement of the law that a bond shall have a surety be waived. Henderson *v.* Benson, 141 Mass. 219. And the objection may be taken any time before judgment is rendered on appeal, as it goes to the jurisdiction. Henderson *v.* Benson, 141 Mass. 219; Santom *v.* Ballard, 133 Mass. 464; Keene *v.* White, 136 Mass. 23; Wheeler Mfg. Co. *v.* Burlingham, 137 Mass. 581. But other defects may be waived. Folsom *v.* Cornell, 150 Mass. 120; Wheeler Mfg. Co. *v.* Burlingham, 137 Mass. 581.

Special Proceeding. — Where, in a special proceeding, the statute makes the right of the appellate tribunal not strictly judicial in its character depend on certain acts, they must be strictly complied with. State *v.* Fitch, 30 Minn. 532.

As, where an appeal was taken to a justice of the peace from the denial by county commissioners of a petition to lay out a highway, it was held that the appeal bond with sureties as required by statute could not be waived. State *v.* Fitch, 30 Minn. 532; Riley *v.* Mitchell, 38 Minn. 13.

1. Thompson *v.* Lea, 28 Ala. 453; Kirkpatrick *v.* Cooper, 89 Me. 210; Cothren *v.* Connaughton, 24 Wis. 134; Blake *v.* Lyon Mfg. Co., 75 N. Y. 611; Yancey *v.* Greenlee, 90 N. Car. 317; Dillingham *v.* Skein, Hempst. (U. S.) 181; Hill *v.* Burk, 62 N. Y. 111; Teall *v.* Van Wyck, 10 Barb. (N. Y.) 376; Acker *v.* Alexandria, etc., R. Co., 84 Va. 650; Chicago, etc., R. Co. *v.* Abilene Town Site Co., 42 Kan. 104; Critchell *v.* Brown, 72 Ind. 539; Burdine *v.* Mustin, 33 Ala. 634; Myers *v.* Segars, 41 Ala. 385; Carter *v.* Thompson, 41 Ala. 375; Magruder *v.* Campbell, 40 Ala. 611; Alexander *v.* Nelson, 42 Ala. 462; Bryan *v.* Berry, 8 Cal. 130; Winona Paper Co. *v.* First Nat. Bank, 33 Ill. App. 630; Martin *v.* Hochstadter, 27 Ill. App. 166; Evans *v.* Pigg, 28 Tex. 586; Wheeler Mfg. Co. *v.* Burlingham, 137 Mass. 581; Simonds *v.* Parker, 1 Met. (Mass.) 508; Kittridge *v.* Bancroft, 1 Met. (Mass.) 514; Clark *v.* Connecticut R. Co., 6 Gray (Mass.) 363; O'Loughlin *v.* Bird, 128 Mass. 600; Norris *v.* Munroe, 128 Mass. 386; Gruber *v.* Washington, etc., R. Co., 92 N. Car. 1; Hancock *v.* Bramlett, 85 N. Car. 393; Harshaw *v.* McDowell, 89 N. Car. 181; McMillan *v.* Nye, 90 N. Car. 11. Unless the case be such that the Supreme Court cannot take jurisdiction of the appeal. Johnston *v.* Fort, 30 Ala. 78; Parish *v.* Galloway, 34 Ala. 163; Mabry *v.* Dickens, 31 Ala. 243.

Special Appearance.—But an appearance for the special purpose of objecting to the jurisdiction constitutes no waiver. Bubb *v.* Cain, 37 Kan. 692.

Acceptance.—The acceptance and approval of an appeal bond by appellee is a waiver of any defects therein. So, where the appellee consents to a different form of security than that designated by the court or statute, he cannot object that it is insufficient. Jones *v.* Potter, 89 N. Car. 220; Greenlee *v.* McCalvey, 92 N. Car. 530; Buchanan *v.* Mulligan, 125 Ind. 334; Norris *v.* Munroe, 128 Mass. 386.

Statements of the Case.—A statement in the case on appeal settled by the judge, that "bond was given" or "filed" or "approved," is construed as indicating a tender and acceptance of the bond in open court by the appellee and a waiver of all objections thereto. Hancock *v.* Bramlett, 85 N. Car. 393; Gruber *v.* Washington, etc., R. Co., 92 N. Car. 1; Harshaw *v.* McDowell, 89 N. Car. 181; Singer Mfg. Co. *v.* Barrett, 94 N. Car. 219.

Objections Must Be Timely.—It is a general rule, applicable to all objections to appellate proceedings on account of errors in the technical mode of bringing up the case, that they should be made at the earliest possible moment. Thus, where the appellee failed to object to deficiencies in the appeal bond until a whole term

XVI. Motion to Dismiss.—An appellant is estopped from moving for dismissal on the ground of defects in his own appeal bond. Where moved for by the appellee, the defects complained of must be specifically pointed out in the motion or they will be deemed waived.[1]

XVII. The Sureties—1. Qualifications—A Necessary Party to the appellate proceeding cannot act as surety on an appeal bond given therein.[2]

had intervened, his objection was held too late. Wallace *v.* Corbitt, 4 Ired. (N. Car.) 45; Arrington *v.* Smith, 4 Ired. (N. Car.) 59; McDowell *v.* Bradley, 8 Ired. (N. Car.) 92; Robinson *v.* Bryan, 12 Ired. (N. Car.) 183; McMillan *v.* Davis, 7 Jones (N. Car.) 218; Council *v.* Monroe, 7 Jones (N. Car.) 396; March *v.* Griffith, 8 Jones (N. Car.) 264; Howze *v*, Green, Phil. Eq. (N. Car.) 250; Hutchinson *v.* Rumfelt, 82 N. Car. 425; Jenkins *v.* Cockerbaum, 1 Ired. (N. Car.) 309; Torrence *v.* Graham, 1 Dev. & B. (N. Car.) 284.

1. Scranton *v.* Bell, 35 Tex. 413; Jester *v.* Hopper, 13 Ark. 48; Healy *v.* Seward, 5 Wash. 319; Cason *v.* Laney, 82 Tex. 317; Casey *v.* Peebles, 13 Neb. 9; Bazzo *v.* Wallace, 16 Neb. 290.

Rehearing.—Where an appeal has been dismissed for failure to prosecute, and a motion to reinstate is opposed on account of defects in the appeal bond, it is too late to offer to file a new bond on petition for rehearing. Tevis *v.* O'Connell, 21 Cal. 512.

Retainer.—Where on appeal the plaintiff's attorney served a general notice of retainer on the appellant under the mistaken notion that an undertaking had been filed, it was held, on motion to dismiss, that the retainer might be withdrawn and cancelled, and that appellee, having relied upon the waiver, might be permitted to file an undertaking without costs to either party. Schaffer *v.* Jones (Buffalo Super. Ct.), 20 N. Y. Supp. 531.

Bond to be Filed.—In Cunningham *v.* Hopkins, 8 Cal. 34, the refusal of a County Court to permit a bond to be filed in that court on appeal from a judgment of a justice of peace was held sufficient ground to reverse the judgment.

Estoppel in Suit on Bond.—A defect which would warrant a dismissal of the appeal if properly objected to constitutes no defense in a suit on the bond to enforce the obligation, since the appellant and his sureties are estopped from raising it. Trueblood *v.* Knox, 73 Ind. 310; Deardorff *v.* Ulmer, 34 Ind. 353; Cunningham *v.* Jacobs, 120 Ind. 306; Peelle *v.* State, 118 Ind. 512; Sammons *v.* Newman, 27 Ind. 508; Harbaugh *v.* Albertson, 102 Ind. 69; Gray *v.* State, 78 Ind. 68, 41 Am. Rep. 545; Bugle *v.* Myers, 59 Ind. 73; Lucas *v.* Shepherd, 16 Ind. 368; Carver *v.* Carver, 77 Ind. 498; Stevenson *v.* Miller, 2 Litt. (Ky.) 306.

2. Hudson *v.* Gray, 58 Miss. 591; Barrow *v.* Clack, 45 La. Ann. 478; State *v.* New Orleans, 2 Rob. (La.) 449; Lafon *v.* Lafon, 2 Martin, N. S. (La.) 571; Syme *v.* Badger, 91 N. Car. 272; Labadie *v.* Dean, 47 Tex. 90; Nichols *v.* MacLean, 98 N. Y. 458; Grimwood *v.* Wilson, 31 Hun (N. Y.) 216; Morse *v.* Hasbrouck, 63 How. Pr. (N. Y. Supreme Ct.) 84.

Representative Party.—A party sued in a representative capacity cannot be surety on his own bond in a private capacity. State *v.* New Orleans, 2 Rob. (La.) 449; Lafon *v.* Lafon, Martin N. S. (La.) 571.

Official.—A clerk of court is competent surety on bond taken in his own court. Russell *v.* Sprigg, 10 La. 423. The official designated to approve the bond cannot become surety thereon. Jourdan *v.* Chandler, 37 Tex. 55.

Party Not Materially Interested.—Where it appears by the record that a party is not materially interested in the result of the appeal, his suretyship is valid. Syme *v.* Badger, 91 N. Car. 272. And see Leffel *v.* Obenchain, 90 Ind. 50.

A Husband is a competent surety for a wife sued on a debt for which she is alone liable, although a nominal party. Shiff *v.* Wilson, 3 Martin, N. S. (La.) 91.

Party as Agent for Real Appellant.—A litigant who is a party to the suit only in his capacity as agent for the real appellant is a competent surety. Montan *v.* Whitley, 12 La. Ann. 175.

A Partnership Firm may become sureties on an appeal bond. Boney *v.* Waterhouse, 35 Tex. 178. But a partner has no authority to sign a firm-

Statutory Qualifications.—A surety should be a citizen of the state where the suit is brought, and should possess the qualifications required by statute.[1]

The Acceptance of a Surety as pecuniarily sufficient rests in the reasonable discretion of the court or officer designated to approve the bond.[2]

name as surety, and unless specially authorized by the firm the signature does not bind them. Charman *v.* Warner, 1 Oregon 339.

Effect of Disqualification of Surety.—The disqualification of a surety does not wholly nullify the bond. It confers jurisdiction for the purpose of amendment, or it may be waived by appellee. McClelland *v.* Allison, 3 Kan. 155. And in *Texas* it is held that the fact that a party to the action signed the bond as a surety is not a sufficient ground for dismissing the appeal, the bond having been approved by the court below. Voss *v.* Feurmann (Tex. Civ. App., 1893), 23 S. W. Rep. 936.

Surety Companies.—Where a surety company has unquestionable power by its charter to act as surety on bonds, it may in the discretion of the approving power be accepted as surety on an appeal bond. Black *v.* Black, 53 Fed. Rep. 985; Cramer *v.* Tittle, 72 Cal. 12; Hurd *v.* Hannibal, etc., R. Co., 33 Hun (N. Y.) 109; Earle *v.* Earle, 49 N. Y. Super. Ct. 57; Travis *v.* Travis, 48 Hun. (N. Y.) 343; McGean *v.* McKellar, 67 How. Pr. (N. Y.) 273.

Where a corporation acts as sole surety it must, when excepted to, show *bona-fide* surplus assets at least equal to the undertaking. Fox *v.* Hale, etc., Silver Min. Co., 97 Cal. 353.

But a bond with such surety will not be approved where there is reason to question the power of the company to bind itself by such an obligation. Black *v.* Black, 53 Fed. Rep. 985.

Acceptance of Surety Company.—A surety company capitalized at an amount much less than the undertaking is not acceptable as a surety, although its individual stockholders are liable for its debt and are amply able to discharge any liability arising on the undertaking. Fox *v.* Hale, etc., Silver Min. Co., 97 Cal. 353.

An undertaking, executed by a foreign surety company, and signed in its behalf by its second vice-president and assistant secretary, with the seal of the corporation affixed, will not be declared void as not being properly signed, where there is nothing to show that such officers were not authorized to sign and deliver it. Gutzeil *v.* Pennie, 95 Cal. 598.

A surety company sustaining an average loss of 12½ per cent of the premiums paid in was accepted as sufficient, although its total capital was but $\frac{1}{8}$ of the amount of its liabilities on bonds. Rosenwald *v.* Phœnix Ins. Co. (Supreme Ct.), 9 N. Y. Civ. Pro. Rep. 444.

Such corporation need not show the personal qualification of sureties, although it must justify in like manner. Its acceptance is discretionary with the judge. Earle *v.* Earle, 49 N. Y. Super. Ct. 57.

1. Ulrich *v.* Farrington Mfg. Co., 69 Wis. 214; Smith *v.* Chicago, etc., R. Co., 19 Wis. 89; Bonesteel *v.* Orvis, 20 Wis. 646; Bonell *v.* Easterly, 30 Wis. 553; Barrow *v.* Clack, 45 La. Ann. 478; Snedicor *v.* Barnett, 9 Ala. 434; Bushong *v.* Graham, 4 Ohio Cir. Ct. Rep. 138.

Need Not be Residents of County.—But not of county where venue is laid, unless statute so requires. Bushong *v.* Graham, 40 Ohio Cir. Ct. Rep. 138.

Affidavit of Worth.—Where surety must make affidavit of his pecuniary condition by statute, the affidavit must accompany the bond to validate it. Bailey *v.* Rutjes, 91 N. Car. 420; State *v.* Wagner, 91 N. Car. 521; Turner *v.* Quinn, 91 N. Car. 92; Anthony *v.* Carter, 91 N. Car. 229; Bryson *v.* Lucas, 85 N. Car. 397; Holcomb *v.* Teal, 4 Oregon 352; Alberson *v.* Mahaffey, 6 Oregon 412; State *v.* McKinmore, 8 Oregon 207; Pencinse *v.* Burton, 9 Oregon 178.

Such affidavit must be made by the surety in person, or it will be void. Morphew *v.* Tatem, 89 N. Car. 183.

Where a statutory provision requires an undertaking to be accompanied by an affidavit of sureties that they are worth an amount defined, the affidavits are sufficient although they exceed the same. Hill *v.* Burk, 62 N. Y. 111; *Ex p.* Eastabrook, 5 Cow. (N. Y.) 27; Gibbons *v.* Berhard, 3 Bosw. (N. Y.) 635.

2. Williams *v.* Claflin, 103 U. S. 753. See XVII. 5. *Review of Approval, infra.*

Pecuniary Responsibility.—A surety is sufficient who in all reasonable probability will be pecuniarily responsible for the amount of the bond.[1]

Attorney as Surety.—Where duly excepted to, an attorney was not good bail in error at common law.[2] Where the statute expressly disqualifies him as surety a bond signed by him is fatally defective.[3] But the disqualification at common law or by rule of court does not avoid the appeal bond,[4] although the attorney may be liable for contempt of court in disobeying the rule.[5]

2. Sureties on Bond in Suit.—Where a judgment is rendered on a bond against a principal and his sureties thereon, the sureties become parties to the judgment, and on appeal therefrom they cannot again act as sureties on the appeal bond.[6] It is otherwise where the judgment is rendered only against the principal.[7]

3. Number of Sureties.—A statute requiring "sureties" on an appeal bond impliedly requires more than one.[8] Where two sureties are required, an appeal bond with one only is defective on a motion to dismiss unless the defect is amended or waived.[9]

1. Zuckerman *v.* Hawes, 146 Ill. 59; Rosenwald *v.* Phœnix Ins. Co., 9 Civ. Pro. Rep. (N. Y. Supreme Ct.) 444; Black *v.* Black, 53 Fed. Rep. 985.

A surety on an appeal bond cannot be rejected because of incumbrances on his real property when his residuary interest in it is so large as to amply secure his liability on the bond Zuckerman *v.* Hawes, 146 Ill. 59.

When Surety Incompetent.—A surety is not competent against whom executions have been issued and returned unsatisfied. Squier *v.* Stockton, 5 La. Ann. 741.

Real Estate.—A surety required by statute to prove his solvency must show the possession of real estate. State *v.* Rightor, 36 La. Ann. 711.

2. Studwell *v.* Palmer, 3 Paige (N. Y.) 57.

3. Ohio, etc., R. Co. *v.* Hardy, 64 Ind. 454.

4. Ohio, etc., R. Co. *v.* Hardy, 64 Ind. 454; State *v.* Costello, 61 Conn. 497; Banter *v.* Levi, 1 Chit. Rep. 713, 18 E. C. L. 212; Harper *v.* Tahourdin, 6 M. & S. 383; Shugar *v.* Muniford, 1 Pa. Dist. Ct. Rep. 324.

But it was not ground for a motion to quash the writ of error. Studwell *v.* Palmer, 5 Paige (N. Y.) 57.

5. Ohio, etc., R. Co. *v.* Hardy, 64 Ind. 454.

Surety as Party.—A surety is not such a party to the suit that he must be consulted in regard to any step taken in the case before final judgment. Bailey *v.* Rosenthal, 56 Mo. 385.

6. Davis *v.* McCampbell, 37 Ala. 609; Eufaula Home Ins. Co. *v.* Plant, 36 Ga. 623; French *v.* Davidson, 32 La. Ann. 718; Bowman *v.* Kaufman, 30 La. Ann. 1021.

7. Sampson *v.* Solinsky, 75 Tex. 664; Trammell *v.* Trammell, 15 Tex. 291; Saylor *v.* Marx, 56 Tex. 90; Heidenheimer *v.* Bledsoe, 1 Tex. App. 317; Word *v.* Reither, 2 Tex. App. Civ. Cas. § 778; Witten *v.* Caspary (Tex., 1890), 15 S. W. Rep. 47; Mehmert *v.* Dietrich, 36 La. Ann. 390; Leeds *v.* Yeatman, 12 La. 383; Pasley *v.* McConnell, 39 La. Ann. 1097; Greiner *v.* Prendergast, 2 Rob. (La.) 235; Lee *v.* Lord, 75 Wis. 35.

Thus sureties on a bond given to secure costs of a suit may become sureties on an appeal bond given on appeal from a judgment rendered against the principal therein. Sampson *v.* Solinsky, 75 Tex. 664.

8. Harris *v.* Register, 70 Md. 109; Riley *v.* Mitchell, 38 Minn. 11; Blake *v.* Sherman, 12 Minn. 305; State *v.* Fitch, 30 Minn. 532; Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38; Hooper *v.* Brinson, 10 Tex. 296.

9. Casey *v.* Peebles, 13 Neb. 7; Torrent *v.* Muskegon Booming Co., 2 Mich. 159; Beebe *v.* Young, 13 Mich. 221; Bartlett's Appeal, 82 Me. 210; Greeley *v.* Currier, 39 Me. 516; Hall *v.* Monroe, 73 Me. 123; Tuck *v.* Moses,

4. Exception to Sureties—Under Code Procedure.—Where the appellee deems the sureties offered insufficient he must serve notice of exception to them upon the appellant within the time required by the statute, or all objections are deemed waived.[1] The sureties must thereupon justify before the official designated by statute, and notice of justification, as the statute requires, must be served upon the appellee.[2] The failure of the sureties on an

54 Me. 115; Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38; North American Co. *v.* Dyett, 4 Paige (N. Y.) 38.

A bond with one surety is amendable. Riley *v.* Mitchell, 38 Minn. 11. See XIII. AMENDMENT and XV. WAIVER, *ante*.

Surety Company.—Where the statute requires "sureties" a surety company is not sufficient without the addition of another surety, unless the statute expressly so provides. White *v.* Rintoul, 6 Civ. Pro. Rep. (N. Y. Super. Ct.) 259; Cramer *v.* Tittle, 72 Cal. 12; Hurd *v.* Hannibal, etc., R. Co., 67 How. Pr. (N. Y. Supreme Ct.) 516; McGean *v.* MacKelter, 67 How. Pr. (N. Y. Super Ct.) 273.

1. Lewis *v.* Lewis, 4 Oregon 209; Culliford *v.* Gadd (Super. Ct.), 22 N. Y. Supp. 539; Hoffman *v.* Smith, 34 Hun (N. Y.) 485.

Perfecting the Appeal.—Where the appellant fails to except to the sureties until the expiration of the time defined by statute for taking an exception to their sufficiency, the appeal becomes perfected; and a motion to compel the sureties thereafter to submit to examination of their qualification will be denied. Culliford *v.* Gadd (Super. Ct.), 22 N. Y. Supp. 539; State *v.* Judge, 13 La. 574; Callahan *v.* Portland, etc., R. Co., 17 Oregon 556.

Form.—An objection to the form merely of the affidavit attached to an undertaking on appeal is not a good objection to the sufficiency of the sureties obliging them to justify. Schacht *v.* Odell, 52 Cal. 447.

2. Judson *v.* Bulen, 6 Dakota 70; Kelsey *v.* Campbell, 14 Abb. Pr. (N. Y. Supreme Ct.) 368; Chamberlain *v.* Dempsey, 22 How. Pr. (N. Y. Super. Ct.) 356; Stark *v.* Barrett, 15 Cal. 361.

Where no notice of justification is given to the appellee, the appeal may be dismissed on motion unless the appellant offers a new bond. Stack *v.* Barrett, 15 Cal. 361; Cummins *v.* Scott, 23 Cal. 526.

Parol Notice.—Parol notice of justification of sureties on an appeal bond is good unless written notice is expressly required by statute. Judson *v.* Bulen, 6 Dakota 70.

Duty of Officer Taking Justification.—An officer who takes justification of sureties should examine them on oath not only as to their pecuniary responsibility, but also as to their residence and other qualifications to become such sureties according to law and the practice of the court; or he may require an affidavit of such qualifications. Ten Eick *v.* Simpson, 11 Paige (N. Y.) 177.

The Affidavit of Justification should be annexed to and filed with the bond to enable respondent to investigate the sureties. Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38.

Ascertaining Sureties' Competency.—Sureties, in the absence of express statutory provisions, should be residents and householders, or such persons as would be competent special bail at common law. Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38. They should be required to justify in at least double the amount of the penalty on the bond. Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38.

Statutory Amount.—Where the statute requires each surety to justify in a certain amount, it is not sufficient that both together justify in twice the amount required for each; the statute must be strictly followed. Anthony *v.* Carter, 91 N. Car. 229; State *v.* Roper, 94 N. Car. 859.

Approval by Clerk or Judge.—Where the bond is duly approved the sureties are presumed to be sufficient, and cannot be compelled to justify unless evidence is offered by appellee tending to show insecurity. Petillon *v.* Gilman, 86 Ill. 401.

Judgment.—Where the surety has to justify in double the amount of the judgment appealed from, the amount of the judgment must be inserted in the undertaking. Harris *v.* Bennett, 3 Code Rep. (N. Y.) 23.

Where sureties must justify in twice the amount of judgment, it is not suffi-

appeal bond to justify, where they have been duly excepted to, does not discharge them,[1] unless the statute expressly provides that, in such case, the bond shall be void.[2]

cient that they justify in twice the amount of the penalty of the bond. Orr *v.* Orr, 5 Cinc. L. Bull. (Ohio) 711.

Acceptance of Surety for Specified Part.—In New Orleans Ins. Co. *v.* Albro Co., 112 U. S. 506, it was held within the discretion of the justice of the U. S. Circuit Court to accept several sureties for specified parts of the entire amount of the obligation. To the same effect Clark *v.* Clark, 7 Paige (N. Y.) 607.

Burden of Proof.—The burden of proof rests on the appellant to show the sufficiency of sureties. State *v.* Judge, 35 La. Ann. 737.

Presumption from Signature.—The person before whom the justification is taken is presumed to have the official character purported by his signature in the jurat. Chamblee *v.* Baker, 95 N. Car. 98.

1. Smith *v.* Nescatunga Town Co., 36 Kan. 758; St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; Schacht *v.* Odell, 52 Cal. 448; Hill *v.* Finnigan, 54 Cal. 311; Wittram *v.* Crommelin, 72 Cal. 89; Swasey *v.* Adair, 83 Cal. 136; McSpedon *v.* Bouton, 5 Daly (N. Y.) 30; Hill *v.* Burke, 62 N. Y. 111; Kitching *v.* Diehl, 40 Barb. (N. Y.) 433; Decker *v.* Anderson, 39 Barb. (N. Y.) 346; Gibbons *v.* Berhard, 3 Bosw. (N. Y.) 635.

Bond Acting as Supersedeas.—Where an appeal bond is given both to perfect the appeal and to act as a supersedeas, the appeal will not be dismissed if the sureties justify in an amount sufficient for the former purpose. Dobbins *v.* Dollarhide, 15 Cal. 374; Hill *v.* Finnigan, 54 Cal. 311; Lower *v.* Knox, 10 Cal. 480; Mokelumne Hill Canal Co. *v.* Woodbury, 10 Cal. 188; Stark *v.* Barrett, 15Cal. 361.

At Common Law notice of bail in error must have been given to the defendant in error or his attorney, and unless excepted to within twenty days the bail was deemed allowed. 2 Tidd Pr. 1156.

Where excepted to and not approved of on the justification, the defendant in error might at any time within twenty days obtain a rule for better bail. 2 Tidd Pr. 1157; Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38.

The mode of adding and justifying new bail in error is the same as on the original bail, except that new notice of justification was not required. 2 Tidd Pr. 1157.

Bail who failed to justify might be stricken out of the bail-piece by order of the court; for unless this were done they might be proceeded against. Gottwald *v.* Tuttle, 7 Daly (N. Y.) 107.

Acceptance of Sureties by Appellee.—Where the appellee accepts the sureties offered, an indorsement of their justification on the undertaking is not necessary. Gopsill *v.* Decker, 4 Hun (N. Y.) 625.

Effect of Failure to Justify.—Where the sureties do not justify when excepted to, the judge may by *ex parte* order allow the appellant to furnish additional sureties within such time as may be designated in the order or allowed by law. The proceedings adopted in adding new sureties are the same as on the original sureties, except that they are required to justify without a new exception. Chamberlain *v.* Dempsey, 22 How. Pr. (N. Y. Super. Ct.) 359; Gregory *v.* Gregory, Barnes 74; Lewis *v.* Gadderrer, 5 B. & Ald. 704; Rex *v.* Essex, 5 T. R. 633; Jones *v.* Vestris, 3 Bing. N. Cas. 677.

2. McCracken *v.* Los Angeles County, 86 Cal. 74; Roush *v.* Van Hagen, 17 Cal. 122; Lower *v.* Knox, 10 Cal. 480; Manning *v.* Gould, 90 N. Y. 476; Ginsburg *v.* Kuntz (Supreme Ct.), 15 N. Y. Supp. 237; Gottwald *v.* Tuttle, 7 Daly (N. Y.) 107; Chamberlain *v.* Dempsey, 13 Abb. Pr. (N. Y. Super. Ct.) 421; Kelsey *v.* Campbell, 14 Abb. Pr. (N. Y. Supreme Ct.) 368.

Where, as in *New York*, the statute expressly provides that the effect of the failure of the sureties to justify shall be the same as if no undertaking had been given, the defect cannot be waived; and in an action on the bond the sureties may allege their failure as a defense. Gottwald *v.* Tuttle, 7 Daly (N. Y.) 107; Manning *v.* Gould, 90 N. Y. 476.

And the defect in an undertaking from the failure of the sureties to justify, when duly excepted to, cannot be amended by withdrawing the notice of exception and waiving justification. Hoffman *v.* Smith, 34 Hun (N. Y.) 485.

In California the failure of sureties to justify after an exception has been taken to their sufficiency does not ren-

Time.—The time fixed by statute within which sureties must justify cannot be extended without express statutory authority.[1]

XVIII. Approval of Bond—1. Generally.—An appeal security is valid without approval by a court or judge, unless a statute so requires.[2] Where approval is required the statute is mandatory, and the appeal bond is invalid on objection where unapproved.[3] Such

der the appeal ineffectual. It merely operates to suspend the stay of proceedings, and does not discharge the sureties from their liability on the undertaking. Schacht *v.* Odell, 52 Cal. 448; Hill *v.* Finnigan 54 Cal. 311; Wittram *v.* Crommelin, 72 Cal. 89.

1. Roush *v.* Van Hagen, 17 Cal. 122; McCracken *v.* Los Angeles County, 86 Cal. 74; Chemin *v.* East Portland, 19 Oregon 512.

The extension of the time to justify does not extend the time within which other acts required to perfect the appeal must be done. Wittram *v.* Crommelin, 72 Cal. 89.

The Motion to Extend must be made on notice. Wheeler *v.* Millar, 61 How. Pr. (N. Y. Supreme Ct.) 396.

Adding New Sureties.—If the original sureties fail to justify, new sureties cannot be added as a matter of course unless there is time enough remaining to serve notice of addition of new sureties and of their justifying Chamberlain *v.* Dempsey, 22 How. Pr. (N. Y. Super. Ct.) 359.

2. Travis *v.* Travis, 48 Hun (N. Y.) 343; State *v.* Armstrong, 5 Wash. 123; Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35.

An unnecessary approval where not required by statute is an immaterial addition to the bond. Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35.

Order Requiring Bond.—Where an order requiring an appeal bond names the sureties, penalty, and time of filing, the bond filed in compliance with the order stands approved without further action. Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35.

3. Cockrill *v.* Owen, 10 Mo. 287; Sargent *v.* Sharp, 1 Mo. 601; Julian *v.* Rogers, 87 Mo. 229; McCloskey *v.* Indianapolis Mfg., etc., Union, 87 Ind. 20; Beach *v.* Southworth, 6 Barb. (N. Y.) 173; Van Slyke *v.* Schmeck, 10 Paige (N. Y.) 302.

Mandamus.—Where the official designated refuses to approve a bond which satisfies the statute, he may be compelled to do so by mandamus. Robinson *v.* Mhoon, 68 Miss. 712; State *v.* Clark, 24 Neb. 318.

Certiorari.—Or where it should have been approved by a trial justice, the court may bring the papers before it by certiorari and allow the bond to be filed *nunc pro tunc.* Robinson *v.* Mhoon, 68 Miss. 712.

New York.—In New York an ordinary undertaking with two sureties need not be approved, but the respondent may except to the sureties, and where found sufficient the judge before whom the justification takes place must endorse his allowance on the undertaking. Travis *v.* Travis, 48 Hun (N. Y.) 343. But where a surety company is offered in place of two sureties it must be approved by the judge below. Travis *v.* Travis, 48 Hun (N. Y.) 343.

In Texas the approval of an appeal bond by a justice of the peace on appeal therefrom is held directory and the bond valid as a statutory obligation. Doughty *v.* State, 33 Tex. 1; Dyches *v.* State, 24 Tex. 266; Cundiff *v.* State, 38 Tex. 641; Taylor *v.* State, 16 Tex. App. 515.

Waiver by Appellee.—As the statutory provision for approval is intended purely for the appellee's benefit the failure of the appellant to secure approval does not invalidate the bond as a common-law obligation where the appellee waives the defect. Jones *v.* Droneberger, 23 Ind. 74; Easter *v.* Acklemire, 81 Ind. 163; Smock *v.* Harrison, 74 Ind. 348; Beach *v.* Southworth, 6 Barb. (N. Y.) 173.

The defect may be waived. Buchanan *v.* Milligan, 125 Ind. 332.

Approval Out of Court.—Where a judge is designated to approve the bond, it is generally held that the approval must be made in term. Ormond *v.* Keith, 1 Colo. 81; Gruner *v.* Moore, 6 Colo. 529; Larco *v.* Casaneuava, 30 Cal. 664; Alvord *v.* Little, 16 Fla. 158; Baars *v.* Creary, 23 Fla. 61. Unless the statute or the court expressly authorizes him to act in vacation. Orman *v.* Keith, 1 Colo. 81.

a statute vests in the official designated to approve the bond a judicial, not a ministerial, power.[1] It cannot, accordingly, be delegated to any other authority than that named in the statute.[2]

2. How Made.—The approval required by the statute need not be expressly endorsed on the bond.[3] Where the bond is received and filed without objection by the official designated to approve it, his approval will be presumed.[4]

The defect may be waived. Williams *v.* Coleman, 49 Mo. 325; and under *United States* practice the bond is valid if approved in vacation. Hudgins *v.* Kemp, 18 How. (U. S.) 530.

By Deputy Clerk.—A deputy clerk may approve a bond in the name of the clerk. Harris *v.* Register, 70 Md. 109.

Jurisdiction to Approve Vested in a Class.—Where a class of officers is designated or authorized to approve a bond, the officer who fixes its penalty does not thereby acquire sole jurisdiction to approve it. Emerson *v.* Atwater, 5 Mich. 34.

Where Official Acts De Facto.—Where an appeal bond is approved by one acting under color of authority, but without legal right, the Supreme Court may allow an amendment. McClintock *v.* Laing, 19 Mich. 300.

1. Abraham *v.* Huntington, 19 Ill. 403; Henderson *v.* Fitch, 19 Ill. 404; Winston *v.* Rivers, 4 Stew. & P. (Ala.) 279; State *v.* Dillon, 98 Mo. 90; Blake *v.* Kimball, 22 Vt. 632.

2. O'Reilly *v.* Edgrington, 96 U. S. 724; National Bank *v.* Omaha, 96 U. S. 737; Haskins *v.* St. Louis, etc., R. Co., 109 U. S. 106; Eustis *v.* Holmes, 48 Miss. 34; Parker *v.* Willis, 27 Miss. 766; Pickett *v.* Pickett, 1 How. (Miss.) 267; Averil *v.* Dickerson, 1 Blackf. (Ind.) 3; Crumley *v.* Hickman, 92 Ind. 388; Jones *v.* Droneberger, 23 Ind. 74; Shepherd *v.* Dodd, 15 Ind. 217; Burk *v.* Howard, 15 Ind. 219; McVey *v.* Heavenridge, 30 Ind. 100; Scotten *v.* Divelbiss, 46 Ind. 301; McCloskey *v.* Indianapolis Mfg., etc., Union, 87 Ind. 20; Buchanan *v.* Milligan, 125 Ind. 332; Julian *v.* Rogers, 87 Mo. 229; Parker *v.* Hannibal, etc., R. Co., 44 Mo. 415; Adams *v.* Wilson, 10 Mo. 341; Putnam *v.* Boyer, 140 Mass. 235; Hardin *v.* Owings, 1 Bibb (Ky.) 214; Knight *v.* People, 11 Colo. 308; Harris *v.* Register, 70 Md. 109; Winona Paper Co. *v.* First Nat. Bank, 33 Ill. App. 630; Abraham *v.* Huntington, 19 Ill. 403; Bowlesville Min., etc., Co. *v.* Pulling, 89 Ill. 58; People *v.* Leaton, 121 Ill. 668; Rogers *v.* Paterson, 4 Paige (N. Y.) 450.

So where power to take an appeal bond is vested in a delegated tribunal or official, it cannot be delegated. McPhartridge *v.* Gregg, 4 Coldw. (Tenn.) 324; *Ex p.* Ricks, 7 Heisk. (Tenn.) 364; Bently *v.* Fowler, 8 Ark. 375.

By Taking a Bond in Open Court instead of before the judge in person as required by statute does not impair its obligatory force. Com. *v.* Watts, 84 Ky. 537.

Commissioner Having Power of Judge.—And in Hemstead *v.* Cargill, 46 Minn. 141, it was held that where a statute directed an appeal bond to be approved by a district judge, an approval by a court commissioner having the powers of a district judge at chambers was sufficient.

3. Sutton *v.* McCoy, Wright (Ohio) 95; Hanaw *v.* Bailey, 83 Mich. 24; Williams *v.* McConico, 25 Ala. 538.

Statutory Directions requiring a written endorsement are construed as directory merely. Taylor *v.* State, 16 Tex. App. 514; Asch *v.* Wiley, 16 Neb. 41; Woodburn *v.* Fleming, 1 Blackf. (Ind.) 4; Miller *v.* O'Reilly, 84 Ind. 168; Jenkins *v.* Emery, 22 Wyoming 58.

Endorsement Nunc Pro Tunc.—Where a written endorsement is deemed essential it may be supplied *nunc pro tunc.* Muller *v.* Humphreys (Tex., 1889), 14 S. W. Rep. 1068.

4. Asch *v.* Wiley, 16 Neb. 41; Woodburn *v.* Fleming, 1 Blackf. (Ind.) 4; McCloskey *v.* Indianapolis Mfg., etc., Union, 87 Ind. 20; Miller *v.* O'Reilly, 84 Ind. 168; Lacy *v.* Fairman, 7 Blackf. (Ind.) 558; Ohio, etc., R. Co. *v.* Hardy, 64 Ind. 454; Jenkins *v.* Emery, 2 Wyoming 58; Clapp *v.* Freeman, 16 R. I. 344; Hanaw *v.* Bailey, 83 Mich. 28; Hancock *v.* Bramlett, 85 N. Car. 395; Moring *v.* Little, 95 N. Car. 87; Taylor *v.* State, 16 Tex. App. 514; McLane *v.* Russell, 29 Tex. 128; David-

3. How Shown.—The approval, or the acts raising a presumption of approval, should be properly shown by the record;[1] but the actual date of approval may always be shown by parol evidence, although it contravenes the written endorsement.[2]

4. Effect.—Unless the approval of an appeal bond is made by a court it passes on only the sufficiency of the sureties and the amount of the bond.[3] Irregularities in the form of the bond are not waived by the failure of the appellee to object on the approval on that ground, and may be objected to for the first time in the appellate court.[4]

son *v.* Lainer, 4 Wall. (U. S.) 453; Littleton *v.* Pratt, 10 La. Ann. 487.

Waiver of Approval.—Any approval of an appeal bond may be waived. Easter *v.* Acklemire, 81 Ind. 163.

Approval a Question of Fact.—Upon appeal from a judgment entered upon such a bond, the question whether it was approved is a question of fact, not of law; and the finding of the trial court that it was in fact approved will be sustained if there is any evidence in the record tending to show it. McCloskey *v.* Indianapolis Mfg., etc., Union, 87 Ind. 20.

1. Woodburn *v.* Fleming, 1 Blackf. (Ind.) 4; Humble *v.* Williams, 4 Blackf. (Ind.) 473; Littell *v.* Bradford, 8 Blackf. (Ind.) 185; Frazer *v.* Smith, 6 Blackf. (Ind.) 210; Miller *v.* O'Reilly, 84 Ind. 168; McCrory *v.* Anderson, 103 Ind. 12.

Sufficient Record.—So where the record showed that an appeal was taken in open court, and that the court fixed the amount of the bond, approved the surety named, and designated the time within which the bond should be filed, the bond was held sufficiently approved. Hartlep *v.* Cole, 120 Ind. 248. Or where the record shows that a justice of the peace received the appeal bond and allowed the appeal. Jenkins *v.* Emery, 2 Wyoming 58.

Entry of the appeal bond upon the docket of the court is sufficient approval. Asch *v.* Wiley, 16 Neb. 41.

Waiver.—By reciting that the appellant "filed a bond not approved or disapproved by the court because no motion was made by either party," approval was presumed waived by appellee. Rawson *v.* Dampner, 143 Mass. 76; Bryson *v.* Lucas, 85 N. Car. 397.

Transcript.—The fact that the clerk embodies an appeal bond in the transcript is presumptive evidence of its approval by him. Evans *v.* Pigg, 28 Tex. 588; Rodgers *v.* Ferguson, 32 Tex. 533.

Form.—An indorsement, "I approve of this bond both in form and substance," *held*, an approval both of the sureties and of the penal sum. Maynard *v.* Haskins, 8 Mich. 260.

2. Woodburn *v.* Fleming, 1 Blackf. (Ind.) 4; Miller *v.* O'Reilly, 84 Ind. 168; McCloskey *v.* Indianapolis Mfg., etc., Union, 87 Ind. 20; McCrory *v.* Anderson. 103 Ind. 12; Simpson *v.* Minor, 1 Blackf. (Ind.) 229; Robinson *v.* Chadwick, 22 Ohio St. 527; Williams *v.* McConico, 25 Ala. 538.

Certiorari to Compel Certification of True Time.—Where the presumption of a different date is sufficiently shown by parol, a special certiorari will be awarded on motion to compel the trial judge to certify the true time. Williams *v.* McConico, 25 Ala. 538.

3. People *v.* Leaton, 25 Ill. App. 45; People *v.* Leaton, 121 Ill. 666; Harris *v.* Register, 70 Md. 109; Jacobs *v.* Morrow, 21 Neb. 233; State *v.* Dillon, 98 Mo. 90; Blake *v.* Kimball, 22 Vt. 632; Potter *v.* Grisham, 3 How. (Miss.) 76; Scranton *v.* Bell, 35 Tex. 415; Hollis *v.* Border, 10 Tex. 277; Shelton *v.* Wade, 4 Tex. 148; Fuerman *v.* Ruhle (Tex. App., 1890), 16 S. W. Rep. 536.

4. Jacobs *v.* Morrow, 21 Neb. 233; Wheeler *v.* Kuhns, 9 Colo. 196; M'Alister *v.* Scrice, 7 Yerg. (Tenn.) 277.

Approval of Irregular Bond.—An officer or court is not authorized to approve of an irregular bond, but approval thereof is sufficient to vest the appellate court with jurisdiction to allow amendment or to hear the appeal where appellee objects. Jacobs *v.* Morrow, 21 Neb. 233; Wheeler *v.* Kuhns, 9 Colo. 196; Sharp *v.* Bedell, 10 Ill. 88; Bragg *v.* Fessenden, 11 Ill. 544; Petillon *v.* Gilman, 86 Ill. 401.

Approval of Form of Bond.—Where an

5. Review of Approval—Objections.—The appellee must make specific objections to the approval of the sureties by the trial courts to have their acceptance reviewed. And objections not duly made in the trial court to the sufficiency of the sureties are deemed to be waived.[1]

When Reviewable.—Whether made *ex parte* or on notice, the approval by the trial judge is ordinarily conclusive,[2] unless fraud in misrepresenting the pecuniary condition of the sureties,[3] or a

official is designated to approve the bond, he is consequently under no obligation to approve of its form. People *v.* Leaton, 25 Ill. App. 45.

On the other hand, an approval of the form and manner of the execution of the bond is not sufficient unless the sufficiency of the sureties in the bond is approved of also. Eldridge *v.* Howell, 4 Paige (N. Y.) 459.

Execution.—Thus an approval of an appeal bond presupposes its due execution, but does not preclude the parties named therein from objecting on the ground of want of proper execution. Ford *v.* Albright, 31 Ohio St. 35.

Approval implies that there is no question of appellant's identity; so that a slight change in spelling in the body and signature of the bond does not vitiate it. Guez *v.* Dupuis, 152 Mass. 456; Gaines *v.* Stiles, 14 Pet. (U. S.) 322; Franklin *v.* Talmadge, 5 Johns. (N. Y.) 84.

Presumption on Approval—Costs.—It will be presumed that an appeal bond duly approved by the proper officer conforms to his estimates, and that where a sum is named as costs therein he included the probable costs of the appeal subsequently accruing. Drum *v.* Ft. Worth, 25 Tex. App. 664.

The appeal will, therefore, not be dismissed because costs are taxed later at a figure which renders the amount of the bond too small. Zidek *v.* State (Tex. Crim. App., 1893), 22 S. W. Rep. 143.

Approval as Fixation of Penalty.—Approval of a bond in a certain amount is a sufficient fixation of the penalty where discretionary. Dunseith *v.* Linke, 10 Daly (N. Y.) 365.

Presumption of Satisfaction with Sureties' Solvency.—The approval by the proper officer is presumptive proof that he was satisfied that the sureties were solvent. Fuerman *v.* Ruhle (Tex. App., 1890), 16 S. W. Rep. 536.

Rescinding Approval.—An official who has once approved a bond has no power to rescind his action subsequently. Miller *v.* O'Reilly, 84 Ind. 168.

Signature of the Sureties.—The court cannot demand that the sureties shall execute the bond in its presence, but it may demand proof of the genuineness of their signature. State *v.* Clark, 24 Neb. 318.

1. Bazzo *v.* Wallace, 16 Neb. 293; Johnston *v.* King, 83 Wis. 8; Culliford *v.* Gadd (Super. Ct.), 22 N. Y. Supp. 539; Poston *v.* Mhoon, 49 Miss. 620; Granger *v.* Parker, 142 Mass. 186; Beardsley *v.* Hill, 61 Ill. 354; State *v.* Judge, 17 La. 433; State *v.* Judge, 19 La. 174; Stanton *v.* Parker, 2 Rob. (La.) 550; *Ex p.* Barrett, 4 La. Ann. 236; Surget *v.* Stanton, 10 La. Ann. 318; Tanner *v.* King, 10 La. Ann. 485; Wood *v.* Harrell, 14 La. Ann. 61; State *v.* Fourth Dist. Ct., 20 La. Ann. 390.

2. Williams *v.* Claflin, 103 U. S. 753; Florida Cent. Co. *v.* Schulte, 100 U. S. 644; Mexican Nat. Const. Co. *v.* Rensens, 118 U. S. 77; Jerome *v.* McCarter, 21 Wall. (U. S.) 17; Martin *v.* Hazard Powder Co., 93 U. S. 302; *Ex p.* French, 100 U. S. 1; Stafford *v.* Union Bank, 16 How. (U. S.) 135; New Orleans Ins. Co. *v.* Albro Co., 112 U. S. 506; Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 410; State *v.* Le Bourgeois, 45 La. Ann. 249; Bradley *v.* Galt, 5 Mackey (D. C.) 317; Midland R. Co. *v.* Wilcox, 111 Ind. 561; Moore *v.* Olin, 6 Mich. 328.

The approval of the sufficiency of the sureties lies ordinarily in the discretion of the trial court. Delamater *v.* Byrne, 57 How Pr. (N. Y. Supreme Ct.) 170.

Approval by Appellate Justice.—The approval of the sufficiency of an amended bond or undertaking by a justice of the appellate court is conclusive. Schacht *v.* Odell, 52 Cal. 447; Stevenson *v.* Steinburg, 32 Cal. 373.

3. Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 410; Hays *v.* Todd, 26 Fla. 214.

material change therein or in the circumstances of the case or parties or in the pecuniary condition of the sureties arising since the approval, can be shown.[1]

XIX. Construction of Contract—1. Generally.—The ordinary rule that a contract will, where possible, be so construed as to carry out the intention of the parties, applies to appeal bonds.[2] The contract of suretyship on appeal, as elsewhere, will be

1. Jerome *v.* McCarter, 21 Wall. (U. S.) 17; Williams *v.* Claflin, 103 U. S. 753; Midland R. Co. *v.* Wilcox, 111 Ind. 561; Martin *v.* Hazard Powder Co., 93 U. S. 302.

Such objections may be made for the first time in the appellate court. Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 410.

Subsequent Insolvency.—Where a surety becomes insolvent subsequent to the approval of the bond, the appellate court may exercise its discretion in requiring a new surety to be given. Mahon *v.* Noon, 99 N. Y. 625; Dering *v.* Metcale, 72 N. Y. 613; Beeman *v.* Banta, 113 N. Y. 615; Ranschaupt *v.* Carpenter, 63 Ind. 359; Booten *v.* Empire State Bank, 67 Ga. 358; Florida Orange Hedge Fence Co. *v.* Branham, 32 Fla. 289.

Where it is satisfied that the remaining surety is abundantly sufficient to answer the penalty of the bond, or where the judgment is otherwise secured, the appellate court will not order a new surety to be given. Mahon *v.* Noon, 99 N. Y. 625; Dering *v.* Metcale, 72 N. Y. 613.

Where ordered, a reasonable time must be given for the appellant to furnish the additional surety. Booten *v.* Empire State Bank, 67 Ga. 358.

In *Louisiana* a trial judge may order the substitution of a new surety although the case has passed to the Supreme Court. Gray *v.* Lowe, 9 La. Ann. 478.

2. Smith *v.* Nescatunga Town Co., 36 Kan. 758; St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; Dyer *v.* Bradley, 88 Cal. 590; Swasey *v.* Adair, 83 Cal. 136; Swain *v.* Graves, 8 Cal. 551; People's Brewing Co. *v.* Boebinger, 40 La. Ann. 277; Pasley *v.* McConnell, 40 La. Ann. 609; Blanchard *v.* Gloyd, 7 Rob. (La.) 542; Baldridge *v.* Penland, 68 Tex. 441; Field *v.* Schricher, 14 Iowa 119; Acker *v.* Alexandria, etc., R. Co., 84 Va. 648; Matthews *v.* Morrison, 13 R. I. 309; Conner *v.* Paxson, 1 Blackf. (Ind.) 207; Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349; Ham *v.* Greve, 41 Ind. 531; Carver *v.* Carver, 115 Ind. 539; U. S. *v.* Drapier (D. C.), 18 Wash. L. J. 532; People *v.* Oneida, 1 Wend. (N. Y.) 28; Yocum *v.* Barnes, 8 B. Mon. (Ky.) 497; Stockton *v.* Turner, 7 J. J. Marsh. (Ky.) 193; Cooke *v.* Graham, 3 Cranch (U. S.) 235; Butler *v.* Wigge, 1 Saund. 65; Whitsett *v.* Womack, 8 Ala. 477; Block *v.* Blum, 33 Ill. App. 643; Hibbard *v.* McKindley, 28 Ill. 240; Schill *v.* Reisdorf, 88 Ill. 411.

Implied Condition.—By the execution of the appeal bond the appellant impliedly covenants that he will do nothing pending the appeal to render compliance with the condition of the appeal bond fruitless. Jones *v.* Fisher, 116 Ill. 72.

Entire Contract.—An undertaking is an entire contract although containing several stipulations. Dore *v.* Covey, 13 Cal. 507.

The Words "To Abide" a judgment or order occurring in an appeal bond mean to "perform," "execute," or conform to such judgment or order. Erickson *v.* Elder, 34 Minn. 370; McMinn *v.* Patton, 92 N. Car. 371. See *ante*, article ABIDING THE EVENT.

Interpretation.—The ordinary canons of interpretation of contracts are to be applied in the construction of appeal securities. Shreffler *v.* Nadelhoffer, 133 Ill. 555; Belloni *v.* Freeborn, 63 N. Y. 383; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Locke *v.* McVean, 33 Mich. 473; Kastner *v.* Winstanley, 20 U. C. C. P. 101; Field *v.* Schricher, 14 Iowa 119.

Thus the court may transpose or reject insensible words and depart from the letter of the text to effectuate the intention of the parties where it can be done without framing a new contract. Matlock *v.* Bank, 7 Yerg. (Tenn.) 95; Nichol *v* McCombs, 2 Yerg. (Tenn.) 83; Swain *v.* Graves, 8 Cal. 551; Blanchard *v.* Gloyd, 7 Rob. (La) 542; Butler *v.* Wigge, 1 Saund. 65; Cooke *v.* Graham, 3 Cranch (U. S.)

strictly construed,[1] but the principle that it cannot be extended

235; Field *v.* Schricher, 14 Iowa 119.

In People *v.* Oneida, 1 Wend. (N. Y.) 28, the words in the condition, "to pay the said judgment and costs of the appeal," were transposed so as to read after the words, "In case judgment shall be given against the said appellant," instead of before, as the bond stood.

1. Shreffler *v.* Nadelhoffer, 133 Ill. 551; Field *v.* Rawlings, 6 Ill. 581; Waters *v.* Simpson, 7 Ill. 570; Reynolds *v.* Hall, 2 Ill. 35; People *v.* Moon, 4 Ill. 123; Governor *v.* Ridgway, 12 Ill. 14; Ryan *v.* Shawneetown, 14 Ill. 20; Chicago, etc., R. Co. *v.* Higgins, 58 Ill. 128; Stull *v.* Hance, 62 Ill. 52; People *v.* Tompkins, 74 Ill. 482; Cooper *v.* People, 85 Ill. 417; Mix *v.* Singleton, 86 Ill. 194; Phillipi *v.* Singer Mfg. Co., 88 Ill. 305; Dodgson *v.* Henderson, 113 Ill. 360; Trustees of Schools *v.* Shirk, 119 Ill. 579; Burlington Ins. Co. *v.* Johnson, 120 Ill. 622; Vinyard *v.* Barnes, 124 Ill. 346 Smith *v.* Huesman, 30 Ohio St. 662; Hall *v.* Williamson, 9 Ohio St. 23; Myers *v.* Parker, 6 Ohio St. 501; Lang *v.* Pike, 27 Ohio St. 498; State *v.* Medary, 17 Ohio St. 307; Marsh *v.* Byrnes, 7 Cinc. L. Bull. (Ohio) 345; Miller *v.* Stewart, 9 Wheat. (U. S.) 680; The Ann Caroline, 2 Wall. (U. S.) 549; The Harriett, 1 W. Rob. 192; Nofsinger *v.* Hartnett, 84 Mo. 549; Ludlow *v.* Simond, 2 Cai. (N. Y.) 1.

In Mix *v.* Singleton, 86 Ill. 194, it was said: "The measure of the liabilities of sureties is fixed by the terms of the instrument they may sign, and we do not understand such undertaking can be enlarged or varied by judicial construction."

In Miller *v.* Stewart, 9 Wheat. (U. S.) 680, it was said: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract."

In Jenkins *v.* Skillern, 5 Yerg. (Tenn.) 288, it was held accordingly that, where the recital of a judgment was erroneous in amount, the surety could not be held beyond it.

And where the bond is conditional for the payment of any judgment against the appellant, the surety is not liable where the judgment is rendered against any other person. Friedman *v.* Lemle, 38 La. Ann. 654.

Variance.—The general rule is that variance in an essential particular between the record and the appeal bond is fatal to the validity, Lemon *v.* Stephenson, 40 Ill. 45; Dietrich *v.* Rumsey, 40 Ill. 50; Willenborg *v.* Murphy, 40 Ill. 46; Williams *v.* State, 26 Ala. 85; Dumas *v.* Hunter, 28 Ala. 688; Burdine *v.* Mustin, 33 Ala. 634; unless the bond itself contains data from which the error may be corrected beyond ambiguity, Lemon *v.* Stephenson, 40 Ill. 45; Forbes *v.* Porter, 23 Fla. 47; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 418; Satterwhite *v.* State, 28 Ala. 99; Weissenger *v.* Crook, 7 Ala. 710; Flournoy *v.* Nims, 17 Ala. 36; People *v.* Munroe, 3 Wend. (N. Y.) 426.

And simple inaccuracies will not avoid the bond where the terms of the contract are sufficiently ascertained otherwise. Mathews *v.* Morrison, 13 R. I. 309.

Thus, where a bond is executed by three appellants and in the condition they are referred to as "the above-named plaintiff," *held*, no variance. Swain *v.* Graves, 8 Cal. 551.

Variation in Names—Substantial variation in the names between obligation and condition avoids the bond, Gillilan *v.* Gray, 13 Ill. 705; unless the context of the bond clearly shows how the mistake should be rectified, as where the name of the appellee is inadvertently used for the appellant's in the condition. Schill *v.* Reisdorf, 88 Ill. 411; Hibbard *v.* McKindley, 28 Ill. 240; Black *v.* Blum, 33 Ill. App. 644; Swain *v.* Graves, 8 Cal. 549; Morris *v.* Covington, 2 La. Ann. 259; or the obligee fails to object thereto, Kendall *v.* Gleason, 152 Mass. 457; Jones *v.* Whitbread, 11 C. B. 406.

Reference to Record.—Reference may be had to the record to determine which party appeals, where the appeal bond does not so state. Chamblee *v.* Baker, 95 N. Car. 98.

And in Surget *v.* Stanton, 10 La. Ann. 318, it was held that where the date of the judgment was omitted by mistake in the bond, the petition of appeal might be referred to to identify it.

Erroneous Description.—The rule *falsa demonstratio non nocet* properly

by implication applies only where its terms have been ascertained by a reasonable construction of the whole instrument by the ordinary canons of interpretation.[1]

2. When Liability Accrues—Final Judgment.—As a general rule the rendition and entry of a final judgment of affirmance on appeal is required to subject the sureties to liability on the bond.[2]

applies, and the instrument will be legally effective if sufficient description remain after the rejection of erroneous or ambiguous portions to identify its objects. Blanchard *v.* Gloyd, 7 Rob. (La.) 542.

Oral Statement of Parties as to Intent.—But oral statements of the parties as to the intent with which it was executed are ordinarily inadmissible to contradict the letter of the bond. Hydraulic Press Brick Co. *v.* Neumeister, 15 Mo. App. 592.

1. McElroy *v.* Mumford, 128 N. Y. 207; Crist *v.* Burlingame, 62 Barb. (N. Y.) 351; Scott *v.* Duncombe, 49 Barb. (N. Y.) 73; Mathews *v.* Morrison, 13 R. I. 309.

Limitation of Rule.—The rule of strict construction is limited by the controlling principle that sureties are presumed to know the nature of the obligation and to intend its obvious purpose. Crist *v.* Burlingame, 62 Barb. (N. Y.) 351; Mathews *v.* Morrison, 13 R. I. 309; Llewellyn *v.* Jersey, 11 M. & W. 183; Adler *v.* Potter, 57 Ala. 571.

Thus in McElroy *v.* Mumford, 128 N. Y. 307, it was held that a judgment reciting that "the abovenamed respondent recovered a judgment against" the appellant "for the sum of $122.97, being costs of affirmance and interest thereon from that date," and further reciting that the sureties named undertook that appellant would pay costs awarded against him to sum named, and in case of affirmance the amount of the judgment directed to be paid thereby. *Held*, that the judgment named for $122.97 was an indivisible part of the entire judgment for $3659.06 defined in the notice of appeal; that the purpose, as shown by the notice of appeal and stay secured by the appeal bond, was to secure the entire amount of the judgment; and that sureties were liable accordingly on affirmance for the entire judgment of $3659.06 plus the $122.97 costs. McElroy *v.* Mumford, 128 N. Y. 307.

2. Wilson *v.* Churchman, 6 La. Ann. 468; Diamond *v.* Petit, 3 La. Ann. 37; Holmes *v.* Steamer Belle Air, 5 La. Ann. 523; Lowenstein, *v.* Fudicker, 43 La. Ann. 886; Rawlings *v.* Barham, 12 La. Ann. 630; Odell *v.* Wootten, 38 Ga. 224; Staley *v.* Howard, 7 Mo. App. 377; Railsback *v.* Greve, 58 Ind. 52; Gregory *v.* Stark, 4 Ill. 611; Mix *v.* People, 86 Ill. 329; Wood *v.* Derrickson, 1 Hilt. (N. Y.) 410; Poppenhusen *v.* Seeley, 41 Barb. (N. Y.) 450; State *v.* Meacham, 6 Ohio Cir. Ct. Rep. 31; Com. *v.* Wistar, 142 Pa. St. 373.

It does not arise, therefore, on the mere signing or entry of a mere order for judgment. Poppenhusen *v.* Seeley, 41 Barb. (N. Y.) 450.

Return of Execution Against Appellant.—Unless statutes so require, appellee need not exhaust the appellant's property by levy and return of execution before proceeding against the sureties. Their liability accrues unless the judgment is immediately paid by the appellant, Gregory *v.* Stark, 4 Ill. 611; Staley *v.* Howard, 7 Mo. App. 377; Poll *v.* Murr, 3 Cinc. L. Bull. (Ohio) 1141; Means *v.* Goodenow, Tappan (Ohio) 255; although the judgment rendered against appellant expressly provides that execution may issue against his specific property if not paid as ordered, Staley *v.* Howard, 7 Mo. App. 377.

Where statutes require its issuance and levy, no liability attaches to the sureties until the execution has been duly returned. Champomier *v.* Worthington, 2 La. Ann. 1013; Chalaron *v.* McFarlane, 9 La. 229; Alley *v.* Hawthorn, 1 La. Ann. 122; Lynch *v.* Burr, 10 Rob. (La.) 136; Levois *v.* Thibodaux, 13 La. Ann. 264; Cass *v.* Adams, 3 Ohio 223; Bank of Chillicothe *v.* Pierce, 6 Ohio 535; Mayo *v.* Williams, 17 Ohio 244; Garhorn *v.* Alexander, 4 West. L. Mag. (Ohio) 139.

And the appellee must in such case enforce every right he may have by lien against the debtor's property. Turner *v.* Parker, 10 Rob. (La.) 151; Flower *v.* Dubois, 10 Rob. (La.) 191.

And fraud by appellee in failing to

An Interlocutory Judgment remanding the cause for further action by the trial court is not sufficient.[1]

3. Joint Bond.—Where a joint appeal bond is given by several appellants, the undertaking of the sureties is several as to each one of the principals, and such sureties are liable accordingly although the judgment is rendered against a portion only on appeal.[2]

satisfy the judgment out of appellant's property is a good defense to the surety. Lafayette F. Ins. Co. *v.* Remmers, 30 La. Ann. 1347.

A return *nulla bona* is usually all which is required to fix the liability of the surety. Rawlings *v.* Barham, 12 La. Ann. 630.

And where the appellant is insolvent the appellee may proceed without awaiting the liquidation. Wells *v.* Roach, 10 La. Ann. 543.

1. Unless it be merely to compute the sum due to appellee. Wilson *v.* Churchman, 6 La. Ann. 468.

Modified Judgment.—An appeal bond conditioned to pay such judgment as the appellate court may render against the appellant makes the sureties liable on the rendition of a modified or corrected judgment against the appellee. Sanders *v.* Rives, 3 Stew. (Ala.) 109.

Dismissal, Abandonment, or Withdrawal of the Appeal is a breach of the condition of the appeal bond to prosecute the appeal to effect, and renders the appellant and sureties liable thereon. Wilcox *v.* Daniels, 22 Mo. 493; Hallam *v.* Stiles, 61 Wis. 270; Helden *v.* Helden, 9 Wis. 557; Meserve *v.* Clark, 115 Ill. 580; Trent *v.* Rhomberg, 66 Tex. 249; Keitzinger *v.* Reynolds, 11 Ind. 245; Champomier *v.* Washington, 2 La. Ann. 1013; Pass *v.* Payne, 63 Miss. 239; Coon *v.* McCormack, 69 Iowa 539; Wood *v.* Thomas, 5 Blackf. (Ind.) 553; Legate *v.* Marr, 8 Blackf. (Ind.) 404; Davis *v.* Sturgis, 1 Ind. 213; Reeves *v.* Andrews, 7 Ind. 207; Blair *v.* Kilpatrick, 40 Ind. 312; Gavisk *v.* McKeever, 37 Ind. 484; Stelle *v.* Lovejoy, 125 Ill. 352.

The liability of the sureties likewise accrues where, by statute, dismissal is equivalent to affirmance of the judgment appealed from, or where the appeal bond is conditioned to pay costs and damages awarded against the appellant. McSpedon *v.* Bouton, 5 Daly (N. Y.) 30.

Or where, in pursuance of a statutory power, the appellee, on failure of the appellant to prosecute the appeal, files the appropriate papers and obtains an affirmance of the judgment. Martin *v.* Campbell, 120 Mass. 129.

Where the breach of the bond consists in a failure to prosecute the appeal with effect, the appellant is liable for nominal damages, although the judgment appealed from and all damages and costs incidental thereto have been paid. George *v.* Bischoff, 68 Ill. 236.

Second Appeal.—Where the appeal is dismissed, but on taking second appeal the judgment appealed from is reversed, sureties on the first appeal bond are liable only for costs and nominal damages. Cook *v.* King, 7 Ill. App. 549; Stelle *v.* Lovejoy, 125 Ill. 352.

Nature of the Contract.—While the contract of a surety is contingent in that the surety only undertakes to perform that part of the judgment which the appellant fails to perform (Sauer *v.* Griffin, 67 Mo. 654; Brown *v.* Ayer, 24 Ga. 288), yet the liability created thereby raises a direct obligation to the obligee for the act to be performed. Consequently where the penalty of the bond is for an undetermined amount, as for use of premises, it need not be adjusted between the appellant and appellee by action or otherwise before suing the surety. Wallerstern *v.* American Surety Co. (City Ct.), 40 N. Y. St. Rep. 508.

2. Ives *v.* Hulce, 17 Ill. App. 35; Warner *v.* Cameron, 64 Mich. 185; Seacord *v.* Morgan, 3 Keyes (N. Y.) 636; Burrall *v.* De Groot, 1 Bosw. (N. Y.) 637; Johnstone *v.* Connor (City Ct.), 10 N. Y. St. Rep. 702; Fritchie *v.* Holden, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 84; Hood *v.* Mathis, 21 Mo. 308.

The same rule obtains where the trial on appeal is *de novo*. Neff *v.* Edwards, 81 Ala. 247; Mount *v.* Stuart, 86 Ala. 366.

The affirmance of a joint judgment on appeal as to one defendant, and reversal with or without award of new trial as to another, deprives the latter

4. Measure of Liability.—The liability of the sureties on an appeal bond, where the appeal goes against the principal, is fixed by the legal import of its condition in the bond.[1] Where the bond is

of any proprietary rights in the judgment, and the former may enforce the appeal security alone. Johnstone *v.* Connor (City Ct.), 10 N. Y. St. Rep. 702.

Successful Appellant.—A successful appellant is released from all liability on the bond although the decision is affirmed as to a co-appellant. Warner *v.* Cameron, 64 Mich. 185.

The Contract of Suretyship Joint.—Unless statutes prescribe otherwise the contract of two or more sureties on the same appeal security is joint only, and not joint and several or several. Wood *v.* Fisk, 63 N. Y. 249; Getty *v.* Binsse, 49 N. Y. 385, 10 Am. Rep. 379; Gross *v.* Bouton, 9 Daly (N. Y.) 25; Pickersgill *v.* Lahens, 15 Wall. (U. S.) 140; U. S. *v.* Price, 9 How. (U. S.) 90.

It follows that the discharge of one surety discharges all. Gross *v.* Bouton, 9 Daly (N. Y.) 25.

It follows also that on the death of a surety his estate is discharged both at law and in equity unless statutes prescribe otherwise. Gross *v.* Bouton, 9 Daly (N. Y.) 25.

1. Parham *v.* Cobb, 9 La. Ann. 423; Lang *v.* Pike, 27 Ohio St. 498; Sharp *v.* Bedell, 10 Ill. 93; Stull *v.* Hance, 62 Ill. 52; Graeter *v.* DeWolf, 112 Ind. 4; Lafayette *v.* James, 92 Ind. 240; Weed Sewing Mach. Co. *v.* Winchel, 107 Ind. 260; Ludlow *v.* Simonds, 2 Cai. (N. Y.) 1; McCluskey *v.* Cromwell, 11 N. Y. 593; Noyes *v.* Granger, 51 Iowa 227; Home Sav. Bank *v.* Traube, 6 Mo. App. 221; Pybus *v.* Gibbs, 38 Eng. L. & Eq. 57.

As the liability of sureties cannot be extended beyond the condition of the bond, the sureties cannot be made liable for damages not included therein. Parham *v.* Cobb, 9 La. Ann. 423. And where conditioned only to pay costs they cannot be forced to pay the original judgment if affirmed. La-Tourette *v.* Baird, Minor (Ala.) 325.

Liability of Principal.—It is also a general rule applicable to the liability of suretyship that up to the amount of the bond the liability of sureties is measured by that of the principal, and that no recovery can be had against them unless it can be had against him. Parnell *v.* Hancock, 48 Cal. 452; Sharon *v.* Sharon, 84 Cal. 433; Coleman *v.* Bean, 14 Abb. Pr. (N. Y. C. Pl.) 38; Onderdonk *v.* Voorhis, 2 Robt. (N. Y.) 24. And in an action on the bond sureties may avail themselves of any defense available to their principal. Sharon *v.* Sharon, 84 Cal. 433.

Amount of Judgment.—So, where the bond is conditioned to pay the judgment and costs, the extent of recovery is ordinarily the judgment, interest, and costs unless the bond specially provides otherwise Kilgour *v.* Drainage Com'rs, 111 Ill. 342; Stelle *v.* Lovejoy, 125 Ill. 352; Pitt *v.* Swearingen, 76 Ill. 250; Shunick *v.* Thompson, 25 Ill. App. 619.

Attorneys' Fees.—Sureties are not liable for attorneys' fees. Noll *v.* Smith, 68 Ind. 168.

Rents and Profits.—Nor ordinarily for rents and profits pending appeal affecting real estate unless the statute so declares. Opp *v.* Ten Eyck, 99 Ind. 345; Hays *v.* Wilstach, 101 Ind. 100; Opp *v.* Ward, 125 Ind. 241; Stults *v.* Zahn, 117 Ind. 297.

Judgment In Rem.—Where a judgment is personal against some of the defendants, and *in rem* against others, and the latter appeal and give a bond, they and their sureties are liable on affirmation of the judgment appealed from only for costs and damages, and not to pay the personal judgment. Wilson *v.* Glenn, 77 Ind. 585; Hinkle *v.* Holmes, 85 Ind. 405; Scott *v.* Marchant, 88 Ind. 349.

Judgment of Foreclosure.—Sureties on an appeal bond in an action enforcing a lien on real estate are not liable for any deficiency arising from the application of the proceeds of the sale to the debt unless a personal judgment was rendered which the bond was conditioned to pay. Kennedy *v.* Nims, 52 Mich. 153; Kephart *v.* Farmers, etc., Bank, 4 Mich. 602.

Statutory Amount.—Where the bond given on appeal fails to mention a fixed sum, it is held in *Indiana* under curative statutes supplying omissions of substance that the amount named in the statute will be held to have been in the contemplation of the parties. Graeter *v.* DeWolf, 112 Ind. 1; State *v.* Britton,

conditioned in a fixed sum as penalty for breach of its obligation, a surety cannot be held to be liable for an amount in excess thereof,[1] except that principal and sureties are liable by way of damages for interest on the sum fixed in the bond and for costs of suit to collect it.[2]

5. Discharge of Sureties.—The liability of the sureties being contingent, any legal satisfaction as a bar of the judgment appealed from as against the principal discharges the sureties,[3] as reversal

102 Ind. 214; Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349; Sharpe *v.* Harding, 21 Ind. 334; King *v.* Brewer, 19 Ind. 267.

The approval by the proper official of an appeal bond for an amount less than the statute requires limits the liability of the sureties to the amount named, Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349; Sharp *v.* Bedell, 10 Ill. 93; unless the statute not merely defines its amount, but mandatorily declares that parties to appeal bond shall be liable in the amount named, in which case it cannot be lessened by agreement, King *v.* Brewer, 19 Ind. 267; Opp *v.* Ten Eyck, 99 Ind. 345.

1. *United States.*—The Wanata, 95 U. S. 605; Ives *v.* Merchants' Bank, 12 How. (U. S.) 159; U. S. *v.* Ricketts, 2 Cranch (C. C.) 164; Bank *v.* Sprigg, 1 McLean (U. S.) 178; Lawrence *v.* U. S., 2 McLean (U. S.) 581; Goldhawk *v.* Duane, 2 Wash. (U. S.) 323; Leggett *v.* Humphreys, 21 How. (U. S.) 66; Bank of Mt. Pleasant *v.* Spring, 1 McLean (U. S.) 178; The Union, 4 Blatchf. (U. S.) 90; Farrar *v.* U. S., 5 Pet. (U. S.) 373; The Ann Caroline, 2 Wall. (U. S.) 538; Godfrey *v.* Gilmartin, 2 Blatchf. (U. S.) 340; Brown *v.* Burrows, 2 Blatchf. (U. S.) 341; Sessions *v.* Pintard, 18 How. (U. S.) 106; The Steamer Wm. H. Webb *v.* Barling, 14 Wall. (U. S.) 406; Wallace *v.* Wilder, 13 Fed. Rep. 707.

New York.—Clark *v.* Bush, 3 Cow. (N. Y.) 151; Wood *v.* Fisk, 63 N. Y. 245; Oshiel *v.* DeGraw, 6 Cow. (N. Y.) 63; Fairlie *v.* Lawson, 5 Cow. (N. Y.) 424.

Indiana.—Graeter *v.* DeWolf, 112 Ind. 1; Weed Sewing Mach. Co. *v.* Winchel, 107 Ind. 260; Sharpe *v.* Harding, 21 Ind. 334; King *v.* Brewer, 19 Ind. 267; Miller *v.* O'Reilly, 64 Ind. 168.

Other States.—Talbot *v.* Morton, 5 Litt. (Ky.) 326; Graham *v.* Swigert, 12 B. Mon. (Ky.) 522; Allen *v.* Grider, 24 Ark. 271; Many *v.* Sizer, 6 Gray (Mass.) 141; Unteriein *v.* McLane, 10 Mo. 343; Hendrick *v.* Cannon, 5 Tex. 248.

2. The Wanata, 95 U. S. 605; U. S. *v.* Arnold, 1 Gall. (U. S.) 348; Ives *v.* Merchants' Bank, 12 How. (U. S.) 159; Crane *v.* Andrews, 10 Colo. 265; Marshall *v.* Winston, 43 Miss. 666; Brainard *v.* Jones, 18 N. Y. 35; Lyon *v.* Clark, 8 N. Y. 148; Seaman *v.* McReynolds, 50 How. Pr. (N. Y. Super. Ct.) 421; Washington County Ins. Co. *v.* Colton, 26 Conn. 42; Carter *v.* Thorn, 18 B. Mon. (Ky.) 613; Hughes *v.* Wickliffe, 11 B. Mon. (Ky.) 202; Baker *v.* Morris, 10 Leigh (Va.) 294; Harris *v.* Clap, 1 Mass. 312, 2 Am. Dec. 27; Pitts *v.* Tilden, 2 Mass. 118; Hughes *v.* Hughes, 54 Pa. St. 240; Rowlain *v.* McDowell, 1 Bay (S. Car.) 490; Smedes *v.* Houghtaling, 3 Cai. (N. Y.) 48; Hale *v.* Thomas, 1 Vern. 349; Erickson *v.* Elder, 34 Minn. 371.

The interest on the penalty by way of damages cannot, together with the penalty, exceed principal and interest due on judgment with costs of suit. East India Co. *v.* Champion, 11 Bligh 459; Harris *v.* Clap, 1 Mass. 312, 2 Am. Dec. 27; Brainard *v.* Jones, 18 N. Y. 35; Hughes *v.* Wickliffe, 11 B. Mon. (Ky.) 202.

In Leggett *v.* Humphreys, 21 How. (U. S.) 66, it was said: "The principle which limits the liability of the surety by the penalty of this bond inheres intrinsically in the character of his engagement. * * * The undertaking of the surety is essentially a pledge to make good this misfeasance or nonfeasance of his principal to an amount coextensive with the penalty of his bond."

3. This follows because their liability is contingent upon his. Green *v.* Raftes, 67 Ind. 49; Cass *v.* Adams, 3 Ohio 223; Cook *v.* King, 7 Ill. App. 549; First Nat. Bank *v.* Rogers, 13 Minn. 407; Ellis *v.* Fisher, 10 La. Ann. 479; Herrick *v.* Swartwout, 72 Ill. 340; Stelle *v.* Lovejoy, 125 Ill. 352; Andrews *v.* Scotton, 2 Bland (Md.) 629.

Execution Against Person.—The issu-

on appeal,[1] or payment of the affirmed judgment by appellant.[2]

6. Change of Issues.—As a general rule, any material change in the issues on appeal, without their consent, discharges the sureties.[3]

Agreement of Parties.—And they are discharged by any agreement of the parties by which the obligation of the judgment appealed from is varied or the time for payment is suspended.[4]

ance of an execution against the person of the appellant, as to whom a judgment has been affirmed on appeal, and his arrest, imprisonment, and discharge thereon, do not release the surety on the undertaking. Prusia *v.* Brown, 45 Hun (N. Y.) 80.

1. Rothberger *v.* Wonderly, 66 Ill. 390.

2. Stelle *v.* Lovejoy, 125 Ill. 352.

Tender.—A sufficient tender of performance of the judgment by either principal or sureties on an appeal bond discharge the sureties from its obligations, whether accepted or not. Spurgeon *v.* Smitha, 114 Ind. 453; Post *v.* Losey, 111 Ind. 75; Musgrave *v.* Glasgow 3 Ind. 31; Wilson *v.* McVey, 83 Ind. 108; Sharp *v.* Miller, 57 Cal. 415; Solomon *v.* Reese, 34 Cal. 28; Hayes *v.* Josephi, 26 Cal. 535; Joslyn *v.* Eastman, 46 Vt. 258; Sears *v.* Van Dusen, 25 Mich. 351; Hampshire Mfg. Bank *v.* Pillings, 17 Pick. (Mass.) 87.

3. Post *v.* Shafer, 63 Mich. 85; Anderson *v.* Robinson, 38 Mich. 407; Taylor *v.* Dansby, 42 Mich. 82; Evers *v.* Sager, 28 Mich. 47; Cross *v.* Eaton, 48 Mich. 184; Munn *v.* Haynes, 56 Mich. 140; Irwin *v.* Sanders, 5 Yerg. (Tenn.) 287; Shimer *v.* Hightshue, 7 Blackf. (Ind.) 238; Sage *v.* Strong, 40 Wis. 575; Willis *v.* Crooker, 1 Pick. (Mass.) 204; Hubbell *v.* Bissell, 2 Allen (Mass.) 196; Hill *v.* Hunnewell, 1 Pick. (Mass.) 192; Danielson *v.* Andrews, 1 Pick. (Mass.) 156; Bean *v.* Parker, 17 Mass. 591; Langley *v.* Adams, 40 Me. 125; Curry *v.* Barclay, 3 Ala. 484; Tarver *v.* Nance, 5 Ala. 718; or where the name of one of the joint plaintiffs in error is stricken out of the writ of error by order of the court. Tarver *v.* Nance, 5 Ala. 718.

Enlargement of Claim.—Thus on appeal from a justice of the peace to the Circuit Court, an enlargement of the claim without the sureties' consent avoids their liability on a bond given to secure a judgment for a defined amount. Sage *v.* Strong, 40 Wis. 575; Willis *v.* Crooker, 1 Pick. (Mass.) 204; Hill *v.* Hunnewell, 1 Pick. (Mass.) 192; Danielson *v.* Andrews, 1 Pick. (Mass.) 156; Hubbell *v.* Bissell 2 Allen (Mass.) 196; Bean *v.* Parker, 17 Mass. 591; Langley *v.* Adams, 40 Me. 125; Irwin *v.* Sanders, 5 Yerg. (Tenn.) 287. Otherwise where the bond is to secure any judgment which may be rendered. Hare *v.* Marsh, 61 Wis. 437, 50 Am. Rep. 141; Masser *v.* Strickland, 17 S. & R. (Pa.) 354, 17 Am. Dec. 668.

Statutory Increase of Liability.—The sureties to an undertaking on appeal are presumed to contract with reference to the power of the legislature to change the law affecting the damages awarded on appeal, and they are bound by any statutory increase therein made after they enter into the contract and while the appeal is undecided. Horner *v.* Lyman, 4 Keyes (N. Y.) 237.

4. Comegys *v.* Cox, 1 Stew. (Ala.) 262; Leonard *v.* Gibson, 6 Ill. App. 503; Gardner *v.* Watson, 13 Ill. 347; Wingate *v.* Wilson, 53 Ind. 78; Shimer *v.* Hightshue, 7 Blackf. (Ind.) 238; Johnson *v.* Flint, 34 Ala. 673.

Thus an agreement without the consent of sureties that judgment of affirmance shall be entered for a specified amount discharges them, Johnson *v.* Flint, 34 Ala. 673; or an agreement to pay a sum in instalments in satisfaction of a judgment pending an appeal without their consent, Leonard *v.* Gibson, 6 Ill. App. 503; or where appellee, without consent of sureties, takes by agreement a judgment against a portion only of the appellants, Shimer *v.* Hightshue, 7 Blackf. (Ind.) 238; or suspends execution on the judgment by agreement with appellant without consent of sureties, Wingate *v.* Wilson, 53 Ind. 78.

Amendment Adding New Party.—But the surety is not discharged by an amendment adding a new party in a Circuit Court on appeal from a justice court. Helt *v.* Whittier, 31 Ohio St.

XX. REMEDIES OF OBLIGEE.—As appeal bonds have all the essentials of valid contracts, the general principle that statutory remedies are cumulative and not exclusive applies.[1] Unless, therefore, the remedy pointed out by statute is expressly mandatory, the obligee may resort to an independent action on the contract against the obligors.[2]

Ignorance and Fraud.—The surety cannot plead his ignorance of the extent of his contract,[3] or even the fraudulent misrepresentations of the appellant or his agents in inducing its creation.[4]

475, *overruling* Lang *v.* Pike, 27 Ohio St. 498.

Injunction Restraining Collection of Judgment.—The obtaining of an injunction by the appellant restraining the collection of the judgment affirmed on appeal, without consent of sureties, does not discharge them. Hodges *v.* Gervin, 6 Ala. 478.

Nonsuit Set Aside by Agreement.—In Bailey *v.* Rosenthal, 56 Mo. 385, it was held that sureties are not such parties to the suit as to require their consultation in any step taken prior to final judgment, and that a nonsuit might be set aside by agreement taken on appeal to a Circuit Court without their discharge.

1. Trent *v.* Rhomberg, 66 Tex. 252; Lobdell *v.* Lake, 32 Conn. 16; Candee *v.* Hayward, 37 N. Y. 653; State *v.* Boies, 41 Me. 344; Mestling *v.* Hughes, 89 Ill. 389; Hester *v.* Keith, 1 Ala. 316; Rowlet *v.* Eubank, 1 Bush (Ky.) 477; Burroughs *v.* Lowder, 8 Mass. 372.

2. Trent *v.* Rhomberg, 66 Tex. 252; Lobdell *v.* Lake, 32 Conn. 16; State *v.* Boies, 41 Me. 345; Legate *v.* Marr, 8 Blackf. (Ind.) 404; Ellis *v.* Hull, 23 Cal. 161; Philbrick *v.* Buxton, 40 N. H. 384; McConnell *v.* Swailes, 3 Ill. 571; Karthaus *v.* Owings, 6 Har. & J. (Md.) 138; Hobart *v.* Hilliard, 11 Pick. (Mass.) 143; Ashley *v.* Brasil, 1 Ark. 144.

A law providing that the appellate court may, on affirmance of the judgment appealed from, render judgment directly against sureties on the appeal bond is constitutional. Beall *v.* New Mexico, 16 Wall. (U. S.) 539.

The Statutory Remedy cannot be resorted to unless the appeal bond given complies with the statutory requirements. Where the obligee accepts or waives the defects in an appeal bond invalid as a statutory obligation, he must bring an independent action on contract. State *v.* Montgomery, 74 Ala. 226; Brown *v.* Levins, 6 Port. (Ala.) 414; Curry *v.* Barclay, 3 Ala. 484; Tarver *v.* Nance, 5 Ala. 712; Hinson *v.* Preslor, 27 Ala. 643.

Deceased Surety.—A valid judgment cannot be rendered on appeal directly against a deceased surety on the bond; his personal representatives should be made parties before the termination of the cause on appeal, otherwise an independent suit must be brought. Nix *v.* French, 10 Heisk. (Tenn.) 377.

3. He is bound to know the measure of his liability on the appeal bond. Vail *v.* Reynolds, 51 Hun (N. Y.) 468; Western New York L. Ins. Co. *v.* Clinton, 66 N. Y. 326; Wallace *v.* Wilder, 13 Fed. Rep. 715; Ladd *v.* Trustees, 80 Ill. 223; George *v.* Tate, 102 U. S. 564; Dair *v.* U. S., 16 Wall. (U. S.) 1; McMinn *v.* Patton, 92 N. Car. 371; Chalaron *v.* McFarlane, 9 La. 229; State *v.* Judge, 19 La. 174.

4. George *v.* Tate, 102 U. S. 564; Dair *v.* U. S., 16 Wall. (U. S.) 1; Wallace *v.* Wilder, 13 Fed. Rep. 715; Western New York L. Ins. Co. *v.* Clinton, 66 N. Y. 326; Ladd *v.* Trustees, 80 Ill. 233; unless the obligee had knowledge thereof at the time. Chalaron *v.* McFarlane, 9 La. 229.

Condition Unperformed.—In *New York*, where a surety signs an appeal bond or undertaking on the condition that another person shall become a party to it, a delivery of the bond in violation of the agreement does not bind the surety. Grimwood *v.* Wilson, 31 Hun (N. Y.) 215; People *v.* Bostwick, 32 N. Y. 445; Bookstaver *v.* Jayne, 60 N. Y. 150; Benton *v.* Martin, 52 N. Y. 570.

The contrary is held in *Indiana*. Allen *v.* Marney, 65 Ind. 398, 32 Am. Rep. 73. See Am. & Eng. Ency. Law, tit. BONDS.

Prior Appeal.—So the fact that sureties were ignorant that the judgment appealed from had already been af-

XXI. ESTOPPEL OF SURETIES.—By obtaining the benefit of an appeal the appellant and his sureties are estopped from questioning the sufficiency of the appeal bond;[1] and the recitals contained therein are conclusive in a suit brought against them on the bond.[2]

firmed on a prior appeal is no defense. McClure *v.* Colclough, 6 Ala. 492.

1. Pray *v.* Wardell, 146 Mass. 327; Fall River *v.* Riley, 140 Mass. 488; Granger *v.* Parker, 142 Mass. 186; Glazier *v.* Carpenter, 16 Gray (Mass.) 385; Com. *v.* Sullivan, 11 Gray (Mass.) 203; Williams *v.* Coleman, 49 Mo. 325; Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Price *v.* Kennedy, 16 La. Ann. 78.

2. Gudtner *v.* Kilpatrick, 14 Neb. 347; Adams *v.* Thompson, 18 Neb. 541; Coon *v.* McCormack, 69 Iowa 539; Trent *v.* Rhomberg, 66 Tex. 249; George *v.* Bischoff, 68 Ill. 236; Arnott *v.* Friel, 50 Ill. 174; Blackburn *v.* Bell, 91 Ill. 434; Meserve *v.* Clark, 115 Ill. 580; Smith *v.* Whitaker, 11 Ill. 417; Mix *v.* People, 86 Ill. 329; Smith *v.* Lozano, 1 Ill. App. 171; Bowen *v.* Reed, 34 Ind. 430; Reeves *v.* Andrews, 7 Ind. 207; Wood *v.* Thomas, 5 Blackf. (Ind.) 553; Legate *v.* Marr, 8 Blackf. (Ind.) 404; Rock *v.* Gordon, 6 Blackf. (Ind.) 192; Davis *v.* Sturgis, 1 Ind. 213; Blair *v.* Kilpatrick, 40 Ind. 312; Buchanan *v.* Milligan, 125 Ind. 332; Trueblood *v.* Knox, 73 Ind. 310; Carver *v.* Carver, 77 Ind. 498; Hartlep *v.* Cole, 120 Ind. 247; Robertson *v.* Smith, 129 Ind. 422; Riley *v.* Mitchell, 38 Minn. 9; Barrett Min. Co. *v.* Tappan, 2 Colo. 124; Beeman *v.* Banta, 113 N. Y. 615; Levi *v.* Dorn, 28 How. Pr. (N. Y. Supreme Ct.) 217; Biagi *v.* Howes, 63 Cal. 384; Goodwin *v.* Fox, 120 U. S. 775.

In Hartlep *v.* Cole, 120 Ind. 250, it was said: "It is too late for the appellants, after having executed the replevin bond and obtained possession of the property after the court had rendered judgment awarding the property to the appellee, and after a failure to comply with the order of the court or pay the judgment, to set up as a defense to the action that the statutory provisions in regard to the execution of the bond were not technically complied with."

Instances.—They cannot therefore contradict the existence of the judgment recited in the bond, Arnott *v.* Friel, 50 Ill. 174; or that it was unsatisfied, Smith *v.* Lozano, 1 Ill. App. 171; or that an appeal has been taken, Adams *v.* Thompson, 18 Neb. 541.

Jurisdictional Defects.—The doctrine of estoppel has been extended to cover defects which are of a jurisdictional character, as where the appeal bond has not been filed in time, Gudtner *v.* Kilpatrick, 14 Neb. 347; Adams *v.* Thompson, 18 Neb. 541; Easter *v.* Acklemire, 81 Ind. 16; Ham *v.* Greve, 41 Ind. 531; Jones *v.* Droneberger, 23 Ind. 74; Railsback *v.* Greve, 58 Ind. 72; Smock *v.* Harrison, 74 Ind. 348; State *v.* Britton, 102 Ind. 214; Pepper *v.* State, 22 Ind. 399; or even where the appeal is void because none lies in the particular case, Gudtner *v.* Kilpatrick, 14 Neb. 347; McConnell *v.* Swailes, 3 Ill. 571; Sutherland *v.* Phelps, 22 Ill. 91; Clark *v.* Miles, 2 Pinney (Wis.) 432; Love *v.* Rockwell, 1 Wis. 382; Stephens *v.* Miller, 80 Ky. 47.

The giving of an appeal bond estops the appellant to deny that the appellate court has jurisdiction over his person. Bowen *v.* Reed, 34 Ind. 430.

But the doctrine of estoppel presupposes that the obligation was voluntarily entered into. See Gudtner *v.* Kilpatrick, 14 Neb. 347.

Impeachment of Judgment.—The judgment rendered on appeal against the principal is generally held *res adjudicata* as to the sureties. Way *v.* Lewis, 115 Mass. 26; Tracy *v.* Maloney, 105 Mass. 90; Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Cutter *v.* Evans, 115 Mass. 27; Tracy *v.* Goodwin, 5 Allen (Mass.) 409; Hydraulic Press Brick Co. *v.* Neumeister, 15 Mo. App. 592; McCormick *v.* Hubbell, 4 Mont. 87; Krall *v.* Libbey, 53 Wis. 292.

But they may impeach the judgment of affirmance as procured by fraud or collusion. Krall *v.* Libbey, 53 Wis. 295; Way *v.* Lewis, 115 Mass. 26; Cutter *v.* Evans, 115 Mass. 27; Granger *v.* Parker, 142 Mass. 186; McCormick *v.* Hubbell, 4 Mont. 87.

But they cannot impeach the origi-

XXII. SUCCESSIVE APPEALS.—Where successive appeals are taken in the same case with different sureties and different bonds, sureties on the prior appeal are not responsible for liability on subsequent appeal,[1] unless the condition of the bond is expressly broad enough to include it.[2]

XXIII. SUBROGATION.—The doctrine of subrogation applies to sureties on an appeal bond. They may pay the judgment affirmed against their principal and be subrogated to all the rights and remedies of the appellee.[3]

nal judgment when not parties to the trial court's action. Krall *v.* Libbey, 53 Wis. 295.

1. Hinckley *v.* Kreitz, 58 N. Y. 586; Nofsinger *v.* Hartnett, 84 Mo. 549; Winston *v.* Rives, 4 Stew. & P. (Ala.) 269.

So, where on appeal to the General Term of the Supreme Court of *New York* the undertaking bound the appellant to pay "all costs and damages incurred which may be awarded against him on *said* appeal," it was held that the sureties were not bound for the costs and damages on further appeal by the appellee to the Court of Appeals. Hinckley *v.* Kreitz, 58 N. Y. 586.

2. Hinckley *v.* Kreitz, 58 N. Y. 586; Tibbles *v.* O'Connor, 28 Barb. (N. Y.) 538; Bennett *v.* Brown, 20 N. Y. 99; Ball *v.* Gardner, 21 Wend. (N. Y.) 270; Traver *v.* Nichols, 7 Wend. (N. Y.) 434; Smith *v.* Crouse, 24 Barb. (N. Y.) 435; Gardner *v.* Barney, 24 How. Pr. (N. Y. Supreme Ct.) 469; Robinson *v.* Plimpton, 25 N. Y. 487; Nofsinger *v.* Hartnett, 84 Mo. 549; Babbitt *v.* Shields, 101 U. S. 7.

Novation.—The execution of a new undertaking, with new sureties on further appeal to a higher court does not act as a novation and discharge the old set of sureties from their liability on the prior appeal. Mackellar *v.* Farrell (Super. Ct.), 29 N. Y. St. Rep. 357; Heebner *v.* Townsend, 8 Abb. Pr. (N. Y. Supreme Ct.) 234; Smith *v.* Crouse, 24 Barb. (N. Y.) 433; Letson *v.* Dodge, 61 Barb. (N. Y.) 125; Gardner *v.* Barney, 24 How. Pr. (N. Y. Supreme Ct.) 467; Richardson *v.* Kropf, 47 How. Pr. (N. Y. C. Pl.) 286; Bennett *v.* Brown, 20 N. Y. 99; Robinson *v.* Plimpton, 25 N. Y. 484; Hummerton *v.* Hay, 65 N. Y. 380; Church *v.* Simmons, 83 N. Y. 261; Clute *v.* Knies, 102 N. Y. 377; Shannon *v.* Dodge, 18 Colo. 169; Rockwell *v.* Lake County, 17 Colo. 118; Ashby *v.* Sharp, 1 Litt. (Ky.) 156; Evers *v.* Sager, 28 Mich. 47; Marquette County *v.* Ward, 50 Mich. 174; State *v.* Bradshaw, 10 Ired. (N. Car.) 229; Howell *v.* Sevier, 1 Lea (Tenn.) 95; Stump *v.* Roberts, Cooke (Tenn.) 350; Whiteside *v.* Hickhan, 2 Yerg. (Tenn.) 358; Duncan *v.* M'Gee, 7 Yerg. (Tenn.) 103.

Where a judgment of reversal by an intermediate appellate tribunal is reversed on further appeal to a higher court, all the sureties on the undertaking given to secure the first appeal are discharged by the first reversal, as that judgment is obliterated by the final decision, and the further appeal is, in contemplation of law, only a necessary step to secure an affirmance in the prior appellate court. Hinckley *v.* Kreitz, 58 N. Y. 588; Robinson *v.* Plimpton, 25 N. Y. 484; Gardner *v.* Barney, 24 How. Pr. (N. Y. Supreme Ct.) 467; Smith *v.* Crouse, 24 Barb. (N. Y.) 433.

Waste.—Where the terms of an undertaking on appeal to an intermediate appellate court render the appellant liable for any waste committed "during his possession of the premises," the sureties are liable for waste committed after the determination of the first appeal and while a further appeal is pending to a higher court. Church *v.* Simmons, 83 N. Y. 264.

New Trial Ordered—Bond for Costs.—Where a judgment is reversed by an intermediate appellate court and new trial ordered, from which order an appeal is taken, an undertaking thereon need only cover costs, as there is no judgment existing until the order granting a new trial is reversed. Seaman *v.* McReynolds, 50 How. Pr. (N. Y. Super. Ct.) 425.

3. Hinckley *v.* Kreitz, 58 N. Y. 590; Armstrong's Appeal, 5 W. & S. (Pa.) 352; Burns *v.* Huntington Bank, 1 P. & W Pa.) 395; Pott *v.* Nathams, 1 W.

XXIV. RECORD ON APPEAL.—Either the original appeal bond or a properly certified copy should be sent up in the record on appeal, to enable the appellate court to judge of its sufficiency, and the record should show that it has been properly filed.[1]

& S. (Pa.) 155; Schurtzel's Appeal, 49 Pa. St. 23; McCormick *v.* Irwin, 35 Pa. St. 111; Parsons *v.* Birddock, 2 Vern. 608.

They may resort to any final lien or equity to which the appellee might have resorted; and of these two sets of sureties on appeal bond, the first set may pay the judgment and enforce the appeal bond against the second sureties. Hinckley *v.* Kreitz, 58 N. Y. 590; Peirce *v.* Higgins, 101 Ind. 178.

The equity of the surety in the property covered by the judgment lien is superior to that of a purchaser who buys after the execution of the appeal bond. Peirce *v.* Higgins, 101 Ind. 178. In this case the court said: "The surety in the appeal bond had a right to assume that the judgment bound the land, and that if he was ultimately compelled to pay it, he would be subrogated to the rights of the creditor and could seize and sell the land upon which the judgment lien rested. When the appellant purchased, he was bound to take cognizance of the legal rights of the surety. It is a fundamental principle that a party who has full knowledge of the facts is bound to know their legal consequences. Trentman *v.* Elridge, 98 Ind. 525; Anderson *v.* Hubble 93 Ind. 570; 47 Am. Rep. 394; Dodge *v.* Pope, 93 Ind. 480, *vide* p. 487; Barnes *v.* McKay, 7 Ind. 301. The essential thing in such cases as this, and in cases of a kindred character, is knowledge of the facts, for, when this exists, knowledge of legal consequences is necessarily implied."

The Execution of a Bond by an Executor or Administrator creates no relation of privity between the sureties and the decedent's estate, and payment by the sureties of the judgment affirmed vests in them no right of action against the estate. Maybury *v.* Grady, 67 Ala. 147; Pearson *v.* Dassington, 32 Ala. 227.

1. Spencer *v.* Thompson, 24 Ala. 512; Nisbet *v.* Lawson, 1 Ga. 275; Felton *v.* Elliott, 66 N. Car. 195; Mitchell *v.* Sloan, 69 N. Car. 10; Franklin *v.* Reiner, 8 Cal. 340; Stetson *v.* Corinna, 44 Me. 29; Leach *v.* People, 118 Ill. 157. See APPEALS, *Record on Appeal.*

Certificate of Clerk.—Where a certificate of the clerk, that "the appeal has been obtained and bond given," must be presented by the appellee on his motion to dismiss for failure to file the transcript in time, it will not be granted where made upon the transcript as actually filed without the production of the certificate. The appellee must furnish the evidence required by statute. Kimball Lumber Co. *v.* Ruge, 26 Fla. 59; West *v.* Brashear, 12 Pet. (U. S.) 101; Macomb *v.* Armstead, 10 Pet. (U. S.) 407.

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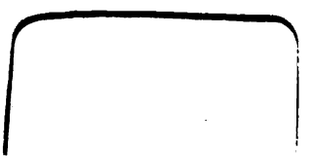
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